June 2023

Administrative Appeal Decision - Wells, John (2022-06-08)

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Wells, John **DIN:** 20-A-1828

Facility: Riverview CF **AC No.:** 10-031-21 B

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Appellant challenges the September 2021 determination of the Board, denying release and imposing a 24-month hold. Appellant is incarcerated for two separate instant offenses. In one, Appellant embezzled and stole funds from multiple Masonic lodges in an amount exceeding $50,000. In the second, Appellant engaged in oral and anal sexual conduct with a 14-year-old victim. Appellant raises the following arguments: 1) the interview focused on the conviction for Criminal Sex Act in the second degree but he will have finished serving his sentence for that crime after thirty-six months; 2) the Board failed to consider Appellant's lack of a prior criminal history and his institutional record including clean discipline, program participation, and receipt of an Earned Eligibility Certificate ("EEC"); 3) the Board unfairly asked Appellant questions that were beyond the scope of his low level sex offender programming; and 4) continued incarceration puts Appellant at risk due [redacted]. 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). In this case, Appellant received an EEC, therefore the deprecation standard does not apply.

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). 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).

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An EEC does not automatically entitle an incarcerated individual to discretionary 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). Moreover, the Board is not required to give each factor equal weight. Matter of Corley, 33 A.D.3d 1142, 1143, 822 N.Y.S.2d 817, 818; Matter of Pearl, 25 A.D.3d 1058, 808 N.Y.S.2d 816, 817. The Board may deny release to parole on a finding that there is a reasonable probability that, if such incarcerated 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 (2d Dept. 1992).

The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offenses of Grand Larceny - Not Auto in the third degree and Criminal Sex Act in the second degree; Appellant's lack of a prior criminal record; that Appellant was originally sentenced to probation for stealing from the Masonic lodges before violating probation by engaging in sexual conduct with the underage victim; Appellant's institutional efforts including a clean disciplinary record, positive programming, and receipt of an EEC; and his release plans to return to Pennsylvania. The Board also had before it and considered, among other things, the case plan, the COMPAS instrument, and the two sets of sentencing minutes.

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 representing extremely poor judgment, the fact that Appellant was on probation at the time of the second instant offense, Appellant's need to complete required programming, and Appellant's need to further develop his release plan. 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 Byas v. Fischer, 120 A.D.3d 1586-87, 1586, 992 N.Y.S.2d 813, 814 (4th Dept. 2014); Matter of Jones v. N.Y. State Bd. of Parole, 175 A.D.3d 1652, 1652, 108 N.Y.S.3d 505, 506 (3rd Dept. 2019); Matter of Delrosario v. Stanford, 140 A.D.3d 1515, 34 N.Y.S.3d 696 (3d Dept. 2016). The Board acted within its discretion in determining these considerations rebutted any presumption created by the EEC and rendered discretionary release inappropriate at this time. See generally Matter of Neal v. Stanford, 131 A.D.3d 1320, 16 N.Y.S.3d 342 (3d Dept. 2015).

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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).

Appellant's claim that he will have finished serving his sentence for the sex offense after thirty-six months is without merit. Concurrent and consecutive sentences yield single sentences, either by merger when concurrent or by addition when consecutive. Penal Law § 70.30(1); People v. Buss, 11 N.Y.3d 553, 557, 872 N.Y.S.2d 413, 415 (2008); People ex rel. Ward v. Awopetu, 187 A.D.3d 1576, 1577, 132 N.Y.S.3d 491 (4th Dept. 2020). Thus, the incarcerated individual is not sequentially completing punishment for each particular conviction. People v. Almestica, 97 A.D.3d 834, 949 N.Y.S.2d 425 (2d Dept. 2012). Rather, the incarcerated individual is subject to all the sentences that make up the merged or aggregate sentence he is serving and the Board may consider the facts of those crimes. Matter of Dawes v. Annucci, 122 A.D.3d 1059, 994 N.Y.S.2d 747 (3d Dept. 2014).

There was no impropriety in the Board's inquiry into Appellant's familiarity with a particular term used in sex offender programming. The challenged question was aimed at Appellant's rehabilitative progress and there is no support for the contention 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). There also is no indication that the Board's decision was influenced by the fact that Appellant appeared to be unaware of the acronym in question.

As for Appellant's [redacted], he is perfectly free to apply for [redacted] parole release. Executive Law §§ 259-r, 259-s. It is a discretionary decision by the Commissioner of DOCCS (or his designee) whether to certify an incarcerated individual to the Board of Parole for [redacted] parole consideration. Matter of McDonnell v. Annucci, 189 A.D.3d 1871, 138 N.Y.S.3d 231 (3rd Dept. 2020); Matter of Ifill v. Wright, 94 A.D.3d 1259, 941 N.Y.S.2d 812 (3d Dept. 2012).

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: Wells, John **Facility:** Riverview CF

NYSID: [redacted] **Appeal Control No.:** 10-031-21 B

DIN: 20-A-1828

Appearances: John Wells, 20-A-1828
Riverview Correctional Facility
1110 Tibbits Drive
P.O. Box 158
Ogdensburg, NY 13669-0158

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

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

Papers considered: Appellant's Letter-brief received February 8, 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 GC

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