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Administrative Appeal Decision - Bannon, Patrick (2022-11-08)

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ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Bannon, Patrick Facility: Eastern NY CF
NYSID: [REDACTED] Appeal Control No.: 05-017-22 B
DIN: 94-A-0386

Appearances: Kathy Manley Esq.
26 Dinmore Road
Selkirk, New York 12158

Decision appealed: April 2022 decision, denying discretionary release and imposing a hold of 18 months.


Board Member(s) who participated: Segarra, Samuels

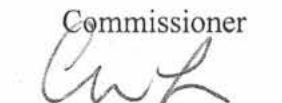
Papers considered: Appellant’s Brief received September 1, 2022
Appellant’s Supplemental Letter-brief received September 2, 2022

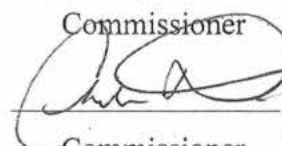
Appeals Unit Review: Statement of the Appeals Unit’s Findings and Recommendation

Records relied upon: Pre-Sentence Investigation Report, Parole Board Report, Interview Transcript, Parole Board Release Decision Notice (Form 9026), COMPAS instrument, Offender Case Plan.

Final Determination: The undersigned determine that the decision appealed is hereby:

 Affirmed Vacated, remanded for de novo interview Modified to _____

Commissioner
 Affirmed Vacated, remanded for de novo interview Modified to _____

Commissioner
 Affirmed Vacated, remanded for de novo interview Modified to _____
Commissioner

If the Final Determination is at variance with Findings and Recommendation of Appeals Unit, written reasons for the Parole Board’s determination must be annexed hereto.

This Final Determination, the related Statement of the Appeals Unit’s Findings and the separate findings of the Parole Board, if any, were mailed to the Appellant and the Appellant’s Counsel, if any, on

11/08/2022

APPEALS UNIT FINDINGS & RECOMMENDATION

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Appellant challenges the April 2022 determination of the Board, denying release and imposing a 18-month hold. Appellant's instant offense is for chasing a group of men and shooting and wounding three of them. While the victims lay down on the ground, wounded and helpless, appellant then walked up to them and shot them in the head, killing two of them. Appellant raises the following issues: 1) the Board failed to consider and/or properly weigh the required statutory factors. 2) the community opposition is based upon penal philosophy as it requests the Board resentence appellant to life without parole-and the Board has complied with that request. 3) the decision failed to list any facts in support of the statutory standard cited. 4) appellant has remorse and insight. 5) the decision lacks detail. 6) the Board decision never explained how the community opposition outweighed the letters of support. 7) the Board failed to comply with the 2011 amendments to the Executive Law, and the 2017 regulations, in that the positive COMPAS was ignored, and the departure was illegally done as it is based only upon the instant offense, and never used the failure to remain at liberty without violating the law statutory standard.

Executive Law § 259-i(2)(c)(A) requires the Board to consider factors relevant to the specific incarcerated individual, including, but not limited to, the individual's institutional record and criminal behavior. People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881 (1st Dept. 1983). While consideration of these factors is mandatory, "the ultimate decision to parole a prisoner is discretionary." Matter of Silmon v. Travis, 95 N.Y.2d 470, 477, 718 N.Y.S.2d 704, 708 (2000). Thus, it is well settled that the weight to be accorded the requisite factors is solely within the Board's discretion. See, e.g., Matter of Delacruz v. Annucci, 122 A.D.3d 1413, 997 N.Y.S.2d 872 (4th Dept. 2014); Matter of Hamilton, 119 A.D.3d at 1271, 990 N.Y.S.2d at 717; Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239, 657 N.Y.S.2d 415, 418 (1st Dept. 1997). The Board need not explicitly refer to each factor in its decision, nor give them equal weight. Matter of Schendel v. Stanford, 185 A.D.3d 1365, 1366, 126 N.Y.S.3d 428, 429 (3rd Dept. 2020); Matter of Campbell v. Stanford, 173 A.D.3d 1012, 1015, 105 N.Y.S.3d 461 (2d Dept. 2019); Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007).

The Board's determination complied with the statutory requirements, and did not evince irrationality bordering on impropriety in case where incarcerated individual shot three individuals, killing two. Matter of Tran v. Evans, 126 A.D.3d 1196, 3 N.Y.S.3d-633 (3d Dept. 2015).

"Although the Board placed great emphasis on the violent nature of the crimes, it was not required to discuss or give equal weight to each statutory factor." Matter of Wise v. State Div. of Parole, 54 A.D.3d 463, 464, 862 N.Y.S.2d 644, 645 (3d Dept. 2008).

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The Board was free to place emphasis on the inmate's uncontrollable anger during the commission of the crime. Schendel v Stanford, 185 A.D.3d 1365, 126 N.Y.S.3d 428 (3d Dept. 2020).

The Board properly considered the deliberate nature of the murder. Molinar v New York State Division of Parole, 119 A.D.3d 1214, 991 N.Y.S.2d 487 (3d Dept. 2014).

The Board may consider a district attorney's recommendation to deny parole. Matter of Applegate v. New York State Bd. of Parole, 164 A.D.3d 996, 997, 82 N.Y.S.3d 240 (3d Dept. 2018); Matter of Porter v. Alexander, 63 A.D.3d 945, 881 N.Y.S.2d 157 (2d Dept. 2009); Matter of Walker v. Travis, 252 A.D.2d 360, 676 N.Y.S.2d 52 (1st Dept. 1998); Matter of Walker v. New York State Bd. of Parole, 218 A.D.2d 891, 630 N.Y.S.2d 417 (3d Dept. 1995); Matter of Williams v. New York State Bd. of Parole, 220 A.D.2d 753, 633 N.Y.S.2d 182 (2d Dept. 1995); Matter of Confoy v. New York State Div. of Parole, 173 A.D.2d 1014, 569 N.Y.S.2d 846, 847 (3d Dept. 1991); Matter of Lynch v. New York State Div. of Parole, 82 A.D.2d 1012, 442 N.Y.S.2d 179 (3d Dept. 1981).

Insight and remorse are relevant not only to rehabilitative-progress but also to whether release would deprecate the severity of the offense. Matter of Phillips v. Dennison, 41 A.D.3d 17, 23, 834 N.Y.S.2d 121, 125 (1st Dept. 2007); see also Matter of Pulliam v. Bd. of Parole Dep't of Corr. & Cmty. Supervision, 197 A.D.3d 1495, 1496, 153 N.Y.S.3d 704, 706 (3rd Dept. 2021). The Board may consider the inmate's limited expression of remorse. Beodeker v Stanford, 164 A.D.3d 1555, 82 N.Y.S.3d 669 (3d Dept. 2018); Pulliam v Board of Parole, 197 A.D.3d 1495, 153 N.Y.S.3d 704 (3d Dept. 2021). And that his remorse was shallow. Campbell v Stanford, 173 A.D.3d 1012, 105 N.Y.S.3d 461 (2nd Dept. 2019).

As for community opposition, the Board may receive and consider written communications from individuals, other than those specifically identified in Executive Law § 259-i(2)(c)(A), opposing an incarcerated individual's release to parole supervision. Matter of Jones v. New York State Bd. of Parole, 175 A.D.3d 1652, 1652, 108 N.Y.S.3d 505, 506 (3d Dept. 2019) (recognizing letters in support and in opposition to release as relevant considerations); Matter of Applewhite v. New York State Bd. of Parole, 167 A.D.3d 1380, 91 N.Y.S.3d 308, 311 (3d Dept. 2018) ("Contrary to petitioner's contention, we do not find that [the Board's] consideration of certain unspecified 'consistent community opposition' to his parole release was outside the scope of the relevant statutory factors that may be taken into account in rendering a parole release determination"), appeal dismissed, 32 N.Y.3d 1219 (2019); Matter of Clark v. New York Bd. of Parole, 166 A.D.3d 531, 89 N.Y.S.3d 134 (1st Dept. 2018) ("the Board permissibly considered letters in opposition to the parole application submitted by public officials and members of the community"); Matter of Rivera v. Stanford, 53 N.Y.S.3d 404, 149 A.D.3d 1445 (3d Dept. 2017), aff'g Matter of Rivera v. Evans, Index No. 0603-16, *Decision & Order* dated July 5, 2016 (Sup. Ct., Sullivan County)(LaBuda A.J.S.C.) (recognizing "[c]onsideration of community or other opposition was proper under the statute"); Matter of Grigger v. New York State Div. of Parole, 11 A.D.3d 850,

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852–53, 783 N.Y.S.2d 689, 691 (3d Dept. 2004) (recognizing 259-i(2)(c)(A)(v)'s list is not the exclusive information the Board may consider and persons in addition to victims and their families may submit letters), lv. denied, 4 N.Y.3d 704, 792 N.Y.S.2d 1 (2005). The same has also long been recognized as true with respect to letters supporting an incarcerated individual's potential parole release. See, e.g., Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d at 1273, 990 N.Y.S.2d at 719 (3d Dept. 2014); Matter of Gaston v. Berbary, 16 A.D.3d 1158, 1159, 791 N.Y.S.2d 781, 782 (4th Dept. 2005); Matter of Torres v. New York State Div. of Parole, 300 A.D.2d 128, 129, 750 N.Y.S.2d 759, 760 (1st Dept. 2002); Matter of Walker v. Travis, 252 A.D.2d 360, 362, 676 N.Y.S.2d 52, 54 (1st Dept. 1998). Indeed, 9 N.Y.C.R.R. § 8000.5(c)(2) refers to the security of letters either in support of or in opposition to an incarcerated individual's release.

By way of analogy, when the Legislature required the Board to consider victims' statements, it undoubtedly realized that these submissions would often be emotional and at times even touch upon inappropriate matters. Such fact does not require the Board to expressly disavow in its decision inappropriate matters interjected by victims or to somehow quantify the extent or degree to which it considered appropriate parts of victim's statements while disregarding other parts in its overall analysis of the statutory factors." Matter of Duffy v. New York State Dep't of Corr. & Cmty. Supervision, 132 A.D.3d 1207, 19 N.Y.S.3d 610 (3d Dept. 2015). The Board's decision will be upheld if there is nothing indicating it was influenced by, placed weight upon, or relied upon any improper matter, in the victim's family statement or otherwise." Matter of Duffy v. New York State Dep't of Corr. & Cmty. Supervision, 132 A.D.3d 1207, 19 N.Y.S.3d 610 (3d Dept. 2015); accord Matter of Duffy v. Dennison, 34 A.D.3d 1083, 1084, 824 N.Y.S.2d 487, 488 (3d Dept. 2006).

As such, the decision is not based upon penal philosophy. Nor has the Board resentenced appellant to life without parole, as nothing in the Board's decision indicates a permanent denial of parole consideration. Hodge v Griffin, 2014 WL 2453333 (SDNY 2014). And any inquiry as to how letters of support compared to community opposition is prohibited, as the appellant may not review the Board's weighing process or assess whether the Board gave proper weight to the relevant factors, since it is not required to state each factor it considers, or weigh each factor equally or grant parole due to exemplary behavior. Comfort v New York State Division of Parole, 68 A.D.3d 1295, 890 N.Y.S.2d 700 (3rd Dept. 2009); Hamilton v New York State Division of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014). The due process clause is not violated by the Board's balancing of the statutory criteria, and which is not to be second guessed by the courts. Mathie v Dennison, 2007 WL 2351072 (S.D.N.Y. 2007); MacKenzie v Cunningham, 2014 WL 5089395 (S.D.N.Y. 2014).

The Board provided its statutory rationale for denying parole. Matter of Murray v. Evans, 83 A.D.3d 1320, 920 N.Y.S.2d 745 (3d Dept. 2011) (Board provided adequate statutory rationale).

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The Board's decision satisfied the criteria set out in Executive Law § 259-i(2)(a), as it was sufficiently detailed to inform the incarcerated individual of the reasons for the denial of parole. Matter of Applegate v. New York State Bd. of Parole, 164 A.D.3d 996, 997, 82 N.Y.S.3d 240 (3d Dept. 2018); Matter of Kozlowski v. New York State Bd. of Parole, 108 A.D.3d 435, 968 N.Y.S.2d 87 (1st Dept. 2013); Matter of Little v. Travis, 15 A.D.3d 698, 788 N.Y.S.2d 628 (3d Dept. 2005); Matter of Davis v. Travis, 292 A.D.2d 742, 739 N.Y.S.2d 300 (3d Dept. 2002); People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881 (1st Dept. 1983).

In the absence of a convincing demonstration that the Board did not consider the statutory factors, it must be presumed that the Board fulfilled its duty. Matter of Fuchino v. Herbert, 255 A.D.2d 914, 914, 680 N.Y.S.2d 389, 390 (4th Dept. 1998); Matter of McLain v. New York State Div. of Parole, 204 A.D.2d 456, 611 N.Y.S.2d 629 (2d Dept. 1994); Matter of McKee v. New York State Bd. of Parole, 157 A.D.2d 944, 945, 550 N.Y.S.2d 204, 205 (3d Dept. 1990); People ex rel. Herbert, 97 A.D.2d 128, 468 N.Y.S.2d 881.

Appellant's claim that the Board failed to comply with the 2011 amendments to the Executive Law is rejected. Dolan v New York State Board of Parole, 122 A.D.3d 1058, 995 N.Y.S.2d 850 (3d Dept. 2014); Tran v Evans, 126 A.D.3d 1196, 3 N.Y.S.3d 633 (3d Dept. 2015); Boccadisi v Stanford, 133 A.D.3d 1169, 20 N.Y.S.3d 477 (3d Dept. 2015). Furthermore, the 2011 Executive Law amendments have been incorporated into the regulations adopted by the Board in 2017.

The Board is not required to give the COMPAS and case plan greater weight than the other statutory factors. Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017); accord Matter of Lewis v. Stanford, 153 A.D.3d 1478, 59 N.Y.S.3d 726 (3d Dept. 2017). The Board still is entitled to place greater emphasis on the instant offense. See Matter of Montane v. Evans, 116 A.D.3d 197, 203, 981 N.Y.S.2d 866, 871 (3d Dept. 2014); see also Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017); Matter of Lewis v. Stanford, 153 A.D.3d 1478, 59 N.Y.S.3d 726 (3d Dept. 2017).

Contrary to appellant's contention, the Board did not depart exclusively due to the instant offenses. Rather, after identifying the scale being departed from, the Board pointed to aggravating factors (victims were on the ground and wounded but appellant walked up to them to execute them), uncontrollable anger, lack of valid remorse and insight, and present day community opposition. The Board may use any of the statutory standards when departing. The 2017 amended regulations don't create any substantive right to release, but rather, merely increase transparency in the final decision. There is no due process clause liberty interest from a State statute that merely establishes procedural requirements. Cofone v Manson, 594 F.2d 934, 938 (2nd Cir. 1979); Olim v. Wakinekona, 461 U.S. 238, 250-51, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983) ("The State may choose to require procedures . . . but in making that choice the State does not create an independent substantive right."). And claims that the Executive Law amendments create objective and evidence

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based procedures, which creates a liberty interest, are incorrect. Franza v Stanford, 2019 WL 452052 (S.D.N.Y. 2019).

Recommendation: Affirm.