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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3695-20**

MARK MCLAUGHLIN,

Appellant,

v.

**NEW JERSEY STATE
PAROLE BOARD,**

Respondent.

Argued May 8, 2023 – Decided June 5, 2023

Before Judges Whipple, Mawla and Walcott-Henderson.

On appeal from the New Jersey State Parole Board.

Kevin S. Finckenauer, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Kevin S. Finckenauer, of counsel and on the briefs).

Christopher C. Josephson, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Donna Arons, Assistant Attorney General, of counsel; Christopher C. Josephson, on the brief).

PER CURIAM

Mark McLaughlin appeals from the April 28, 2021 final agency decision of New Jersey State Parole Board (the Board) denying him parole and imposing a 120-month future eligibility term (FET). While we affirm the denial of parole, we reverse and vacate the FET because the Board did not explain why such a departure from the presumptive twenty-seven-month FET was necessary.

McLaughlin raises the following issues on appeal:

POINT I

THE FAILURE TO PROVIDE . . . MCLAUGHLIN WITH WRITTEN NOTICE OF HIS BASIC PAROLE RIGHTS AND BASIC INFORMATION ABOUT THE PROCEEDINGS IS A VIOLATION OF PROCEDURAL DUE PROCESS.

POINT II

THE CRITERION "LACK OF INSIGHT" LACKS SUFFICIENT PRECISION TO PROVIDE A CONSTITUTIONALLY SOUND BASIS FOR A PAROLE DENIAL. (Not Raised Below).

POINT III

THE CONFIDENTIAL MATERIALS, WHICH FORMED A SIGNIFICANT BASIS FOR WHY THE BOARD DENIED . . . MCLAUGHLIN PAROLE, SHOULD BE MADE AVAILABLE TO HIM FOR USE IN HIS PAROLE PREPARATION.

POINT IV

THE RECORD ESTABLISHED IN THIS CASE DOES NOT SATISFY THE REQUIREMENTS OF THE 1979 PAROLE ACT[, N.J.S.A. 30:4-123.53,] THAT THERE IS A SUBSTANTIAL LIKELIHOOD . . . MCLAUGHLIN WILL COMMIT ANOTHER CRIME IF HE IS RELEASED.

POINT V

THE PAROLE BOARD ACTED ARBITRARILY AND CAPRICIOUSLY IN ESTABLISHING [AN FET] INCONSISTENT WITH ITS OWN REGULATIONS.

On August 16, 1980, on his way home from the bar, twenty-year-old McLaughlin broke into a house to steal from it. He had been drinking heavily, and earlier had taken mescaline and smoked hashish. A sixteen-year-old girl who lived in the home discovered him, and—when she did not stop screaming—he stabbed her twenty times, killing her. Her eleven-year-old brother attempted to help her by jumping on McLaughlin, but he stabbed and killed him as well. A neighbor who heard the girl's screams saw this from the window. He entered the house as McLaughlin tried to escape through the back door and attempted to stop him. McLaughlin stabbed the neighbor twice before the neighbor knocked him unconscious and called the police.

McLaughlin pleaded guilty to two counts of purposely causing the death of another in the course of committing a crime, N.J.S.A. 2C:11-3, and one

count of attempting to cause the death of another in furtherance of the commission of a crime, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3. He was sentenced to life in prison, with a twenty-five-year period of parole ineligibility, for one murder; thirty years, fifteen without parole, to run consecutively with the first sentence, for the other murder; and seven years for the attempted murder of the neighbor, to run concurrently with the other two sentences.

While in prison, McLaughlin accumulated several infractions. His "asterisk" offenses—those considered most serious, N.J.A.C. 10A:4-4.2(a)—include fighting, threatening someone with bodily harm, possession of a weapon, attempting or planning an escape, and possession or use of drugs or drug paraphernalia. However, most of these occurred within the first twenty years of his time in prison. In the last twenty years, he only committed two asterisk offenses, both drug related. The most recent was in 2006. McLaughlin accumulated eight minor infractions, the most recent occurring in 2019.

He participated or attempted to participate in eleven rehabilitative programs, but only completed Alcoholics Anonymous, Focus on the Victim,

Anger Management, and Reentry Preparation. McLaughlin also obtained his GED while in prison and participated in several work programs.

McLaughlin became eligible for parole in October 2020. In preparation for his parole hearing, a psychological evaluation was completed that April. The evaluation revealed McLaughlin did not exhibit any "acute psychiatric symptoms" It noted McLaughlin's history of drug use, starting when he was twelve years old and continuing while he was incarcerated. It also explained there were several other risks, including his exposure to "violent modeling" and substance use during childhood; lack of "prosocial peer supports" and limited family supports; "[e]vidence of antisocial personality features"; and "inadequate understanding of [h]is criminal behavior." The evaluation reported a high risk of re-offending. On the Level of Service Inventory—Revised, McLaughlin scored a thirty-one out of fifty-four, also indicating a high risk of recidivism.

On July 28, 2020, the Board held an initial hearing. A two-member Board panel denied parole on August 17, 2020.¹ The panel found there was a "substantial likelihood" he would "commit a new crime if released on parole at this time." It listed the specific reasons for denial: the facts and circumstances

¹ The Board amended its decision on November 5, 2020 to clarify a few details and add more explanation.

of the offense—namely, two counts of first-degree murder; the increasingly serious nature of his criminal record; the fact he was committed to incarceration for multiple offenses; the fact he committed new offenses on probation; the fact probation did not deter criminal behavior; prior incarceration and community supervision did not deter behavior; and he had numerous, persistent, and serious institutional infractions resulting in loss of commutation time, confinement in detention, and administrative segregation.

The panel also found insufficient problem resolution—specifically, that McLaughlin demonstrated a lack of insight into criminal behavior and had not sufficiently addressed his substance abuse problems. The interview with McLaughlin, pre-parole report, documentation in his case file, and confidential material—the "in-depth pre-parole psychological evaluation"—demonstrated this.

The panel found mitigating factors. These included McLaughlin's minimal offense record; opportunities on community supervision were completed without violation; participated in programs specific to behavior; participated in institutional programs; institutional reports reflect favorable institutional adjustment; and attempts to enroll and participate in programs but was not admitted.

The case was then transferred to a third Board member, creating a three-member panel, to establish an FET. While this was pending, McLaughlin submitted two letters of mitigation, explaining what he accomplished while incarcerated, his plans for release, his desire to take care of his elderly mother, and that he was no longer "the boy" who murdered the two children.

The three-member panel found that, though the presumptive FET for the crime of murder is twenty-seven months, N.J.A.C. 10A:71-3.21(a)(1), the factors enumerated in N.J.A.C. 10A:71-3.11 supported an FET of 120 months. It found McLaughlin did not understand the full extent of his actions or the cause of his actions, and instead blamed them on "factors out of [his] immediate control," like youth and substance use.

The panel also noted McLaughlin did not make "adequate progress in the rehabilitative process" because, although he participated in several programs and obtained his GED, he still "fail[ed] to recognize how personality defects played a role in [his] poor conduct." Additionally, the panel cited his "lengthy institutional record" which reflected "violence, substance abuse, weapons and noncompliance" It noted he still blamed his "negative behavior" while incarcerated on the prison environment, rather than understanding how it is "created through personal choices."

McLaughlin appealed the three-member panel's decision to the full Board, arguing he was denied due process because he was not informed he could have an institutional representative help him prepare for the hearing; the panel failed to consider the research on "maturation and the underdeveloped brain[s] of juveniles and young adult offenders that provide[s] a clinical explanation concerning anti-social behavior before imposing a new FET"; and the panel's use of a confidential record in making its determination violated his right to confrontation. The Board affirmed the panel's decision to deny parole and its imposition of a 120-month FET. This appeal followed.

"Parole Board decisions are highly individualized discretionary appraisals" that should be reversed only if arbitrary or capricious. Hare v. N.J. State Parole Bd., 368 N.J. Super. 175, 179-80 (App. Div.), certif. denied, 180 N.J. 452 (2004) (quoting Trantino v. N.J. State Parole Bd., 166 N.J. 113, 173 (2001)). However, the nature of parole decisions "does not engender a more exacting standard of judicial review than that applicable to other administrative agency decisions." Trantino, 166 N.J. at 173 (quoting Trantino v. N.J. State Parole Bd., 154 N.J. 19, 25 (1998)).

We focus on these three inquiries to determine if an agency action is arbitrary, capricious, or unreasonable:

(1) whether the agency's action violates express or implied legislative policies, i.e., did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[Trantino, 154 N.J. at 24 (citing Brady v. Dep't of Personnel, 149 N.J. 244, 256 (1997)).]

We are "deferential to an agency's expertise." Berta v. N.J. State Parole Bd., 473 N.J. Super. 284, 302 (App. Div. 2022). "Where there is substantial evidence in the record to support more than one regulatory conclusion, 'it is the agency's choice which governs.'" In re Vineland Chem. Co., 243 N.J. Super. 285, 307 (App. Div.), certif. denied, 127 N.J. 323, (1990) (quoting De Vitis v. N.J. Racing Comm'n, 202 N.J. Super. 484, 491 (App. Div. 1985)).

Further, "[o]ur task is to be neutral reviewers of agency decisions, not apologists for them, and thus nothing prevents us from piercing the veil of an unsupported decision." Berta, 473 N.J. Super. at 303-04.

Having carefully reviewed the record, we conclude it supports the imposition of an FET and we do not consider the Board's decision to be arbitrary, capricious, or unreasonable. Additionally, we find McLaughlin's

arguments asserting a denial of due process are not worthy of discussion in a written opinion. R. 2:11-3(e)(2).

However, we require further explanation for what we consider a dramatic departure from the presumptive twenty-seven-month FET. N.J.A.C. 10A:71-3.21 governs the establishment of FETs for people denied parole. For murder, the presumptive term—established by a two-member Board panel—is twenty-seven months. N.J.A.C. 10A:71-3.21(a)(1). Subsection (d), however, provides a three-member Board panel may establish an FET that differs from the presumptive term

if the [FET] date which would be established pursuant to such subsections is clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior. In making the determination that the establishment of a [presumptive FET date] is clearly inappropriate, the three-member panel shall consider the factors enumerated in N.J.A.C. 10A:71-3.11.

[N.J.A.C. 10A:71-3.21(d).]

Here, the three-member panel determined those factors supported establishment of an FET longer than the presumptive term. Specifically, the Board panel found that: defendant refused to take responsibility for his actions and he "must develop a better understanding to the specifics of [his] personality defects and why they led [him] to commit such a violent act";

although he participated in rehabilitative programs, he did not make "adequate progress"; defendant had a "lengthy institutional record" reflecting violence; and defendant "must address [his] substance abuse issues as well as [his] personal interactions and how these [a]ffect [his] interactions with others." It also noted a confidential document—the psychological evaluation—had an impact on its decision.

However, the Board must also explain why the extended FET it imposes is appropriate and necessary. While this appeal was pending, we decided Berta, 473 N.J. Super. 284. There, we reversed the Board's establishment of a seventy-two-month FET because "the Board failed to adequately explain why it fixed an FET almost three times as long as the presumptive twenty-seven-month FET" Id. at 322. "[T]he 'punitive aspect' of an inmate's sentence has already been satisfied by the time he or she first becomes eligible for parole." Id. at 323. We held in imposing an FET longer than the presumed FET in N.J.A.C. 10A:71-3.11(b), "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. The Board cannot simply pick a number out of thin air." Ibid.

Here, neither the Board panel nor the Board explained why the imposed FET was over four times the presumptive FET. While the Board adequately explained why the presumptive term was clearly inappropriate, it offered nothing to address why it believed ten years was appropriate to impose upon a sixty-year-old inmate. The Board must "explain . . . why the FET that was actually imposed is necessary and appropriate." Id. at 323.

The denial of parole is affirmed, and the FET is vacated and remanded for further 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