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Administrative Appeal Decision - Miller, Kurt (2022-02-11)

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STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Miller, Kurt

DIN: 98-A-6702

Facility: Fishkill CF

AC No.: 07-051-21 B

Findings: (Page 1 of 4)

Appellant challenges the June 2021 determination of the Board, denying release and imposing a 24-month hold. Appellant is incarcerated for two separate instant offenses. In one, Appellant and a co-defendant approached the victim and displayed a handgun. Appellant demanded money and the co-defendant grabbed the victim from behind, striking him with a gun. In the second instant offense, Appellant and the same co-defendant terrorized two victims for several hours while armed with an Uzi machine gun. The male victim was placed in the trunk of a car after his mouth was covered with tape and his hands were bound with rope. The female victim was forced to withdraw \$1,300 from a bank before being blindfolded, gagged, tied up, hit in the face, and raped by Appellant. Appellant raises the following issues: 1) the decision is arbitrary and capricious because the Board improperly focused on the severity of the instant offense without citing any aggravating factors; 2) the Board failed to properly consider the required statutory factors including those in Appellant’s favor; 3) the decision was conclusory and lacked detail; 4) the Board violated Appellant’s due process rights; 5) the decision was based on the personal opinions of the Commissioners; 6) the Board failed to comply with the 2011 amendments requiring a future-focused analysis/risk assessment; 7) the Board denied release despite Appellant’s low COMPAS scores; and 8) the Board failed to consider Appellant’s final order of deportation. These arguments are without merit.

As an initial matter, discretionary release to parole is not to be granted “merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such [incarcerated individual] is released, he will live and remain at liberty without violating the law, **and** that his release is not incompatible with the welfare of society **and** will not so deprecate the seriousness of his crime as to undermine respect for the law.” Executive Law § 259-i(2)(c)(A) (emphasis added); accord Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014). Executive Law § 259-i(2)(c)(A) requires the Board to consider criteria which is 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 Betancourt v. Stanford, 148 A.D.3d 1497, 49 N.Y.S.3d 315 (3d Dept. 2017); Matter of LeGeros v. New York State Bd. Of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016).

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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).

The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offenses of three counts of Robbery in the first degree, three counts of Robbery in the second degree, Kidnapping in the second degree, Criminal Possession of a Weapon in the second degree, and two counts of Criminal Possession of a Weapon in the third degree; that Appellant was on probation supervision at the time of the instant offense; Appellant's criminal history including three prior convictions for misdemeanor offenses including Criminal Possession of a Weapon in the fourth degree, Attempted Assault in the third degree and Criminal Contempt in the second degree; Appellant's final order of deportation; Appellant's expressions of remorse; Appellant's institutional efforts including completion of recommended programs, work as a facility baker, participation in self-help groups, religious pursuits, and over 30 misbehavior reports but none since 2017; and release plans to return to Guyana. The Board also had before it and considered, among other things, the case plan, the COMPAS instrument, the sentencing minutes, statements from the District Attorney and the sentencing judge, and Appellant's parole portfolio featuring letters of support and assurance, photos, and an apology letter.

After considering all required factors, the Board acted within its discretion in determining release would not satisfy the standards provided for by Executive Law § 259-i(2)(c)(A). In reaching its conclusion, the Board permissibly relied on the instant offenses – committed while on probation supervision and representing an escalation of Appellant's violent criminal record – together with Appellant's poor disciplinary record while incarcerated and Appellant's lack of insight into why he raped the female victim. See Matter of Campbell v. Stanford, 173 A.D.3d 1012, 1016, 105 N.Y.S.3d 461, 465 (2d Dept. 2019); Matter of Kirkpatrick v. Travis, 5 A.D.3d 385, 772 N.Y.S.2d 540 (2d Dept. 2004); People ex rel. Yates v. Walters, 111 A.D.2d 839, 839, 490 N.Y.S.2d 573, 575 (2d Dept. 1985); Matter of Stanley v. New York State Div. of Parole, 92 A.D.3d 948, 948-49, 939 N.Y.S.2d 132, 134 (2d Dept.), lv. denied, 19 N.Y.3d 806, 949 N.Y.S.2d 343 (2012); Matter of Almeyda v. New York State Div. of Parole, 290 A.D.2d 505, 736 N.Y.S.2d 275 (2d Dept. 2002). The Board also cited Appellant's elevated COMPAS scores for history of violence and low self-efficacy/optimism. While the Board does not agree that aggravating factors are always required to support emphasis on an incarcerated individual's offense, Matter of Hamilton, 119 A.D.3d 1268, 990 N.Y.S.2d 714, the Board's decision here was based on the additional considerations outlined above.

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Inasmuch as Appellant contends the Board failed to consider requisite factors, there is a presumption of honesty and integrity that attaches to Judges and administrative fact-finders. See People ex rel. Carlo v. Bednosky, 294 A.D.2d 382, 383, 741 N.Y.S.2d 703 (2d Dept. 2002); People ex. rel. Johnson v. New York State Bd. of Parole, 180 A.D.2d 914, 916, 580 N.Y.S.2d 957, 959 (3d Dept. 1992). The Board is presumed to follow its statutory commands and internal policies in fulfilling its obligations. See Garner v. Jones, 529 U.S. 244, 256, 120 S. Ct. 1362, 1371 (2000).

The Board's decision satisfied the criteria set out in Executive Law § 259-i(2)(a) and 9 N.Y.C.R.R. § 8002.3(b), 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). The Board addressed many of the factors and principles considered in individualized terms and explained those that ultimately weighed most heavily in its deliberations.

Contrary to Appellant's suggestion, an incarcerated individual has no Constitutional right to be conditionally released on parole before expiration of a valid sentence. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 2104 (1979); Matter of Russo v. Bd. of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982 (1980); Matter of Vineski v. Travis, 244 A.D.2d 737, 664 N.Y.S.2d 391 (3d Dept. 1997). The New York State parole scheme "holds out no more than a possibility of parole" and thus does not create a protected liberty interest implicating the due process clause. Matter of Russo, 50 N.Y.2d at 75-76, 427 N.Y.S.2d at 985; see also Barna v. Travis, 239 F.3d 169, 171 (2d Cir. 2001); Matter of Freeman v. New York State Div. of Parole, 21 A.D.3d 1174, 800 N.Y.S.2d 797 (3d Dept. 2005).

While Appellant attempts to characterize the decision as being based on the personal opinions of the Commissioners, there must be support in the record to prove an alleged bias and proof that the decision flowed from such bias. Matter of Hernandez v. McSherry, 271 A.D.2d 777, 706 N.Y.S.2d 647 (3d Dept. 2000), lv. denied, 95 N.Y.2d 769, 722 N.Y.S.2d 472 (2000). Here, there is no such proof. The transcript as a whole does not support Appellant's contention that the parole interview was conducted improperly or that he was denied a fair interview. Matter of Rivers v. Evans, 119 A.D.3d 1188, 989 N.Y.S.2d 400 (3d Dept. 2014); see also Matter of Mays v. Stanford, 55 N.Y.S.3d 502, 150 A.D.3d 1521 (3d Dept. 2017); Matter of Bonilla v. New York State Bd. of Parole, 32 A.D.3d 1070, 1071, 820 N.Y.S.2d 661, 662 (3d Dept. 2006).

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There is no merit to Appellant’s related claims that the Board failed to comply with the 2011 amendments requiring a future-focused analysis/risk assessment and that the Board denied release despite Appellant’s low COMPAS scores. The 2011 amendments require procedures incorporating risk and needs principles to “assist” the Board in making parole release decisions. Executive Law § 259-c(4). The Board satisfies this requirement in part by using the COMPAS instrument. Matter of Montane v. Evans, 116 A.D.3d 197, 202, 981 N.Y.S.2d 866, 870 (3d Dept. 2014); see also Matter of Hawthorne v. Stanford, 135 A.D.3d 1036, 1042, 22 N.Y.S.3d 640, 645 (3d Dept. 2016); Matter of LeGeros v. New York State Bd. of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016); Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386, 387 (4th Dept. 2014). This is encompassed in the Board’s regulations. 9 N.Y.C.R.R. § 8002.2(a). However, the COMPAS is not predictive and was never intended to be the sole indicator of risk and needs as the Board gets risk and needs information from a variety of sources, including the statutory factors and the interview. Notably, the 2011 amendments did not eliminate the requirement that the Board conduct a case-by-case review of each incarcerated individual by considering the statutory factors including the instant offense. The amendments also did not change the three substantive standards that the Board is required to apply when deciding whether to grant parole. Executive Law § 259-i(2)(c)(A). Thus, the COMPAS cannot mandate a particular result. Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016). Rather, the COMPAS is an additional consideration that the Board must weigh along with the statutory factors for the purposes of deciding whether the three standards are satisfied. See Matter of Rivera v. N.Y. State Div. of Parole, 119 A.D.3d 1107, 1108, 990 N.Y.S.2d 295 (3d Dept. 2014); accord Matter of Dawes v. Annucci, 122 A.D.3d 1059, 994 N.Y.S.2d 747 (3d Dept. 2014); see also Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017). That is exactly what occurred here.

Finally, the record reflects the Board was aware of Appellant’s deportation status and its inquiry into his release plans in the event he is not deported does not negate its knowledge of that order. Matter of Delrosario v. Stanford, 140 A.D.3d 1515, 1515, 34 N.Y.S.3d 696, 697 (3rd Dept. 2016). The existence of a deportation order does not require an incarcerated individual’s release, but is merely one factor to consider. Matter of Espinal v. New York Bd. of Parole, 172 A.D.3d 1816, 1817, 100 N.Y.S.3d 777, 779 (3d Dept. 2019); Matter of Peralta v. New York State Bd. of Parole, 157 A.D.3d 1151, 69 N.Y.S.3d 885 (3d Dept. 2018); People ex rel. Borrell v. New York State Bd. of Parole, 85 A.D.3d 1515, 925 N.Y.S.2d 922 (3d Dept.), lv. denied, 17 N.Y.3d 718, 936 N.Y.S.2d 75 (2011); Matter of Samuel v. Alexander, 69 A.D.3d 861, 892 N.Y.S.2d 557 (2d Dept. 2010).

Recommendation: Affirm.

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Miller, Kurt

Facility: Fishkill CF

NYSID: [REDACTED]

Appeal Control No.: 07-051-21 B

DIN: 98-A-6702

Appearances: Jennifer Burton, Esq.
Dutchess County Office of the Public Defender
45 Market Street
Poughkeepsie, NY 12601

Decision appealed: June 2021 decision, denying discretionary release and imposing a hold of 24 months.


Board Member(s) who participated: Segarra, Mitchell

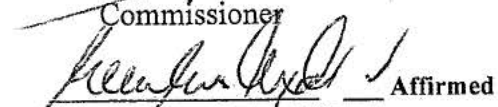
Papers considered: Appellant's Letter-brief received December 13, 2021

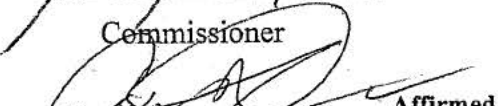
Appeals Unit Review: Statement of the Appeals Unit's Findings and Recommendation

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 02/11/2022 66.