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Administrative Appeal Decision - Yarinich, David (2022-06-08)

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STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Yarinish, David

DIN: 15-B-3529

Facility: Cayuga CF

AC No.: 09-131-21 B

Findings: (Page 1 of 4)

The Appellant is serving a sentence of five to fifteen years as a result of his plea to Vehicular Manslaughter in the First Degree. In the instant offense, the Appellant was high on heroin, fentanyl, clonazepam, and marijuana when he drove his father's vehicle, crossed the center line, and collided with the 79-year-old victim, causing her death. The Appellant challenges the September 2021 determination of the Board, denying release and imposing a 21-month hold on the following grounds: (1) the Board failed to consider the Appellant's EEC; (2) the Board relied solely on the severity of the instant offense; (3) the Board failed to consider the Appellant's programming achievements; (4) the Appellant's COMPAS instrument contained errors; (5) the Board departed from the COMPAS instrument without sufficient reasoning in violation of §9 NYCRR 8002.2(a); (6) the Board failed to consider the Appellant's release plans; (7) the Board failed to review the recommendations from the Appellant's defense attorney; and (8) the Board's decision was conclusory. These arguments are without merit.

Generally, discretionary release to parole is not to be granted unless the Board determines that an incarcerated individual meets three standards: "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). The Board must consider factors relevant to the specific incarcerated individual, including, but not limited to, the individual's institutional record and criminal behavior. Executive Law § 259-i(2)(c)(A). Whereas here the incarcerated individual has received an EEC, the Board may deny release to parole on a finding that there is a reasonable probability that, if such individual is released, the individual will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society. Correction Law § 805; Matter of Heitman v. New York State Bd. of Parole, 214 A.D.2d 673, 625 N.Y.S.2d 264 (2d Dept. 1995); Matter of Salcedo v. Ross, 183 A.D.2d 771, 771, 583 N.Y.S.2d 502, 503 (1st Dept. 1992); Matter of Walker v. Russi, 176 A.D.2d 1185, 576 N.Y.S.2d 51 (3d Dept. 1991), appeal dismissed, 79 N.Y.2d 89 7, 581 N.Y.S.2d 660 (1992). An EEC does not automatically guarantee release or eliminate consideration of the statutory factors, including the instant offense. Matter of Corley v. New York State Div. of Parole, 33 A.D.3d 1142, 1143, 822 N.Y.S.2d 817, 818 (3d Dept. 2006); Matter of Pearl v. New York State Div. of Parole, 25 A.D.3d 1058, 808 N.Y.S.2d 816, 817 (3d Dept. 2006); Matter of White v. Dennison, 29 A.D.3d 1144, 814 N.Y.S.2d 393 (3d Dept. 2006).

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

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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 Campbell v. Stanford, 173 A.D.3d 1012, 1015, 105 N.Y.S.3d 461 (2d Dept. 2019); Matter of Betancourt v. Stanford, 148 A.D.3d 1497, 49 N.Y.S.3d 315 (3d Dept. 2017); 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.

The Board considered the relevant statutory factors and properly considered the incarcerated individual's receipt of an EEC. However, the Board was not required to give each factor equal weight and could place greater emphasis on the severity of his crime and the attendant circumstances. The Board was persuaded by the recklessness of Appellant's actions. In view of this and limited insight, together with self-centered statements and minimization of the offense, highly probably reentry substance abuse COMPAS scores, negative institutional discipline history, the decision was not irrational bordering on impropriety. Matter of Beodeker v. Stanford, 164 A.D.3d 1555, 82 N.Y.S.3d 669 (3d Dept. 2018). The Board cites to and acknowledged positive factors including the Appellant's programming competitions and term of sobriety. The Board has the discretion as to the weight given to these factors. However, there were several other negative factors that the Board emphasized in their decision to deny release.

Upon review of the COMPAS input information, four discrepancies were found, including an indication that the Appellant's current incarceration was his second New York State incarceration. Based on these discrepancies, the COMPAS has subsequently been re-calculated to include the corrected information. The COMPAS scores did not change. The updated COMPAS will be placed in the Appellant's file and in preparation for future interviews, new COMPAS assessments will be completed with the correct information included. Given that these errors had no effect on the ultimate scores considered by the Board at the time of the interview, the error is harmless.

The Board's decision was not impacted by a departure from a scale within the COMPAS instrument and the decision is consistent with amended 9 NYCRR § 8002.2(a). Notice of Adoption, NY Reg, Sept. 27, 2017 at 2. In fact, the Board cited the COMPAS instrument in its

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denial and reasonably indicated concern about the medium risk of felony violence score, as well as the highly probable score for reentry substance abuse in view of the Appellant's history including before the instant offenses.

The Board considered the Appellant's release plans and advised him to "develop a more comprehensive relapse prevention plan with the detailed triggers for relapse, as well as detail coping skills to help [him to] maintain [his] sobriety." The Appellant fails to identify how the Board failed to consider his release plans, as they specifically cite to and analyzed them in their release decision. This argument is without merit.

The Appellant has argued that the Board should have had and did not review a copy of a letter from the Appellant's defense attorney. This argument is based on the indication on the Parole Board Report, which notated the existence of the letter. The Appellant has not provided a copy of the letter as part of their appeal. A thorough review of the file indicates that this notation was a mistake. The Board did properly request input from the Appellant's defense attorney, however there is no letter from him for the Board's review. The indication on the Parole Board Report was a clerical error, which has been corrected. Thus, the Board did not fail to consider a required factor, the defense attorney letter, as it does not exist for their review. This argument is without merit.

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 Kozłowski 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: the instant offense, the Appellant's COMPAS scores (medium risk of felony violence and high probability or re-entry substance abuse), and limited insight into the effect of the instant offense on the victim's family.

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)).

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Recommendation: Affirm.

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Yarinich, David

Facility: Cayuga CF

NYSID: [REDACTED]

Appeal Control No.: 09-131-21 B

DIN: 15-B-3529

Appearances: Cheryl L. Kates, PC
PO Box 734
Fairport, NY 14450

Decision appealed: September 2021 decision, denying discretionary release and imposing a hold of 21 months.

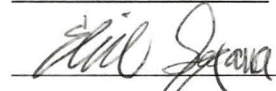
Board Member(s) who participated: Drake, Alexander, Crangle


Papers considered: Appellant’s Brief received February 16, 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

06/08/2022 66