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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1086-15T4

JAMES KENNEDY,

Appellant,

v.

NEW JERSEY STATE PAROLE BOARD,

Respondent.

Submitted November 9, 2017 – Decided January 9, 2018

Before Judges Manahan and Suter.

On appeal from the New Jersey State Parole
Board.

James Kennedy, appellant pro se.

Christopher S. Porrino, Attorney General,
attorney for respondent (Jason W. Rockwell,
Assistant Attorney General, of counsel;
Christopher C. Josephson, Deputy Attorney
General, on the brief).

PER CURIAM

James Kennedy appeals the October 22, 2015 final administrative decision of the New Jersey Parole Board (Board), denying his parole and setting a 120-month future parole eligibility term (FET). We affirm the Board's decision.

We recount only such facts as are necessary for our decision. In December 1984, Kennedy and "C.J." were involved in a fight at a "sweet-16" party. When Kennedy did not win, he went back to his home, which was nearby, obtained a .32 caliber handgun, returned to the party and, while C.J. was trying to flee from a crowd that was attacking him, fatally shot him.

In November 1985, following a jury trial, Kennedy was convicted of murder, N.J.S.A. 2C:11-3(a), and second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a). He was sentenced to life in prison with a thirty-year period of parole ineligibility. The weapons conviction was merged with the murder conviction for purposes of sentencing.

After consideration of Kennedy's eligibility status, on October 27, 2014, a two-member panel denied Kennedy's parole and determined the standard FET was inadequate. It referred the matter to a three-member panel to establish an FET outside of the presumptive schedule.¹

The two-member panel determined that "a substantial likelihood exist[ed] that [Kennedy] would commit a new crime if

¹ See N.J.A.C. 10A:71-3.21(d) (allowing a three-member panel to "establish a future parole eligibility date which differs from [the standard FET] if . . . [the standard FET would be] clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior.").

released on parole at this time." It cited institutional infractions that were "numerous," "persistent" and "serious in nature" and involved his "loss of commutation time," "confinement in detention," and "administrative segregation." Kennedy's last infraction was in January 2014. The panel considered Kennedy's prior criminal record, that the nature of his criminal record was increasingly more serious, and that he had committed this offense while on probation. The panel noted that Kennedy demonstrated insufficient problem resolution, specifically by his lack of insight into his criminal behavior, his minimization of his conduct and his failure to address substance abuse issues. The panel found that Kennedy believed "by admitting the man died[,] he accepts responsibility" but that his thinking "display[ed] no empathy or remorse." He continued to show "aggressive assaultive behavior in prison but he [did] not believe that he continue[d] to be angry." Kennedy "continue[ed] the same pattern of retaliation when he [felt] it [was] justified."

Although the panel did find certain mitigating factors, it considered Kennedy's interview, documentation in his case file, and the confidential material report in denying his parole. The panel suggested Kennedy participate in behavior modification and remain infraction free.

On February 11, 2015, a three-member panel imposed a 120-month FET. While in prison, the panel found Kennedy "continued [his] pattern of violent and antisocial behavior" by committing thirty-six infractions of the institution's regulations, eighteen of which were "asterisk infractions" (of a more serious nature) with the last infraction having been committed in January 2014. As a result of these, Kennedy had forfeited over 1700 days of commutation credits and had been placed in administrative segregation for over 1800 days. The infractions included assault, extortion, blackmail, misuse of electronic equipment, possession of a weapon and of prohibited substances, and disruptive conduct.

The three-member panel found that Kennedy was "unable and/or unwilling to accept full responsibility" for the murder. His continued infractions in prison were "consistent with [his] criminal behavior" and if he were released, the panel found this would continue. He lacked an adequate parole plan. The three-member panel imposed a 120-month FET because of his continued "violent and maladaptive behavior during [his] incarceration," which "foreshadows an inability to control violent impulses on the street." He was reluctant to accept responsibility for the murder and this "hampered [his] ability to gain insight into this crime" and disrupted his ability to have empathy or remorse for his

actions. He continued to act out while incarcerated and needed to address this behavior. He showed little interest in addressing substance abuse issues. The 120-month FET was set because Kennedy had "not shown the requisite amount of rehabilitative progress in reducing the likelihood of future criminal activity."

Kennedy appealed the three-member panel's decision to the full Board. In its October 22, 2015 final agency decision, the Board affirmed the decision to deny parole and to establish a 120-month FET finding that "the aggregate of information [had been considered] pursuant to N.J.A.C. 10A:71-3.11," and that there was support in the record and documentation in accord with N.J.A.C. 10A:71-3.18(f). The Board found it was appropriate to consider the facts and circumstances of the offense. The Board agreed that the standard FET was inappropriate in Kennedy's case and agreed with the reasoning of the three-member panel in imposing a 120-month FET.

Although he had participated in some programs, this did not negate the fact that he lacked insight into his criminal behavior and continued to minimize his conduct. The Board concurred after looking at all relevant factors that there was a substantial likelihood Kennedy would commit another crime if released on parole at this time. He was not a suitable candidate to be released to

a halfway house. The 120-month FET was appropriate because of his lack of progress in reducing the likelihood of future criminal behavior.

Kennedy appeals the October 22, 2015 Board decision, raising these issues:²

POINT ONE:

The (NJSPB) findings and conclusions to deny Appellant release on parole and impose an excessive (FET) upon him was contrary to the material facts.

POINT [TWO]:

The (NJSPB) decision to deny Appellant parole release and impose a most lengthy (120-months) (FET) was arbitrary, capricious and unreasonable.

The scope of our review is limited. "[T]he Parole Board is the 'agency charged with the responsibility of deciding whether an inmate satisfies the criteria for parole release under the Parole Act of 1979.'" Acoli v. N.J. State Parole Bd., 224 N.J. 213, 222 (quoting In re Application of Hawley, 98 N.J. 108, 112 (1984)), cert. denied, ___ U.S. ___, 137 S. Ct. 85 (2016). "The decision of a parole board involves 'discretionary assessment[s] of a multiplicity of imponderables'" Trantino v. N.J. State Parole Bd., 166 N.J. 113, 201 (2001) (Trantino V) (alteration

² We set forth the points exactly as presented by Kennedy.

in original) (quoting Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 10 (1979)). "[T]he Board 'has broad but not unlimited discretionary powers'" Id. at 173 (quoting Monks v. N.J. State Parole Bd., 58 N.J. 238, 242 (1971)). The Board's decision regarding parole will not be disturbed unless "arbitrary, capricious, or unreasonable, or [] not supported by substantial credible evidence in the record as a whole." In re Stallworth, 208 N.J. 182, 194 (2011) (alteration in original) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980)); see also Acoli, 224 N.J. at 222-23.

Kennedy is serving a life sentence for the murder he committed in 1984. Under the statute in effect at the time, "[t]he Parole Board's ultimate determination of parole fitness must be based on whether there is a likelihood that [appellant] will again engage in criminal activity." Trantino v. N.J. State Parole Bd., 154 N.J. 19, 39 (1998) (Trantino IV); see also Williams v. N.J. State Parole Bd., 336 N.J. Super. 1, 7 (App. Div. 2000). "[T]he Board panel shall determine whether . . . by a preponderance of the evidence . . . there is a substantial likelihood that the inmate will commit a crime under the laws of the State of New Jersey if released on parole." N.J.A.C. 10A:71-3.10(a).


N.J.A.C. 10A:71-3.11(b)(1) to (23) contains a non-exhaustive list of factors that the Board may consider in determining whether an inmate should be released on parole. "[T]he Board [must] focus its attention squarely on the likelihood of recidivism." McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 565 (App. Div. 2002). We find the applicable factors were taken into account in reaching the decisions, as evidenced by the two-member panel's notice of decision as well as the three-member panel's notice of decision. Our review reveals nothing in the Board's decision that was arbitrary, capricious or unreasonable.

Kennedy contends the Board's decision was arbitrary and capricious because the evidence did not support its conclusion he would likely reoffend if released, arguing his prison record was just one factor to consider. He said he admitted responsibility for the crime. He suggested the Board might have defined what insight he was to gain about his past offense and how he was to express it to them. He also claimed the 120-month FET was arbitrary, capricious and unreasonable because he had taken responsibility for the crime and expressed remorse even though he had "minor" disciplinary infractions. He suggested he could obtain any needed counseling at a halfway house.

We are satisfied based from the record that the Board's decision was not arbitrary, capricious or unreasonable and add only brief comments. Kennedy does not dispute that his thirty years in prison have reflected continual infractions of the prison's rules and regulations, with many of those infractions serious enough to warrant the loss of commutation time and imposition of administrative segregation. We find nothing improper by the Board in considering this record in its assessment of whether there is a substantial likelihood he would commit a new crime if paroled. Although Kennedy says that he has taken responsibility for the murder, the panels found that he continued to lack empathy for the victim or insight into his criminal behavior. He continued to respond to problems through aggression as his prison record demonstrated. He did not plan for the future and did not address substance abuse issues. We are fully satisfied on this record that there was nothing arbitrary, capricious or unreasonable in the Board's conclusion to deny parole because of the likelihood of continued criminal behavior. In addition, the Board adequately supported its decision to impose a 120-month FET because of his assaultive behavior in prison, inability to control his violence, lack of insight into the crime, empathy or remorse and lack of progress in addressing these issues.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION