

Administrative Appeal Decision Notice

Inmate Name: Comer, Wallee

Facility: Arthurkill Correctional Facility

NYSID No.: 4550667H

Appeal Control #: 07-133-09-B

Dept. DIN#: 86-A-6915

Appearances:

For the Division, the Appeals Unit

For Appellant:

Cheryl Kates, Esq.
P.O. Box 711
Honeoye, New York 14471

Board Member(s) who participated in appealed from decision: Clarke, Casey, Ross.

Decision appealed from: 6/2009 Denial of Discretionary Release, with an imposition of a 24-month hold.

Pleadings considered:

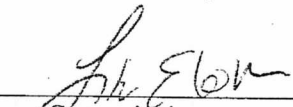
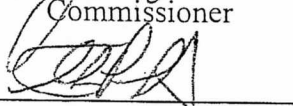
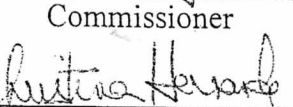
Brief submitted by attorney for appellant received on September 16, 2009.

Statement of the Appeals Unit's Findings and Recommendation.

Documents relied upon:

Pre-Sentence Investigation Report, Inmate Status Report, Interview Transcript, Parole Board Release Decision Notice (Form 9026).

Final Determination: The undersigned have determined that the decision from which this appeal was taken and the same is hereby

 Commissioner	<input checked="" type="checkbox"/> Affirmed	<input type="checkbox"/> Reversed for De Novo Interview	<input type="checkbox"/> Modified to _____
 Commissioner	<input checked="" type="checkbox"/> Affirmed	<input type="checkbox"/> Reversed for De Novo Interview	<input type="checkbox"/> Modified to _____
 Commissioner	<input checked="" type="checkbox"/> Affirmed	<input type="checkbox"/> Reversed for De Novo Interview	<input type="checkbox"/> Modified to _____

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 2/12/10

Distribution: Appeals Unit – Inmate - Inmate's Counsel - Inst. Parole File - Central File
P-2002 (1/10)

STATEMENT OF APPEALS UNIT FINDINGS & RECOMMENDATION

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Findings:

Appellant raises a number of issues in his brief submitted in support of the administrative appeal. The Appeals Unit has reviewed each of the issues raised by Appellant, and finds that the issues have no merit for the following reasons:

Appellant contends that the Board's decision was arbitrary and capricious. In response to this claim, we note that unless Appellant is able to demonstrate convincing evidence to the contrary, the Board is presumed to have acted properly in accordance with statutory requirements, and judicial intervention is warranted only when there is a showing of irrationality to the extent that it borders on impropriety, with such determination to begin with a review of whether the Board's decision to deny parole was arbitrary or capricious. Matter of Silmon v. Travis, 95 N.Y.2d 470 (2000); Matter of Phillips v. Dennison, 41 A.D.3d 17 (1st Dept. 2007); Matter of Nankervis v. Dennison, 30 A.D.3d 521 (2d Dept. 2006). It is well settled that when considering an inmate for discretionary release to parole supervision, the Parole Board must consider and weigh the factors set out in Executive Law §§259-i(1) and (2). So long as the decision denying release to parole supervision is made in accordance with the statutory requirements, it is not to be set aside when subject to administrative or judicial review. White v. Dennison, 29 A.D.3d 1144 (3d Dept. 2006); Matter of Flood v. Travis, 17 A.D.3d 757 (3d Dept. 2005); Matter of Borda v. New York State Division of Parole, 219 A.D.2d 843 (4th Dept. 1995); Matter of Heitman v. New York State Board of Parole, 214 A.D.2d 673 (2d Dept. 1995). Thus, in the absence of a convincing demonstration that the Board did not consider the statutory factors set out under the Executive Law, it must be presumed that the Board fulfilled its duty. Peo. ex rel. Herbert v. NYS Board of Parole, 97 A.D.2d 128, 133 (1st Dept. 1983). That the Board did not discuss each factor with the inmate during his interview, or ascribed particular weight to one or more of the factors, does not constitute convincing evidence that the Board did not consider all of the statutory factors. Romer v. Dennison, 24 A.D.3d 866 (3d Dept. 2005); Matter of Collado v. New York State Division of Parole, 287 A.D.2d 921 (3d Dept. 2001); Matter of Rivera v. Executive Department, Board of Parole, 268 A.D.2d 928 (3d Dept. 2000); Matter of Hawkins v. Travis, 259 A.D.2d 813 (3d Dept. 1999); In re Garcia v. New York State Division of Parole, 239 A.D.2d 235 (1st Dept. 1997); Matter of Mackall v. NYS Board of Parole, 91 A.D.2d 1023 (2d Dept. 1983). In this regard, the denial of parole release primarily because of the severity of the inmate's crime is appropriate. Karlin v. Alexander, 57 A.D.3d 1156 (3d Dept. 2008); Matter of Alamo v. New York State Div. of Parole, 52 AD3d 1163 (3d Dept. 2008); Matter of Flood, 17 A.D.3d 757; Matter of Collado, 287 A.D.2d 921; Matter of Wright v. Travis, 284 A.D.2d 544 (2d Dept. 2001). The Board, in making its determination, need not enumerate each factor it relied upon in making its determination, nor provide each factor with equal weight, nor discuss each factor. Matter of Barnes v. New York State

STATE OF NEW YORK - EXECUTIVE DEPARTMENT - BOARD OF PAROLE

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Div. of Parole, 53 A.D.3d 1012 (Third Dept. 2008); Matter of Abbas v. New York State Div. of Parole, 61 A.D.3d 1228 (Third Dept. 2009). That an inmate has numerous achievements within a prison's institutional setting does not automatically entitle him to parole release. Pearl v. New York State Div. of Parole, 25 A.D.3d 1058 (3d Dept. 2006); Corley v. New York State Div. of Parole, 33 A.D.3d 1142 (3d Dept. 2006); Rivera v. Travis, 289 A.D.2d 829 (3d Dept. 2001); Matter of Faison v. Travis, 260 A.D.2d 866 (3d Dept. 1999). In addition, per Executive Law §259-i(2)(c), an application for parole release shall not be granted merely as a reward for Appellant's good conduct or achievements while incarcerated. Matter of Larrier v. New York State Board of Parole Appeals Unit, 283 A.D.2d 700 (3d Dept 2001). Therefore, a determination that the inmate's achievements are outweighed by the severity of the crimes is within the Board's discretion. Matter of Anthony v. New York State Division of Parole, 17 A.D.3d 301 (1st Dept. 2005); Matter of Kirkpatrick v. Travis, 5 A.D.3d 385 (2d Dept. 2004).

The Board's decision was sufficiently detailed to apprise Appellant of the reasons for his denial of parole release, and no further detail was necessary. Little v. Travis, 15 A.D.3d 698 (3d Dept. 2005); Matter of Davis v. Travis, 292 A.D.2d 742 (3d Dept. 2002); Matter of Green v. New York State Division of Parole, 199 A.D.2d 677 (3d Dept. 1993). The Board's challenged decision was also made in accordance with pertinent statutory requirements, and the Board exercised proper discretion in denying Appellant early release on parole. Matter of Rhoden v. New York State Div. of Parole, 270 AD2d 550 (3d Dept. 2000), leave dismissed, 95 NY2d 898 (2000); Matter of Barrett, 242 AD2d 763. Therefore, with the Appellant having the burden of showing that the Parole Board's determination was irrational "bordering on impropriety" before administrative appellate or judicial intervention is warranted, Matter of Silmon, 95 N.Y.2d 470; Matter of Russo v. New York State Board of Parole, 50 N.Y.2d 69 (1980); Johnson v. Dennison, 48 A.D. 3d 1082 (4th Dept. 2008); Lu Po-Yen v. Dennison, 28 A.D. 3d 770 (2d Dept. 2006), and parole release being a discretionary function of the Board, Appellant has not demonstrated that any abuse or infirm decision making on the part of the Board has occurred so as to warrant a *de novo* release interview.

The Board has made reasonable attempts at securing the sentencing minutes from the sentencing court, and has not received them to date. Where the Board had requested the sentencing minutes from the sentencing court, and where the sentencing court had responded to the Board that the sentencing minutes were not available, the Board's inability to consider them did not render its decision irrational to the point of impropriety. Williams v. New York state

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Division of Parole, ___ A.D.3d ___ (3d Dept. 2010); Matter of Blasich v. New York State Bd. of Parole, 68 A.D.3d 1339 (3d Dept. 2009); Matter of Freeman v. Alexander, (3d Dept. 2009).

Despite Appellant's claim that he is entitled to know the internal deliberations of the Board, there is no statutory or due process requirement that the internal deliberations or discussions of the Board following its interview with a parole eligible inmate appear on the record. Matter of Collins v. Hammock, 96 A.D.2d 733(4th Dept. 1983); Matter of Dow v. Hammock, 118 Misc.2d 462 (Sup. Ct. Wyoming Co. March 31, 1983).

As to erroneous information, we find no errors made by the Board, and note that if Appellant had objected to the contents of any document before the Board, he could have undertaken efforts to address his concerns. He could also have raised issues during the interview. If Appellant wanted a lengthier discussion of certain issues, he should have made greater use of the opportunity provided by the Board. See, Matter of Serna v. New York State Division of Parole, 279 A.D.2d 684 (3d Dept. 2001); Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235 (1st Dept. 1997).

Recommendation:

It is the recommendation of the Appeals Unit that the Board's decision be affirmed.