

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Winkler, Stuart

DIN: 01-A-0384

Facility: Otisville CF

AC No.: 05-054-19 B

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Appellant was sentenced to an aggregate term of eleven years, four months to 30 years upon his conviction of Enterprise Corruption and Conspiracy in the second degree. In the instant appeal, Appellant challenges the April 2019 determination of the Board denying release and imposing a 15-month hold on the following grounds: (1) the Board's determination is irrational bordering on impropriety; (2) the Board used boilerplate language and conclusory terms in its decision; and (3) the Board's decision was tainted by bias and personal opinion. These arguments are without merit.

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). 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 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).

The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offenses stemming from an in concert scheme to defraud in the sales of securities and a conspiracy to murder the judge presiding over his case; that they represent Appellant's only convictions; his institutional record including clean discipline, completion of ART and participation in the Network program; his age and health; and release plans

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to reside with his son, collect social security and seek employment. The Board also had before it and considered, among other things, an official statement by the District Attorney, Appellant's case plan, the COMPAS instrument, and Appellant's parole packet and letters of support.

After considering all required factors and principles, 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 and aggravating factors – namely, the ongoing course of conduct involving the judge and taking advantage of investors over a period of time – that Appellant minimized the impact of his criminal conduct on the victims, and opposition to his release. See Executive Law § 259-i(2)(c)(A); Matter of Silmon, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704; 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), rev'g 2013 N.Y. Slip Op 30265(U), 2013 N.Y. Misc. 3d Lexis 552 (Sup. Ct. New York Co. Feb. 5, 2013).

Appellant's objection to decision language amounts to a claim that the Board relied on erroneous information. In particular, he disputes that he "manipulated prices of securities" or took advantage of investors over time. However, this information is contained in the pre-sentence investigation report, which the Board is required to consider and entitled to rely upon. Executive Law § 259-i(2)(c)(A); 9 N.Y.C.R.R. § 8002.2(d)(7); Matter of Carter v. Evans, 81 A.D.3d 1031, 1031, 916 N.Y.S.2d 291, 293 (3d Dept.), lv. denied, 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011). Appellant also disputes that he minimized his behavior's impact on the victims and contends there were no victims in the enterprise corruption case. The Board's statement is supported by the record.

Finally, there is no record support to prove an alleged bias or that the decision flowed from such bias. Matter of Hernandez v. McSherry, 271 A.D.2d 777, 706 N.Y.S.2d 647 (3d Dept. 2000), lv. denied, 95 N.Y.2d 769, 722 N.Y.S.2d 472 (2000); see also Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017); Matter of Grune v. Board of Parole, 41 A.D.3d 1014, 838 N.Y.S.2d 694 (3d Dept. 2007). The transcript as a whole does not support Appellant's apparent 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); Matter of Bonilla v. New York State Bd. of Parole, 32 A.D.3d 1070, 1071, 820 N.Y.S.2d 661, 662 (3d Dept. 2006). The Board issued its determination based on a review of the record, the interview and deliberation consistent with the requirements of the Executive Law.

Recommendation: Affirm.