

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3127-11T2

THOMAS BAILIFF,

Appellant,

v.

NEW JERSEY STATE PAROLE
BOARD,

Respondent.

Argued November 13, 2013 – Decided January 16, 2014

Before Judges Sabatino and Hayden.

On appeal from the New Jersey State Parole Board.

Eric J. Marcy argued the cause for appellant (Wilentz, Goldman & Spitzer, attorneys; Mr. Marcy, of counsel and on the brief).

Christopher C. Josephson, Deputy Attorney General, argued the cause for respondent (John J. Hoffman, Acting Attorney General, attorney; Melissa H. Raksa and Lisa A. Puglisi, Assistant Attorneys General, of counsel; Mr. Josephson, on the brief).

PER CURIAM

Appellant Thomas Bailiff appeals from the January 25, 2012 final decision of the New Jersey State Parole Board, denying his application for parole, and the May 30, 2012 final Board

decision establishing a future eligibility term (FET) of 180 months. We affirm the denial of parole, but reverse the 180-month FET and remand for proceedings in accordance with this opinion.

In 1982, appellant was charged under three separate indictments for murder, robbery, and theft from the person. On November 18, 1982, appellant was tried for the latter two charges and found guilty of a lesser-included charge of theft on the robbery indictment, and of the theft from the person on the other indictment. He pled guilty to the murder indictment on December 8, 1982. For the murder, the judge imposed a life sentence with a twenty-year parole bar. For the thefts, appellant received two concurrent five year terms with two and one-half years of parole ineligibility.

Appellant's convictions arose out of the following facts. On March 6, 1982, appellant and his co-defendant picked up a female hitchhiker. Appellant was intoxicated at the time on alcohol, marijuana, and mescaline, and was absent without leave from the United States Marine Corps. During the drive, appellant forced the woman to perform sex acts, and then stabbed her with a six-inch bayonet, piercing her heart. Appellant and his co-defendant dumped her on the side of the road, where she died.

The two thefts occurred on March 7 and 8, 1982. They both involved purse snatching in parking lots. Appellant was twenty years old at the time of these three crimes.

The Board denied appellant parole for the first time in March 2002 and established a thirty-six-month FET. The Board denied appellant parole a second time in April 2004, establishing a sixty-month FET. In August 2008, the Board again denied appellant parole and set his FET at sixty months. We affirmed the Board's denial of parole, but reversed the imposition of the sixty-month FET. Bailiff v. N.J. State Parole Bd., No. A-0213-08 (App. Div. June 29, 2010) (slip op. at 1).

The Board provided two reasons in 2008 for setting the FET at sixty months, which is beyond the prescribed twenty-seven month FET and the maximum recommended thirty-six month FET. N.J.A.C. 10A:71-3.21(a)(1) and (c). First, the Board cited appellant's three separate crimes. Bailiff, supra, No. A-0213-08 (slip op. at 14). Second, the panel felt that appellant needed to, and had not yet come to understand why he reacted in such a violent manner. Ibid. We concluded that these reasons were insufficient to establish an FET beyond the recommended maximum of thirty-six months, especially in light of the numerous programs completed by appellant. Id. (slip op. at 14-15). Upon remand, the Board set a thirty-six month FET.

On December 20, 2010, appellant received an initial hearing before a hearing officer for his fourth parole eligibility determination. The officer referred the matter to a Board panel for a hearing. On December 30, 2010, a two-member Board panel conducted a hearing, and subsequently referred appellant's case to the full Board for review. On August 24, 2011, the full Board heard appellant's case.

The full Board denied appellant parole citing his incarceration for multiple crimes and lack of insight into his criminal behavior. Specifically, the Board noted that appellant was at "the beginning stages of understanding and accepting full responsibility for his actions on the night of the murder." The Board also noted that appellant "appear[ed] to take what he [was] told in counseling sessions to explain his behaviors in a clinical manner. However, [he] continue[d] to emphasize [that] the murder was not an intentional act."

On January 25, 2012, the Board affirmed the denial of parole for appellant and referred the case to the full Board again to establish an FET. In its affirmation, the Board noted appellant's mitigating factors, including institutional, behavioral, and educational program participation; average to above average institutional reports; the absence of infractions since 1998; and appellant's minimum custody status. However, in

addition to appellant's convictions for multiple crimes,¹ the Board stated that appellant's "ability to repeat what he has been told about his behavior has not fully translated into him processing what he has learned and that he has not truly comprehended how and why his deadly violent behavior occurred." The Board further stated that appellant was reciting "information in a clinical, detached manner" and "continue[d] to overly emphasize that his Murder offense was not an intentional act."

On February 17, 2012, appellant requested that an FET date be set immediately so that an appeal could be properly filed. On March 21, 2012, the Board established a 180-month FET, and stated that the written Notice of Decision was forthcoming.

On April 16, 2012, the Board issued its Notice of Decision regarding the FET, essentially relying on the same reasoning as the parole denial. The Board elaborated that appellant remained "a substantial threat to public safety" because (1) he was unable to identify the cause of his "murderous behavior" and properly address his "violent criminal personality

¹ The Board wrote that appellant was "presently incarcerated for three offenses arising out of three separate incidents." As we noted in our last decision in appellant's case, Bailiff, supra, No. A-0213-08 (slip op. at 10 n.2), the use of the term "presently" is erroneous as appellant served the maximum sentence imposed on the theft-related charges long ago.

characteristic"; and (2) he possessed inadequate insight and was only beginning to fully accept responsibility.

The Board emphasized that appellant "just realized" during the discussion with the two-member panel, after always having maintained that the sexual contact with the victim was consensual, that he may have forced her to perform the sexual acts. The Board also considered that appellant repeatedly insisted at the full Board hearing that he did not intentionally kill the victim, but then finally acknowledged that by leaving the victim bleeding at the side of the road, he did intentionally kill her. The Board concluded that

setting any term less than a one hundred and eighty (180) month future parole eligibility term would be wholly inconsistent with the conclusion that, after nearly twenty-nine (29) years of incarceration, [appellant] ha[d] not shown the requisite amount of rehabilitative progress in reducing the likelihood of future criminal activity.

On May 30, 2012, in response to appellant's administrative appeal, the Board issued a Notice of Final Agency Decision affirming the 180-month FET.² On June 6, 2012, appellant

² As a result of the lengthy FET, appellant was transferred from the correctional facility where he was housed to a different correctional facility and became ineligible for several rehabilitative programs, including one-on-one counseling. He was also assigned to "trash detail" at the new facility, as opposed to working in the education department as he had previously.

consolidated his appeal of the parole denial with an appeal of the FET.

On appeal, appellant contests both the denial of parole and the 180-month FET as arbitrary and capricious. He contends that the Board ignored, disregarded, or undervalued substantial positive evidence supportive of parole and failed to consider appellant's suitability for a transitional community program. He further asserts that the Board's delay in setting the FET immediately after denying parole, which required him to file two administrative appeals, was a denial of due process.

N.J.S.A. 30:4-123.53, which governs appellant's application, provides that when an inmate is eligible for parole, he shall be released unless a preponderance of the evidence demonstrates that "there is substantial likelihood that the inmate will commit a crime under the laws of this State if released on parole at such time."³ In determining parole eligibility, the Board must consider the factors enumerated in N.J.A.C. 10A:71-3.11(b).

Our scope of review is limited and subject to the same standard as other administrative reviews. Trantino v. N.J. State Parole Bd., 166 N.J. 113, 173 (2001) (Trantino VI). We

³ The statute was amended in 1997 by L. 1997, c. 213, § 1. However, based on the dates of appellant's offenses, we apply the 1979 version.

must affirm the administrative action unless it was "'arbitrary, capricious or unreasonable, or not supported by substantial credible evidence in the record as a whole.'" Warren Hosp. v. N.J. Dep't of Human Servs., Div. of Mental Health Servs., 407 N.J. Super. 598, 610 (App. Div. 2009) (quoting SSI Med. Servs., Inc. v. State, Dep't of Human Servs., Div. of Med. Assistance and Health Servs., 146 N.J. 614, 620 (1996)). "The burden of demonstrating arbitrary, capricious or unreasonable action rests upon the party challenging the administrative action." Ibid. (citing McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002)).

Moreover, we may not substitute our judgment for the fact-finding of an administrative agency. Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 587 (2001). "'If the Appellate Division is satisfied after its review that the evidence and the inferences to be drawn therefrom support the agency head's decision, then it must affirm even if the court feels that it would have reached a different result itself.'" Ibid. (quoting Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588 (1988)). Indeed, we accord a "strong presumption of reasonableness" to the agency's exercise of its statutorily-delegated responsibilities. Newark v. Natural Res. Council Dep't Env'tl.

Prot., 82 N.J. 530, 539, cert. denied, 449 U.S. 983, 101 S. Ct. 400, 66 L. Ed. 2d 245 (1980).

Pursuant to these standards, "the agency's decision will be set aside 'if there exists in the reviewing mind a definite conviction that the determination below went so far wide of the mark that a mistake must have been made.'" N.J. State Parole Bd. v. Cestari, 224 N.J. Super. 534, 547 (App. Div.) (quoting 613 Corp. v. State, Div. of State Lottery, 210 N.J. Super. 485, 495 (App. Div. 1986)), certif. denied, 111 N.J. 649 (1988). "We recognize that Parole Board determinations are highly 'individualized discretionary appraisals,' and, therefore, Parole Board decisions should not be reversed by a court unless found to be arbitrary" Trantino v. N.J. State Parole Bd., 154 N.J. 19, 25 (1998) (Trantino IV) (quoting Beckworth v. State Parole Bd., 62 N.J. 348, 359 (1973)).

Using these standards as our guide, we have carefully considered appellant's contentions and thoroughly reviewed the record on appeal. We note that the Board properly considered the relevant factors in denying appellant's application for parole. The Board took into account all mitigating factors appellant advanced, including his institutional, behavioral, and educational program participation.

Appellant contends that the Board failed to consider three favorable Department of Correction psychological evaluations from 1999, 2000, and 2004. Appellant further contends that the Board ignored or disregarded his most recent favorable psychological evaluations from 2010 and 2011. The record reveals that the Board reviewed numerous evaluations of appellant from January 1983 through November 2010. While the three older psychological evaluations may not have been seen by the Board this time, in light of the volume of psychological evaluations the Board reviewed, including the most recent full evaluation before this parole process began, we cannot find that the failure to review a few reports rendered the parole decision arbitrary.

Indeed, contrary to appellant's assertion, the Board did not ignore or disregard his two 2010 evaluations. Rather, the Board questioned the reliability of these positive psychological evaluations, noting that his recent admissions that the sexual acts were not consensual and that he intentionally killed his victim were contrary to his assertions in his most recent psychological evaluations.⁴

⁴ The record does indicate that the Board did not review the August 1, 2011 opinion by Dr. Gerald Cooke; however, this was not a full evaluation, it was an opinion generated using past evaluations, and it was completed well into the parole process.

The Board determined that there was a substantial likelihood of recidivism should appellant be paroled. First, the Board noted that "[o]ver the years, [appellant has] overly emphasized that [he] did not intentionally murder [the victim], which was clearly an important issue for him." Moreover, the Board found it alarming that appellant had been "blind to this deficiency in [his] rehabilitative progress for nearly thirty (30) years." Second, the Board noted that appellant's statements regarding the murder have been inconsistent over the years, which "call[ed] into question the credibility of what [he] reveal[ed] when questioned." Third, based on appellant's two recent admissions of guilt, the Board found that appellant was "only in the beginning stages of understanding and gaining insight into [his] violent behavior." The Board noted that it hoped he would develop "some substantive understanding into why [he] specifically exploded in rage and killed" the victim and "why [he has] struggled for so many years in [his] insistence that [he] did not purposely kill [his] victim[.]"

Based upon our review of the record and legal arguments, we are satisfied that the Board had ample factual and legal basis to conclude there is a substantial likelihood that appellant will commit another crime if released on parole. Accordingly, there is no basis for judicial interference with the Board's

decision to deny appellant parole, including its denial of appellant's request for a transitional program.⁵

We cannot, however, reach the same conclusion with respect to the Board's determination that a 180-month FET is appropriate. The regulation governing the establishment of FETs provides, in pertinent part:

(a) Upon determining to deny parole to a prison inmate, a two-member adult Board panel shall, based upon the following schedule, establish a future parole eligibility date upon which the inmate shall be primarily eligible for parole.

1. Except as provided herein, a prison inmate serving a sentence for murder . . . shall serve 27 additional months.

. . . .

(c) The future parole eligibility dates required pursuant to (a) . . . above may be increased or decreased 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.

(d) A three-member Board panel may establish a future parole eligibility date which differs from that required by the provisions of (a) . . . and (c) above if the future parole eligibility date which would be established pursuant to such subsections is clearly inappropriate due to the inmate's

⁵ Appellant provides no support for his assertion that the Board erred when it summarily rejected his request for a transitional program once it decided that he was not suitable for parole.

lack of satisfactory progress in reducing the likelihood of future criminal behavior. In making the determination that the establishment of a future parole eligibility date pursuant to (a) . . . and (c) above 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(a), (c), and (d).]

Here, the full Board increased the standard FET from the presumptive twenty-seven months (plus or minus nine months) to 180 months, and gave two reasons for this decision. First, appellant was unable to identify the cause of his "murderous behavior" and properly address his "violent criminal personality characteristic[.]" Second, appellant possessed inadequate insight and was only at the beginning of fully accepting responsibility.

We are not satisfied that these two reasons, standing alone, justify the establishment of an FET beyond the maximum thirty-six-month range afforded by N.J.A.C. 10A:71-3.21(a)(1) and (c). As noted above, in 2010, we reversed the Board's imposition of a sixty-month FET because it lacked adequate justification. The Board has similarly failed here to provide any cogent basis for the extreme deviation from the maximum range set in the regulation, which is over six times the regulatory recommended amount and three times the amount we found was not justified in 2010. This is particularly true

since the Board recognized that appellant now has more insight into his crime than in 2008.

Considering the number of therapeutic programs appellant has completed, along with his achievement of a master's degree and his work aiding other inmates in their educational endeavors, the Board has provided no viable basis for delaying appellant's next parole hearing for another fifteen years. Based upon appellant's successes while incarcerated, psychological evaluations, and lack of institutional discipline, we find no reason in the record why he would not be capable of addressing the issues the Board identified within the twenty-seven-month range (plus or minus nine months), as set forth in N.J.A.C. 10A:71-5.21(a)(1) and (c). We therefore reverse the imposition of the 180-month FET and remand that issue for further proceedings in conformity with this opinion.

We find no merit in appellant's contention that the bifurcation of his parole denial and the Board's establishment of his FET violated his due process rights. R. 2:11-3(e)(1)(D). Suffice it to say, the Board may bifurcate the denial of parole from the setting of an FET when the FET may be outside the parameters prescribed by the regulations. N.J.A.C. 10A:71-3.21(d)-(e). Appellant has not shown any due process violation here resulting from the Board following the regulations.

Affirmed in part; reversed and remanded in part. We do not retain jurisdiction.

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

A handwritten signature in black ink, appearing to be the initials 'AWA' with a stylized flourish.

CLERK OF THE APPELLATE DIVISION