

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the 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-3237-20**

SEAN P. FARRELL,

Appellant,

v.

**NEW JERSEY STATE
PAROLE BOARD,**

Respondent.

Argued October 3, 2022 – Decided November 29, 2022

Before Judges Currier and Bishop-Thompson.

On appeal from the New Jersey State Parole Board.

Morgan A. Birck, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Morgan A. Birck, of counsel and on the briefs).

Michael Vomacka, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Suzanne Davies, Deputy Attorney General, on the brief).

PER CURIAM

State prison inmate Sean Farrell appeals the June 11, 2020 final decision of the New Jersey State Parole Board denying parole and imposing a 120-month, or ten-year, future eligibility term (FET). We affirm.

In 1990, at fourteen years old, Farrell pled guilty to murder and was sentenced to a term of life imprisonment, with a mandatory minimum term of thirty years. While incarcerated, he committed fifty-five disciplinary infractions, with twenty-four of those infractions in the "asterisk" (most serious) category. Farrell's most recent asterisk infraction occurred on May 28, 2019, for *.003, assaulting any person with a weapon, and *.306, conduct which disrupts or interferes with the security or orderly running of the correctional facility.

In July 2020, Farrell became eligible for parole. Prior to the parole eligibility date, Farrell met with a hearing officer and the matter was referred to a two-member Board panel for a hearing.

On June 11, 2020, a two-member Board panel denied parole and determined the presumptive FET was inappropriate. The panel's determination was based upon the following factors: facts and circumstances of the offense; extensive prior offense record; repetitive offense record; increasingly more

serious criminal record; prior probation terminated; committed new offenses on probation; prior probation violated; institutional infraction(s): numerous, serious in nature; loss of commutation time; administrative segregation; last asterisk infraction on May 28, 2019; risk assessment evaluation; and insufficient problem resolution namely, minimizes conduct and a failure to address "criminal way of thinking and behavior."

The two-member Board panel also found several mitigating factors: participation in programs specific to behavior; participation in institutional programs; institutional reports reflect favorable institutional adjustment; attempt made to enroll and participate in programs but not admitted. The panel concluded Farrell had a substantial likelihood of committing a new crime if released on parole and referred the matter to a three-member panel for establishment of an FET.

Thereafter, on August 19, 2020, the two-member Board panel administratively reviewed Farrell's case and amended the June 11, 2020 decision to clarify the factors in the record relied upon by the panel.

Farrell submitted a Letter of Mitigation to the three-member panel contending: "[t]here was an unwarranted belief" that prior to his crime and conviction, he was an "out of control, violent, sociopath, destined to commit this

offense"; he found it "hard to relate [to] or fit-in" with the "hardened" older inmates because of his youth; recommended programs were not completed because of limited programs or vocational trades; inaccurate LSI-R scores for inmates incarcerated over one year; enrollment in programs addressing behavioral and critical thinking skills; and the two-member panel considered minor juvenile offenses committed at the age of fourteen.

A three-member Board panel considered Farrell's parole case and established a 120-month FET on September 16, 2020. In an eleven-page comprehensive Notice of Decision, the three-member Board panel concurred with the two-member panel's determination that "Farrell demonstrated a lack of satisfactory progress in reducing future criminal behavior" and an FET within the presumptive schedule was "clearly inappropriate." In denying parole, the Board panel found "the factors supporting the denial of parole, collectively, [were] of such a serious nature as to warrant the setting of a future eligibility term which differs from the presumptive term of twenty-seven (27) months (\pm 9 months)."

Farrell timely appealed the three-member Board panel decision to the full Board. The Board issued a final agency decision on May 26, 2021 affirming the June 11, 2020 two-member panel decision to deny parole and the September 16,

2020 three-member panel decision to establish a 120-month FET. The Board rejected Farrell's arguments, stating:

Based upon consideration of the facts cited [in the record], the Board has determined that the aggregate of information pursuant to N.J.A.C. 10A:71-3.11 was considered and determined that the Board panel has fully documented and supported its decision pursuant to N.J.A.C. 10A:71-3.18(f). The Board affirms the determination that a preponderance of evidence indicates that there is a substantial likelihood that he would commit a crime if released on parole at this time. The Board also affirms the determination that a future eligibility term established pursuant to N.J.A.C. 10A:71-3.21(a), (b) and (c) is clearly inappropriate due to Mr. Farrell's lack of satisfactory progress in reducing the likelihood of future criminal behavior and the determination to refer his case for the establishment of a future eligibility term. Further, the Board affirms the determination to establish a future eligibility term pursuant to N.J.A.C. 10A:71- 3.21(d) and, pursuant to N.J.A.C. 10A:71-3.21(e), the particular reasons for the establishment of said term as set forth in the Notice of Decision. Accordingly, the Board affirms the June 11, 2020 decision to deny parole and the September 16, 2020 decision to establish a [120]-month future eligibility term. Mr. Farrell will be scheduled for a subsequent parole release hearing when it is appropriate.

On appeal, Farrell raises the following issues:

POINT I

FARRELL WAS DEPRIVED OF DUE PROCESS WHEN HE WAS GIVEN A 120-MONTH FUTURE ELIGIBILITY TERM WITHOUT CONSIDERATION

OF HIS YOUTH AND WITHOUT ACCESS TO COUNSEL.

POINT II

THE PAROLE BOARD ACTED ARBITRARILY AND CAPRICIOUSLY IN ESTABLISHING A FUTURE ELIGIBILITY TERM INCONSISTENT WITH ITS OWN REGULATIONS.

Farrell raises an additional issue in his reply brief:

POINT I

BECAUSE THE PAROLE PROCESS FAILED TO ENSURE MR. FARRELL'S RIGHT TO A MEANINGFUL OPPORTUNITY FOR RELEASE, HE IS ENTITLED TO A NEW HEARING.

We have considered Farrell's contentions in light of the record and conclude they are without sufficient merit to warrant discussion in a written opinion, Rule 2:11-3(e)(1)(E) and affirm substantially for the reasons expressed by the full Board in its February 25, 2015 written final decision. We add the following brief comments.

The scope of this court's review of an administrative agency's decision is limited and "grounded in strong public policy concerns and practical realities." Trantino v. N.J. State Parole Bd., 166 N.J. 113, 200 (2001) (Trantino VI). "Our review of the Parole Board's determination[s] is deferential in light of its expertise in the specialized area of parole supervision" J.I. v. N.J. State

Parole Bd., 228 N.J. 204, 230 (2017) (citing McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002)). We recognize "[t]o a greater degree than is the case with other administrative agencies, the Parole Board's decision-making function involves individualized discretionary appraisals." Trantino VI, 166 N.J. at 201 (citing Beckworth v. N.J. State Parole Bd., 62 N.J. 348, 358-59 (1973)). Such appraisals are presumed valid. McGowan, 347 N.J. Super. at 563.

"The discretionary power exercised by the Parole Board, however, is not unlimited or absolute." Acoli v. N.J. State Parole Bd., 250 N.J. 431, 455 (2022). Accordingly, "[w]e will reverse a decision of the Board only if the offender shows that the decision was arbitrary or unreasonable, lacked credible support in the record, or violated legislative policies." K.G. v. N.J. State Parole Bd., 458 N.J. Super. 1, 30 (App. Div. 2019).

We do not disturb the Board's factual findings if they "could reasonably have been reached on sufficient credible evidence in the whole record." Trantino VI, 166 N.J. at 172. (internal quotation marks omitted) (quoting Trantino v. N.J. State Parole Bd. (Trantino IV), 154 N.J. 19, 24 (1998)). Having considered the record and applying these principles, we see no basis to disturb the Board's decision.

Farrell contends in his first point the FET was established without consideration of his youth and the lack of counsel at the parole hearing, resulting in a deprivation of due process. We reject Farrell's due process arguments.

Farrell argues that "[a] juvenile lifer's generalized 'liberty interest in being free from physical restraint' is 'heightened' by the protections guaranteed in Miller and Zuber." See Miller v. Alabama, 567 U.S. 460 (2012) and State v. Zuber, 227 N.J. 422 (2017). Farrell challenges the life sentence with a thirty-year parole bar imposed upon him as a juvenile cloaked as a challenge to the FET. Farrell's sentence as a juvenile offender is not properly before us. As such, we decline to recognize a "heightened liberty interest" under Miller and Zuber. The mere possibility of release does not create a liberty interest. Greenholtz v. Inmates of the Nebraska Penal and Corr. Complex, 442 U.S. 1, 9-10, 11 (1979). Moreover, the principles articulated in Miller and Zuber concern the application of the Eighth Amendment to the sentencing of a juvenile offender, and guarantee no more than a possibility of release, whether supervised or unsupervised. Cf. Greenholtz, 442 U.S. at 11.

Farrell raises for the first time in his reply brief he is entitled to a new hearing because he was denied a meaningful opportunity for release. Raising an argument on reply for the first time is improper and unfair; it deprives the

respondent of an opportunity to respond. See Fuhrman v. Mailander, 466 N.J. Super. 572, 599 (App. Div. 2021) ("A matter raised for the first time in a reply brief need not be addressed by this court."); Bacon v. N.J. State Dep't of Educ., 443 N.J. Super. 24, 38 (App. Div. 2015) (raising an argument in a reply brief on appeal, and not in an initial appellate brief, constitutes waiver of that argument). Farrell's point on reply is not properly before us.

We are not persuaded by Farrell's reliance on Diatchenko v. Dist. Att'y for Suffolk Dist., 27 N.E.3d 349, 353 (Mass. 2015).¹ Since New Jersey does not recognize a "heightened liberty interest" entitling juvenile offenders to special due process protections, we find the ordinary due process protections apply. See State v. Thomas, 470 N.J. Super. 167, 183 (App. Div. 2022) (citing Jones v. Mississippi, 593 U.S. ___, 141 S. Ct. 1307, 1311 (2021)). Nor do New Jersey courts recognize counsel at a parole hearing as properly noted by the full Board. Monks v. N.J. State Parole Bd., 58 N.J. Super. 238, 244 (1971). Consequently, Farrell was not entitled to the right to counsel.

¹ In Diatchenko, the court required counsel at parole hearings of juvenile offenders to provide a "meaningful" opportunity for release. Id. at 357.

Farrell next argues the Board action was arbitrary and capricious because the established FET was "inconsistent" with the administrative regulations. We likewise reject this argument.

The Board is "charged with the responsibility of deciding whether an inmate satisfies the criteria for parole release under the Parole Act of 1979." In re Application of Hawley, 98 N.J. 108, 112 (1984); see also N.J.S.A. 30:4-123.45 to -123.79. The Board makes "highly predictive and individualized discretionary appraisals." Beckworth, 62 N.J. at 359. "Those appraisals must realistically be recognized to be inherently imprecise, as they are based on 'discretionary assessment[s] of a multiplicity of imponderables, entailing primarily what a [prospective parolee] is and what he [or she] may become rather than simply what he [or she] has done.'" Acoli, 224 N.J. 213, 222 (2016) (first alteration in original) (quoting Greenholtz, 442 U.S. at 10). A parole board is tasked with predicting an inmate's future behavior, a decision fraught with swift subjectivity and afforded broad discretion. Puchalski v. N.J. State Parole Bd., 104 N.J. Super. 294, 300 (App. Div. 1969).

Because Farrell committed his crime before August 19, 1997, the Board determination must be supported by "a preponderance of the evidence that there is a substantial likelihood that the inmate" will re-offend if released on parole. See

N.J.S.A. 30:4-123.53(a) (1979), amended by L. 1997, c. 213 § 1; N.J.S.A. 30:4-123.56(c) (1979), amended by L. 1997, c. 213, § 2; see also Trantino VI, 166 N.J. at 126 (explaining application of the 1979 Act); N.J.A.C. 10A:71-3.10(a). The Board must consider the factors applicable in each case, including those set forth in N.J.A.C. 10A:71-3.11(b). McGowan, 347 N.J. Super. at 561. The list of twenty-four factors is not exhaustive. See N.J.A.C. 10A:71-3.11(b). There is no requirement the Board consider each and every factor enumerated in the administrative regulations.

We are satisfied the Board's thorough explanation established the 120-month FET was "necessary and appropriate." When departing from the presumptive twenty-seven-month FET, the Board needs to explain its decision and provide reasons. N.J.A.C. 10A:71-3.21(d)(4). See also Monks, 58 N.J. at 245 (citation omitted) (explaining that an explanation of the agency's reasoning is required because it is "[o]ne of the best procedural protections against arbitrary exercise of discretionary power.").

The full Board, in its written decision, found that the three-member panel sufficiently articulated the specific reasons for the 120-month FET. As previous

noted, the Board assessed all relevant twenty-four factors,² enumerated in N.J.A.C. 10A:71-3.11(b) and arrived at a decision supported by competent credible evidence in the record. We have reviewed the comprehensive and complete record presented to the panels. In its written decision, the full Board noted that both the three-member and two-member panels considered and documented specific examples. For instance, the Board considered Farrell's lack of insight. We have upheld Board decisions finding lack of insight as a basis for parole denial. McGowan, 347 N.J. Super. at 558. Here, unlike the Board's decision in Acoli and Berta,³ the Board noted the three-member Board panel also considered "Farrell's risk assessment evaluation and score of 38, which indicate[d] a high risk of recidivism." Thus, the finding Farrell lacked insight into his criminal thinking is corroborated by expert evaluation in the record.

² At the time Farrell applied for parole, there were only twenty-three express factors. The administrative code was amended in 2021 to include factor twenty-four: "Subsequent growth and increased maturity of the inmate during incarceration." See N.J.A.C. 10A:71-3.11(b); 53 N.J.R. 250(c).

³ Berta v. N.J. Parole Bd., 473 N.J. Super 284 (App. Div. 2022), was decided by this court during the pending of the instant appeal. We reversed and remanded finding the Board did not satisfactorily explain why that circumstance, viewed in context with Berta's overall rehabilitative efforts, established by a preponderance of the evidence that he was substantially likely to re-offend.

While we cannot disclose the contents of the confidential psychological evaluation, we have read it carefully, and it also supports the Board's decision that Farrell is substantially likely to commit another crime if released at this time.

The Board also specifically noted Farrell exhibited insufficient problem resolution, and a prior opportunity on community supervision failed to deter criminal behavior. The Board further noted the fifty-five institutional infractions committed by Farrell including the latest incident which took place nearly thirty years after his initial incarceration. From these facts, the Board determined Farrell exhibited a lack of rehabilitative progress.

Finally, the Board properly noted and weighed Farrell's FET would be reduced by applicable credits, and he is likely to be eligible in December 2026, a consideration made within the Board's expertise and application of the statutes.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION