June 2023

Administrative Appeal Decision - Espinal, Henry (2022-03-30)

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Espinal, Henry **DIN:** 96-A-3878

Facility: Fishkill CF **AC No.:** 08-034-21 B

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Appellant is serving an aggregate sentence of 26 years and 6 months to life upon his conviction by verdict to Murder in the Second Degree in 1996. In this offense, the Appellant accused the victim of giving him "dirty looks" and subsequently pulled out a knife and stabbed him multiple times, causing his death. The Appellant is also serving a consecutive sentence of 1 year and 6 months to 3 years upon his conviction by plea to Attempted Assault in the Second Degree in 2000. While incarcerated on the Murder 2nd charge, the Appellant struck a corrections officer in the mouth with his head while the officer was attempting to restrain him. The Appellant challenges the July 2021 determination of the Board, denying release and imposing a 24-month hold on the following grounds: (1) the Board failed to consider other factors such as the Appellant's institutional accomplishments and programming; (2) the Board denied release solely on the seriousness of the offense; (3) the Board disregarded positive COMPAS scores; (4) the Board departed from the COMPAS instrument without sufficient reasoning in violation of 9 NYCRR 8002.2(a); (5) the Board failed to review mitigating factors of youth; (6) the Board failed to review all sentencing minutes; (7) the Board failed to consider the final deportation order and any recommendation from the Commissioner pursuant to Corrections Law 147; (8) the Board failed to provide any future guidance; (9) the Board's conclusion that Appellant's release would be incompatible with welfare of society is irrational given the deportation order; (10) the Board failed to consider the Appellant's display of remorse and insight; and 11) the transcript of the interview was inaccurate. 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

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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); Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007). 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.

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 which involved a vicious knife attack on the victim, causing his death. See 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 Symmonds v. Dennison, 21 A.D.3d 1171, 1172, 801 N.Y.S.2d 90, 90 (3d Dept.), lv. denied, 6 N.Y.3d 701, 810 N.Y.S.2d 415 (2005); Matter of Warren v. New York State Div. of Parole, 307 A.D.2d 493, 493, 761 N.Y.S.2d 883 (3d Dept. 2003); Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239-40, 657 N.Y.S.2d 415, 418 (1st Dept. 1997); Matter of Silmon v. Travis, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704 (2000); 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).

The record as a whole reflects that the Board did consider the appropriate factors, including appellant's instant offense and appellant's lack of criminal history. The Board also considered the appellant's extensive institutional disciplinary record. The Board also had before it and considered the appellant's letters of support, program completion records, appellant's institutional efforts; and his release plans including a final deportation order for the Dominican Republic. The Board also received and considered an official letter from the Appellant's defense attorney as well as the sentencing minutes from the assault charge in 1998.

Appellant's contention that the Board failed to comply with the 2011 amendments to the Executive Law is without merit. 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).

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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.

The decision is consistent with amended 9 NYCRR § 8002.2(a) as there is no departure to explain. That is, the Board's decision was not impacted by a departure from a scale within the assessment. Notice of Adoption, NY Reg, Sept. 27, 2017 at 2. In fact, the Board cited the COMPAS instrument in its denial and reasonably indicated concern about the "high" scores for prison misconduct. The Board relied on this elevated score, together with other factors, in denying release.

"[P]etitioner's contention that, given the deportation order, it was irrational to conclude that his release would be incompatible with the welfare and safety of the community" is without merit. Matter of Kelly v. Hagler, 94 A.D.3d 1301, 942 N.Y.S.2d 290 (3d Dept. 2012); see also Matter of Hunter v. New York State Div. of Parole, 21 A.D.3d 1178, 800 N.Y.S.2d 799 (3d Dept. 2005). The existence of a final 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).

The Appellant argues that the Board was required and failed to consider a report mandated by Corrections Law §147. A failure to properly maintain the Appellant's file with each and every document the law directs to be included in his file, and "a failure to consider one or more of those required documents at his parole [interview], without more, is insufficient to state a plausible claim that [the Board of Parole] acted arbitrarily or capriciously in denying parole." See Germenis v.

NYS Dept of Corr. Servs., 2009 US Dist. LEXIS 81808 (USSD 2009). While the Board did not possess this report at the time of their review, the Appeals Unit has been able to obtain it since his appearance before the Board. This report was provided to U.S. Immigration upon the Appellant's admission into the State Correctional Facility. It contains demographic information and does not contain any recommendation regarding the Appellant's potential deportation. The Executive Law specifically states that the Board is required to consider "any deportation order issued by the federal government against the incarcerated individual while in the custody of the department and *any recommendation regarding deportation* made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law." Executive Law 259-i (2)(c)(A) (*emphasis added*). Given that the form did not include any recommendation, the Appellant's argument is meritless.

The Board is permitted to conclude that the serious nature of the incarcerated individual's offense, as well as limited insight and/or remorse, outweigh other factors. See, e.g., Matter of Silmon v. Travis, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704 (2000), aff'd 266 A.D.2d 296, 297, 698 N.Y.S.2d 685, 686 (2d Dept. 1999); Matter of Beodeker v. Stanford, 164 A.D.3d 1555, 82 N.Y.S.3d 669 (3d Dept. 2018); Matter of Crawford v. New York State Bd. of Parole, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3d Dept. 2016), lv. denied, 29 N.Y.3d 901, 57 N.Y.S.3d 704 (2017); Matter of Almeyda v. New York State Div. of Parole, 290 A.D.2d 505, 736 N.Y.S.2d 275 (2d Dept. 2002); Matter of Serrano v. N.Y. State Exec. Dep't-Div. of Parole, 261 A.D.2d 163, 164, 689 N.Y.S.2d 504, 505 (1st Dept. 1999).

"[T]here is a strong rehabilitative component in the statute that may be given effect by considering remorse and insight." Matter of Silmon v. Travis, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704 (2000). 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). Insight and remorse are permissible factors. Matter of Silmon v. Travis, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704 (2000); Matter of Payne v. Stanford, 173 A.D.3d 1577, 1578, 104 N.Y.S.3d 383, 385 (3rd Dept. 2019); 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) (minimization of crimes); Matter of Beodeker v. Stanford, 164 A.D.3d 1555, 82 N.Y.S.3d 669 (3d Dept. 2018) (limited expression of remorse); Matter of Crawford v. New York State Bd. of Parole, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3d Dept. 2016) (lack of insight and failure to accept responsibility), lv. denied, 29 N.Y.3d 901 (2017); Matter of Phillips v. Dennison, 41 A.D.3d 17, 23, 834 N.Y.S.2d 121 (1st Dept. 2007) (limited insight and remorse); Matter of Almeyda v. New York State Div. of Parole, 290 A.D.2d 505, 736 N.Y.S.2d 275 (2d Dept. 2002) (limited insight into why crime committed).

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Inasmuch as Appellant disputes the Board's finding with respect to insight, it was well within the Board's authority to make an assessment of Appellant's credibility (Matter of Siao-Pao v. Dennison, 51 A.D.3d 105, 108, 854 N.Y.S.2d 348, 351 (1st Dept.), aff'd, 11 N.Y.3d 777, 866 N.Y.S.2d 602 (2008)) and there is record support. The interview transcript reflects an inability and/or unwillingness to engage in a meaningful discussion about the murder, as well as the Appellant's inability to take responsibility for any of his negative disciplinary behavior while incarcerated.

Contrary to Appellant's claim, Hawkins – which requires consideration of youth and its attendant characteristics in relationship to the commission of the crime at issue for inmates serving a maximum life sentence for crimes committed as juveniles – does not apply whereas here the incarcerated individual was an adult (23 y.o.) when he committed the offense. Matter of Hawkins v. New York State Dep't of Corr. & Cmty. Supervision, 140 A.D.3d 34, 30 N.Y.S.3d 397, 400 (3d Dept. 2016); accord Matter of Cobb v Stanford, 153 A.D.3d 1500, 59 N.Y.S.3d 915 (3d Dept. 2017). See also Miller v. Alabama, 57 U.S. 460 ,132 S. Ct. 2455 (2012); Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011 (2010).

The Board is obligated to consider the sentencing minutes where available and any recommendations of the court. Matter of Standley v. New York State Div. of Parole, 34 A.D.3d 1169, 1170, 825 N.Y.S.2d 568, 569 (3d Dept. 2006) (de novo granted); cf. Matter of Freeman v. Alexander, 65 A.D.3d 1429, 1430, 885 N.Y.S.2d 379, 380 (3d Dept. 2009) (rejecting challenge because sentencing minutes unavailable). This is not a case where the Board failed to consider sentencing minutes which were available. The Board properly considered the sentencing minutes from the 2000 assault offense, but did not have the sentencing minutes from the 1996 murder offense available for their review. If the sentencing minutes are unavailable, Appellant is not entitled to a presumption that the sentencing minutes contained a favorable parole recommendation. Matter of Geraci v. Evans, 76 A.D.3d 1161, 907 N.Y.S.2d 726 (3d Dept. 2010); Matter of Midgette v. New York State Div. of Parole, 70 A.D.3d 1039, 895 N.Y.S.2d 530 (2d Dept. 2010); Matter of Lebron v. Alexander, 68 A.D.3d 1476, 892 N.Y.S.2d 579 (3d Dept. 2009). The Board's inability to consider the sentencing minutes from the 1996 murder offense did not render its decision irrational so as to border on impropriety. See Matter of Cartagena v. Alexander, 64 A.D.3d 841 (3d Dept 2009).

As for Appellant's complaint about lack of future guidance, the Board is not required to state what an incarcerated individual should do to improve his chances for parole in the future. Matter of Francis v. New York State Div. of Parole, 89 A.D.3d 1312, 934 N.Y.S.2d 514 (3d Dept. 2011); Matter of Freeman v. New York State Div. of Parole, 21 A.D.3d 1174, 800 N.Y.S.2d 797 (3d Dept. 2005); Matter of Partee v. Evans, 40 Misc.3d 896, 969 N.Y.S.2d 733 (Sup. Ct. Albany

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Co. 2013), aff'd, 117 A.D.3d 1258, 984 N.Y.S.2d 894 (3d Dept. 2014), lv. denied, 24 N.Y.3d 901, 995 N.Y.S.2d 710 (2014).

There is no merit to Appellant's suggestion that "the transcript was altered, incomplete or insufficient to permit meaningful review." Matter of Davis v. Laclair, 165 A.D.3d 1367, 1368, 85 N.Y.S.3d 623 (3d Dept. 2018).

In conclusion, Appellant has failed to demonstrate the Board's decision was not made in accordance with the pertinent statutory requirements or was irrational "bordering on impropriety." Matter of Silmon, 95 N.Y.2d 470, 476, 718 N.Y.S.2d 704 (2000) (quoting Matter of Russo v. New York State Bd. of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982 (1980)).

Recommendation: Affirm.

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Espinal, Henry **Facility:** Fishkill CF

NYSID: [redacted] **Appeal Control No.:** 08-034-21 B

DIN: 96-A-3878

Appearances: Henry Espinal (DIN 96A3878)
Fishkill Correctional Facility
BOX 1245
Beacon, New York 12508

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

Board Member(s) who participated: Drake, Berliner, Coppola

Papers considered: Appellant's Brief received December 27, 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 03/30/2022 GG

Distribution: Appeals Unit – Appellant - Appellant's Counsel - Inst. Parole File - Central File
P-2002(B) (11/2018)