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June 2023

### Administrative Appeal Decision - Emmick, James (2022-02-11)

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STATE OF NEW YORK – BOARD OF PAROLE

**APPEALS UNIT FINDINGS & RECOMMENDATION**

**Name:** Emmick, James

**DIN:** 88-C-0628

**Facility:** Marcy CF

**AC No.:** 09-136-21 B

**Findings:** (Page 1 of 3)

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Appellant challenges the September 2021 determination of the Board, denying release and imposing a 12-month hold. The instant offense involved causing the death of an elderly male victim by stabbing him with a knife. Appellant raises the following issues: 1) the decision was arbitrary and capricious because the Board focused too much on the instant offense and prior criminal history; 2) the Board did not explain how the factors were weighed or why the positive aspects were unable to counterbalance the negative aspects; and 3) the decision was conclusory and failed to explain how the various factors were considered and weighted against each other. 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 (4<sup>th</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (4<sup>th</sup> 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.

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The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offense of Murder in the second degree; Appellant's lengthy history of criminal conduct dating back to his juvenile years; Appellant's institutional efforts including positive programming and clean disciplinary record since his last Board appearance; and release plans to seek assistance from a religious institution and work for his niece's home improvement business. The Board also had before it and considered, among other things, the case plan, the COMPAS instrument, the sentencing minutes, a letter from the District Attorney, and letters of support and assurance.

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 serious instant offense together with Appellant's criminal history. See Matter of Jones v. New York State Dep't of Corr. & Cmty. Supervision, 151 A.D.3d 1622, 57 N.Y.S.3d 265 (4th Dept. 2017); Matter of Kenefick v. Sticht, 139 A.D.3d 1380, 31 N.Y.S.3d 367 (4th Dept. 2016); Matter of Fischer v. Graziano, 130 A.D.3d 1470, 12 N.Y.S.3d 756, 756 (4th Dept.), *lv. denied*, 132 A.D.3d 1331, 17 N.Y.S.3d 344 (2015); Matter of Thurman v. Hodges, 292 A.D.2d 872, 873, 739 N.Y.S.2d 324 (4th Dept.), *lv. denied*, 98 N.Y.2d 604, 746 N.Y.S.2d 278 (2002); Matter of Byas v. Fischer, 120 A.D.3d 1586-87, 1586, 992 N.Y.S.2d 813, 814 (4th Dept. 2014). The Board also cited the COMPAS instrument's elevated scores for criminal involvement, history of violence and reentry substance abuse. See Matter of Espinal v. N.Y. State Bd. Of Parole, 172 A.D.3d 1816, 100 N.Y.S.3d 777 (3d Dept. 2019); Matter of Bush v. Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017). While the Board does not agree that aggravating factors are always necessary to support reliance on an incarcerated individual's crime, Matter of Hamilton, 119 A.D.3d 1268, 990 N.Y.S.2d 714, here the Board found an aggravating circumstance beyond the inherent seriousness of the crime itself – the age and vulnerability of the victim, who was in his sixties and legally blind.

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 inmate 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). The Board addressed many of the factors and principles considered in individualized terms and explained those that ultimately weighed most heavily in its deliberations. However, the Board was not required to address, or articulate the weight accorded to, each factor considered in its decision. See Matter of Mullins v. New York State Bd. of Parole, 136 A.D.3d 1141, 1142, 25 N.Y.S.3d 698 (3d Dept. 2016); Matter of Allis v. New York State Div. of Parole, 68 A.D.3d 1309, 1309, 890 N.Y.S.2d 200, 201 (3d Dept. 2009).

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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.

**ADMINISTRATIVE APPEAL DECISION NOTICE**

**Name:** Emmick, James

**Facility:** Marcy CF

**NYSID:** [REDACTED]

**Appeal Control No.:** 09-136-21 B

**DIN:** 88-C-0628

Appearances: James P. Godemann, Esq.  
Oneida County Public Defender  
Boehlert Center at Union Station  
321 Main Street  
Utica, NY 13501

Decision appealed: September 2021 decision, denying discretionary release and imposing a hold of 12 months.

Board Member(s) who participated: **Coppola, Cruse, Davis**

Papers considered: Appellant's Brief received December 9, 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:

[Signature] Affirmed \_\_\_ Vacated, remanded for de novo interview \_\_\_ Modified to \_\_\_

Commissioner

[Signature] Affirmed \_\_\_ Vacated, remanded for de novo interview \_\_\_ Modified to \_\_\_

Commissioner

[Signature] 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 GG