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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2581-20

KEVIN SABATINI,

Appellant,

v.

NEW JERSEY STATE PAROLE BOARD,

Respondent.

Submitted May 15, 2023 – Decided June 19, 2023

Before Judges DeAlmeida and Mitterhoff.

On appeal from the New Jersey State Parole Board.

Kevin Sabatini, appellant pro se.

Matthew J. Platkin, Attorney General of New Jersey, attorney for respondent (Donna Arons, Assistant Attorney General, of counsel; Dorothy M. Rodriguez, Deputy Attorney General, on the brief).

PER CURIAM

Appellant Kevin Sabatini appeals from the March 31, 2021 final agency decision of respondent New Jersey State Parole Board (Board) denying him parole and imposing a 180-month future eligibility term (FET). We affirm the denial of parole, vacate the FET, and remand for further proceedings.

I.

In May 1980, Sabatini, who was on community supervision for a prior offense, and three codefendants burglarized a house in Barrington. They stole cash, jewelry, and other items.

Seven months later, Sabatini and two codefendants met a man at a bar in Bordentown. The four went to a restaurant, where they ate and drank. While there, Sabatini and the victim got into a verbal altercation. The group left the restaurant by car, giving the victim the impression they were taking him home. A codefendant pulled the car off the road, where Sabatini punched the victim in the face and broke a whisky bottle over his head. He and another codefendant riffled through the victim's pockets and stole his money. During the robbery, Sabatini found a "police courtesy card," which prompted him to state that the victim "had to be gotten rid of."

Sabatini bound and gagged the victim, placing him in the backseat of the car. He later removed the victim from the car and struck him in the face with a

heavy chain, while a codefendant burned the victim with a cigarette lighter. Sabatini and a codefendant subsequently drove the victim to Millstone, where Sabatini stabbed him several times, including in the upper chest and neck, killing him. Sabatini then covered the victim's body with debris and left the area with the codefendant.

Sabatini was arrested shortly after he killed the victim and was charged with murder, conspiracy to commit murder, kidnapping, conspiracy to commit kidnapping, robbery, aggravated assault, possession of a weapon for an unlawful purpose, and unlawful possession of a weapon. He was also charged with burglary for the earlier incident.

Sabatini later pleaded guilty to all charges arising from the murder. He was sentenced to life imprisonment with a mandatory minimum term of twenty-five years.[1] The following year, Sabatini was sentenced to a concurrent five-year term of imprisonment for the burglary.

While incarcerated, Sabatini was adjudicated guilty of thirty-eight institutional disciplinary infractions, including six asterisk infractions, which are considered more serious. Among Sabatini's institutional infractions are

[1] At sentencing, the trial court judge described the murder as "the most vicious, brutal, senseless, inhumane crime [he] ha[d] ever sentenced . . . ."

charges related to threatening behavior, possessing a weapon, drug use, and disruptive acts. Most recently, in July 2013, Sabatini was adjudicated guilty of committing prohibited act .554, possession of tobacco products or matches where not permitted. See N.J.A.C. 10A:4-4.1(a)(4)(vi).

Sabatini became eligible for parole for the first time on October 15, 2015. On April 16, 2018, a two-member Board panel denied parole and referred the matter to a three-member Board panel to establish an FET outside of administrative guidelines. See N.J.A.C. 10A:71-3.21(d). On June 20, 2016, the two-member panel amended its decision, amplifying its prior analysis and adding two reasons for denying parole. On September 21, 2016, a three-member panel imposed a ninety-six-month FET. Sabatini appealed both panel decisions to the full Board. On May 31, 2017, the Board issued a final decision affirming the decisions of both panels.

We vacated the Board's May 31, 2017 decision. Sabatini v. N.J. State Parole Bd., No. A-4935-16 (App. Div. May 28, 2019). We were compelled to reach that result because Samuel J. Plumeri, Jr., a member of the Board who participated in making the decision, previously served as a law enforcement officer and was involved in the investigation of Sabatini's crimes and his arrest thirty-six years earlier. Id. at 3. We credited a certification from Plumeri that

he had no recollection of investigating Sabatini's crimes or arresting him and had he known of his involvement, he would have recused himself from the matter pursuant to the Board's Code of Professional Conduct and Recusal Policy. Ibid. We remanded for reconsideration of the Board's decision without Plumeri's participation.

On remand, after a new initial hearing, the Board denied parole and referred the matter for establishment of an FET outside of administrative guidelines. The Board based its decision on the following factors: (1) the serious nature of the offenses; (2) extensive and repetitive prior criminal record; (3) nature of criminal record increasingly more serious; (4) currently incarcerated for multiple offenses; (5) prior opportunities on probation and prior incarceration failed to deter criminal behavior; (6) committed new offenses while on probation but status not formally terminated; (7) numerous, persistent institutional disciplinary infractions resulting in loss of commutation time and confinement in detention; (8) insufficient problem resolution; and (9) the results of a risk assessment evaluation, which showed a moderate risk of recidivism.

With regard to insufficient problem solving, the Board found that Sabatini failed to provide insight into what led him to resolve his verbal dispute with the victim, who he had just met, by violently murdering him. The Board also found

that Sabatini failed to understand how contributing environmental factors, such as dropping out of high school and substance abuse starting at a young age, played a role in his criminal thinking.

The Board found the following mitigating factors: (1) opportunities on community supervision completed without violation;[2] (2) participation in institutional programs, including those specific to behavior; (3) institutional reports reflecting a favorable institutional adjustment; (4) attempts to enroll in additional programs, but not admitted; (5) minimum custody status achieved and maintained; and (6) commutation time restored.

On July 30, 2020, the Board established a 180-month FET. The Board issued a written decision relying on the same factors and mitigating considerations on which it had previously relied.

On March 31, 2021, the Board issued a final decision adopting its prior determinations.

This appeal follows. Sabatini argues that: (1) the Board failed to cure the taint in the record arising from Plumeri's involvement in the original decision; and (2) the Board's imposition of a 180-month FET after having previously

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[2] It is not clear how this mitigating factor applies in light of the fact that Sabatini engaged in criminal behavior while on community supervision.

determined that a ninety-six-month FET was adequate was arbitrary, capricious, and vindictive.

II.

We accord considerable deference to the Board, and our review of its decision is limited. Hare v. N.J. State Parole Bd., 368 N.J. Super. 175, 179 (App. Div. 2004). "Appellate review of parole determinations 'focuses upon whether the factual findings made by the Parole Board could reasonably have been reached on sufficient credible evidence in the record.'" Perry v. N.J. State Parole Bd., 459 N.J. Super. 186, 193 (App. Div. 2019) (quoting Trantino v. N.J. State Parole Bd., 166 N.J. 113, 199 (2001)). An appellate court must not substitute its judgment for that of the agency, and an agency's decision is accorded a strong presumption of reasonableness. McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002). The burden of showing that an action was arbitrary, unreasonable or capricious rests with the appellant. Barone v. Dep't of Human Servs., 210 N.J. Super. 276, 285 (App. Div. 1986), aff'd, 107 N.J. 355 (1987).

For offenses committed before August 18, 1997, "the Parole Board may deny parole release if it appears from a preponderance of the evidence that 'there is a substantial likelihood that the inmate will commit a crime under the laws of

this State if released on parole at such time.'" Williams v. N.J. State Parole Bd., 336 N.J. Super. 1, 7 (App. Div. 2000) (quoting L. 1979, c. 441, § 9). When reaching a decision under this standard, the Board must consider the aggregate of all pertinent factors, including those set forth in N.J.A.C. 10A:71-3.11(b). Acoli v. N.J. State Parole Bd., 250 N.J. 431, 457 (2022). "Assessing the risk that a parole-eligible candidate will reoffend requires a finding that is more than a mere probability and considerably less than a certainty." Id. at 456.

We begin with Sabatini's argument that the Board failed to cure the taint in the record from Plumeri's participation in the original decision. Sabatini correctly notes that Plumeri stated that he was involved in the issuance of the June 20, 2016 amended decision of the original two-member panel. That decision added two reasons for denying parole not mentioned in the panel's previous decision: prior offense record is extensive; and offense record repetitive. Those reasons appear in the Board's final decision issued on remand. Sabatini surmises that Plumeri's involvement in the June 20, 2016 amended decision resulted in the addition of those two factors and argues that in order to remove the taint of his participation the Board must be precluded from considering those factors on remand. Sabatini argues that had those factors been removed from consideration on remand, his risk of recidivism score, which

declined from his first evaluation in 2016 as high-risk, to his second evaluation in 2020 as medium-risk, would have been even lower. In addition, Sabatini argues that the Board will never be able to remove the taint of Plumeri's involvement in his request for parole and should be ordered to release him on parole as a remedy for Plumeri's violation of the Board's Code of Professional Conduct and Recusal Policy.[3]

We note that Sabatini failed to raise these arguments before the Board. We generally "do not consider issues not raised . . . at an administrative hearing" unless the issues are "of public importance and will likely arise in the future." In re Stream Encroachment Permit, 402 N.J. Super. 587, 602 (App. Div. 2008). While we do not view Sabatini's argument as raising an issue of public

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[3] Plumeri certified that he was involved in issuing the June 20, 2016 amended decision because one of the original panel members was no longer with the Board. Yet, as Sabatini points out, Plumeri's signature is missing from the amended decision, which is signed by the two original panel members. Sabatini argues that the absence of Plumeri's signature "concealed" his involvement in issuing the amended decision. Sabatini also accurately notes that the original decision of the Board does not contain the names of the members who issued it. Sabatini did not become aware of Plumeri's involvement in issuing the original decision until the Board included in the appendix it filed with this court in the first appeal a voting sheet indicating Plumeri voted for the original final decision. Sabatini appears to question the veracity of Plumeri's assertion that he did not recall his involvement in the investigation and arrest of Sabatini and suggests a coverup of his involvement in the original decision. We see nothing in the record suggesting that Plumeri participated in the original denial of parole while aware that he had a conflict.

importance warranting review, because the argument concerns, in effect, the scope of our remand, we elect to address it.

We find no support in the record for Sabatini's speculation that Plumeri was responsible for adding the two new factors in the July 30, 2016 amended decision. Moreover, even if Plumeri contributed to the inclusion of those factors in the amended decision, we see no connection between Plumeri's admitted conflict and the extent and nature of Sabatini's prior criminal record, which are the subjects of the two added factors. Sabatini's prior convictions are matters of fact, not opinion. Plumeri's participation in the original Board decision did not have the capacity to change the extent or nature of the crimes Sabatini committed prior to the murder and burglary that resulted in his present incarceration. Barring the Board from considering Sabatini's criminal history on remand because Plumeri participated in the prior denial of parole would be an unwarranted intrusion into the Board's exercise of its statutory authority, frustrate the legislative intent with respect to well-founded decisions to release inmates on parole, and amount to an overcompensation for an unintentional violation of the Board's internal professional code and recusal policy.

To the extent we have not specifically addressed any of Sabatini's remaining claims regarding Plumeri's participation in the original Board

decision, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

We turn to the Board's imposition of a 180-month FET.[4] An inmate serving a sentence for murder is ordinarily assigned a twenty-seven-month FET after a denial of parole. See N.J.A.C. 10A:71-3.21(a)(1). A two-member Board panel may increase or decrease the standard FET "by up to nine months when, in the opinion of the Board panel, the severity of the crime for which the inmate was denied parole and the prior criminal record or other characteristics of the inmate warrant such adjustment." N.J.A.C. 10A:71-3.21(c).[5] A three-member Board panel may establish an FET different from the standard if the presumptive FET "is clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior." N.J.A.C. 10A:71-3.21(d). In making that determination, the three-member panel is required to "consider the factors enumerated in N.J.A.C. 10A:71-3.11." N.J.A.C. 10A:71-3.21(d).

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[4] Other than with respect to his arguments relating to the taint of Plumeri's participation in the Board's prior decision, Sabatini does not argue the court should reverse the Board's denial of parole. Nevertheless, we have reviewed the record and find sufficient support for the Board's denial of parole, as detailed in its written decision addressing relevant factors. N.J.A.C. 10A:71-3.11(b).

[5] On remand, the Board elected to act in place of the two-member and three-member panels when setting Sabatini's FET.

The Board may depart from the presumptive FET if it "is clearly inappropriate in consideration of the circumstances of the crime, the characteristics and prior criminal records of the inmate[,] and the inmate's institutional behavior." N.J.A.C. 10A:71-3.21(e). When doing so, the Board shall consider the factors in N.J.A.C. 10A:71-3.11 but must focus "squarely on the likelihood of recidivism." McGowan, 347 N.J. Super. at 565.

"[T]he 'clearly inappropriate' standard [is] a high threshold to vault" and "[t]he presumption that convicted murderers denied parole should be given a twenty-seven-month FET is not to be dispensed with for light or transient reasons." Berta v. N.J. State Parole Bd., 473 N.J. Super. 284, 322-23 (App. Div. 2022). "The Board cannot simply pick a number out of thin air" when it decides "to impose a higher FET." Id. at 323. Rather, "the Board must explain not only why the presumptive FET is clearly inappropriate, but also why the FET that was actually imposed is necessary and appropriate." Ibid.

We have considered the record carefully. We conclude that there is substantial credible evidence supporting the Board's determination that the presumptive twenty-seven-month FET is clearly inappropriate due to Sabatini's lack of satisfactory progress in reducing the likelihood that he will engage in criminal behavior if released on parole. The Board focused on Sabatini's failure

to address the environmental factors that led to his criminal behavior, the thought processes that caused him to escalate a verbal dispute with a stranger into a vicious murder, and his thirty-eight institutional infractions, including several for serious behavior. These factors support the conclusion that twenty-seven months is too little time for Sabatini to address the concerns identified by the Board, which relate to his likelihood of committing a crime if paroled.

The Board, however, did not adequately explain why an FET of 180 months, or fifteen years, which is nearly seven times the presumptive FET, and nearly twice the FET adopted by the Board in 2017 was "necessary and appropriate." We understand that the FET commences on the original parole eligibility date and is reduced by commutation, work, and minimum custody credits. Thus, Sabatini will be eligible for parole far sooner than 180 months from the Board's decision. However, whatever the practical effect of the 180-month FET, the Board is obligated to explain why such a drastic departure from the presumptive FET is warranted, particularly given the ninety-six-month FET was found to be appropriate before Sabatini's successful appeal. The reasoning on which the Board relied for the ninety-six-month FET is practically identical to the reasoning it advanced for the 180-month FET.

While Sabatini was given a new hearing, at which he made new statements, prior to imposition of the 180-month FET, we did not see a significant deviation between those statements and the answers he gave to Board member questions prior to entry of the ninety-six-month FET. In addition, Sabatini participated in institutional programs, has not committed an institutional infraction, and received a score showing a decreased risk of recidivism in the time between the first Board decision and the hearing on remand. These apparently mitigating factors are at odds with a significant increase in Sabatini's FET. We are, therefore, constrained to vacate the 180-month FET and remand for the Board to determine an appropriate FET with an adequate explanation for the Board's decision.

We have considered Sabatini's remaining arguments, including that the 180-month FET was imposed as retaliation, and conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

The March 31, 2021 decision is affirmed to the extent that it denies Sabatini parole and finds that the presumptive twenty-seven-month FET is clearly inappropriate. The 180-month FET imposed by the Board is vacated and the matter is remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION