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STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Mullally, Karen

Facility: Bedford Hills CF

NYSID: [REDACTED]

Appeal Control No.: 09-111-18B

DIN: 86-G-0489

Appearances: Joanne Best Esq.
Orleans County Public Defender
1 South Main Street
Suite 5
Albion, New York 14411

Decision appealed: August 2018 decision, denying discretionary release and imposing a hold of 24 months.

Board Member(s) who participated: Coppola, Smith

Papers considered: Appellant's Brief received April 2, 2019

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 Inmate and the Inmate's Counsel, if any, on 6/25/19 66.

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Appellant challenges the August 2018 determination of the Board, denying release and imposing a 24-month hold. Appellant's instant offense involved setting fire to a house, and during the fire two minor children were killed. This is the fourth fire ignited by the appellant. The appellant raises the following issues: 1) the decision is arbitrary and capricious in that the Board failed to consider and/or properly weigh the required statutory factors. 2) appellant was prejudiced because she was not allowed to review the entire contents of her Board of Parole file. 3) the interview was not in person, but rather by video-conference. 4) the COMPAS has errors. 5) the 24 month hold is excessive.

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 inmate 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 inmate, including, but not limited to, the inmate'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); Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007).

There is no requirement in the law that the board place equal or greater emphasis on petitioner's present commendable conduct than on the gravity of her offense. People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128, 133, 468 N.Y.S.2d 881, 884 (1st Dept. 1983).

The Parole Board's determination denying petitioner parole was rationally based on the seriousness of petitioner's crimes. People ex rel. Watson v. Hollins, 302 A.D.2d 279, 280, 753 N.Y.S.2d 841 (1st Dept. 2003). The Board permissibly denied parole release as incompatible with the welfare of society based upon the violent nature of the instant offense and escalation of prior

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criminal conduct. 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).

The Board may acknowledge the senseless and violent nature of the crime. Sanchez v Dennison, 21 A.D.3d 1249, 801 N.Y.S.2d 423 (3d Dept. 2005); Dorman v New York State Board of Parole, 30 A.D.3d 880, 816 N.Y.S.2d 765 (3d Dept. 2006).

The Board may take note of the inmate's disregard for the life of another human being. Hakim v Travis, 302 A.D.2d 821, 754 N.Y.S.2d 600 (3d Dept 2003); Angel v Travis, 1 A.D.3d 589, 767 N.Y.S.2d 290 (3d Dept 2003).

The Board may consider an inmate's failure to comply with DOCCS rules in denying parole. See Matter of Almonte v. New York State Bd. of Parole, 145 A.D.3d 1307, 42 N.Y.S.3d 691 (3d Dept. 2016), lv. denied, 29 N.Y.3d 905 (2017); Matter of Karlin v. Cully, 104 A.D.3d 1285, 1286, 960 N.Y.S.2d 827, 828 (4th Dept. 2013); 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).

The Board may consider an inmate's need to complete rehabilitative programming in denying parole. See Matter of Allen v. Stanford, 161 A.D.3d 1503, 1506, 78 N.Y.S.3d 445 (3d Dept.), lv. denied, 32 N.Y.3d 903 (2018); Matter of Barrett v. New York State Div. of Parole, 242 A.D.2d 763, 661 N.Y.S.2d 857 (3d Dept. 1997); see also Matter of Connelly v. New York State Div. of Parole, 286 A.D.2d 792, 729 N.Y.S.2d 808, 809 (3d Dept.), appeal dismissed 97 N.Y.2d 677, 738 N.Y.S.2d 291 (2001).

That the victims were particularly vulnerable may be considered by the Board. See, e.g., Matter of Feilzer v. New York State Div. of Parole, 131 A.D.3d 1321, 1322, 16 N.Y.S.3d 341, 341 (3d Dept. 2015) (financial crime involving elderly woman by financial advisor); Matter of Karlin v. Cully, 104 A.D.3d 1285, 1286, 960 N.Y.S.2d 827, 828 (4th Dept. 2013) (sex crimes against young boys by camp counselor); Matter of Wise v. State Div. of Parole, 54 A.D.3d 463, 464, 862 N.Y.S.2d 644, 645 (3d Dept. 2008) (three elderly women); Matter of Wellman v. Dennison, 23 A.D.3d 974, 975, 805 N.Y.S.2d 159, 160 (3d Dept. 2005) (inmate and multiple others victimized a 6 y.o. child); Matter of Bockeno v. New York State Parole Bd., 227 A.D.2d 751, 642 N.Y.S.2d 97 (3d Dept. 1996) (appropriate factors include vulnerability of victims, subject's minor daughters).

Credibility of an inmates explanation is to be made by the Board. The Board may consider the inmate's capacity to tell the truth, and how this impacts on the statutory factors. Siao-Pao v Dennison, 51 A.D.3d 105, 854 N.Y.S.2d 348 (1st Dept. 2008).

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The Board may consider negative aspects of the COMPAS instrument. Matter of Bush v. Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017) (COMPAS instrument with mixed results including substance abuse relevant given use before crime); Matter of Wade v. Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017) (low risk felony violence but probable risk for substance abuse alcohol related crimes); Matter of Crawford v. New York State Bd. of Parole, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3d Dept. 2016) (scores not uniformly low including family support), lv. denied, 29 N.Y.3d 901, 57 N.Y.S.3d 704 (2017).

Appellant didn't raise any alleged COMPAS errors during the interview, thereby waiving the issue. Matter of Shaffer v. Leonardo, 179 A.D.2d 980, 579 N.Y.S.2d 910 (3d Dept. 1992); Boddie v New York State Division of Parole, 288 F.Supp.2d 431 (S.D.N.Y. 2003). If the inmate was given a chance to discuss the matter at the interview and didn't mention it, the issue is without merit. Matter of Mercer v New York State Department of Corrections and Community Supervision, Index # 5872-13, *Decision/Order/Judgment* dated April 7, 2014 (Sup. Ct. Albany Co.)(Ceresia J.S.C.); Matter of Cox v Stanford, Index # 228-14, *Decision and Order* dated June 17, 2014 (Sup. Ct. Albany Co.)(McGrath J.S.C.). If the inmate fails to raise the issue of alleged COMPAS error at the interview, and the matter could have been corrected then, the issue is waived. Matter of Cox v Stanford, Index # 228-14, *Decision and Order* dated April 18, 2014 (Sup. Ct. Albany Co.)(McGrath J.S.C.).

Denial of parole is neither arbitrary nor capricious when the Parole Board relied on the factors defined by the New York statute. Hodge v Griffin, 2014 WL 2453333(S.D.N.Y. 2014) citing Romer v Travis, 2003 WL 21744079. An arbitrary action is one without sound basis in reason and without regard to the facts. Rationality is what is reviewed under an arbitrary and capricious standard. Hamilton v New York State Division of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014). An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. Ward v City of Long Beach, 20 N.Y.3d 1042 (2013). Denial is neither arbitrary nor capricious when the Board relies on factors defined by New York statute. Siao-Paul v. Connolly, 564 F. Supp. 2d 232, 242 (S.D.N.Y. 2008); Hanna v New York State Board of Parole, 169 A.D.3d 503, 92 N.Y.S.3d 621 (1st Dept. 2019).

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.

The use of videoconferencing technology to conduct parole release interviews is permissible. It does not prejudice the inmate and is consistent with the requirement that a parole candidate be "personally interviewed." Matter of Webb v. Travis, 26 A.D.3d 614, 810 N.Y.S.2d 233 (3d Dept.

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2006); Matter of Mack v Travis, 283 A.D.2d 700, 723 N.Y.S.2d 905 (3d Dept. 2001); Matter of Vanier v. Travis, 274 A.D.2d 797, 711 N.Y.S.2d 920 (3d Dept. 2000); see also Yourdon v. Johnson, No. 01-CV-0812ESC, 2006 WL 2811710, at *3 (W.D.N.Y. Sept. 28, 2006); Boddie v. New York State Div. of Parole, 288 F.Supp.2d 431, 441 (S.D.N.Y. 2003).

An inmate has no constitutional right to the information in her parole file. Billiteri v U.S. Board of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976). An inmate does not have automatic access to confidential material. Matter of Perez v New York State Division of Parole, 294 A.D.2d 726, 741 N.Y.S.2d 753 (3d Dept 2002); Macklin v Travis, 274 A.D.2d 821, 711 N.Y.S.2d 915, 916 (3d Dept. 2000). The Board may consider the confidential section to the Inmate Status Report is permissible. Molinar v New York State Division of Parole, 119 A.D.3d 1214, 991 N.Y.S.2d 487 (3d Dept. 2014). Per Executive Law 259-i(2)(c)(B), items submitted to the Parole Board are deemed to be confidential. Per Executive Law 259-k(2) and 9 N.Y.C.R.R. 8000.5(c)(2)(i)(a)(b), the Parole Board is entitled to designate certain parole records as confidential. Wade v Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017).

The Board's decision to hold an inmate for the maximum period of 24 months is within the Board's discretion and within its authority pursuant to Executive Law § 259-i(2)(a) and 9 N.Y.C.R.R. § 8002.3(b). Matter of Tatta v. State of N.Y., Div. of Parole, 290 A.D.2d 907, 737 N.Y.S.2d 163 (3d Dept. 2002), lv. denied, 98 N.Y.2d 604, 746 N.Y.S.2d 278 (2002); see also Matter of Campbell v. Evans, 106 A.D.3d 1363, 965 N.Y.S.2d 672 (3d Dept. 2013). Appellant has failed to demonstrate that a hold of 24 months for discretionary release was excessive or improper. In the absence of impropriety, the reconsideration date set by the Board will not be disturbed. Matter of Tatta v. State of N.Y., Div. of Parole, 290 A.D.2d 907, 908, 737 N.Y.S.2d 163 (3d Dept. 2002).

Recommendation: Affirm.