

**NOT FOR PUBLICATION WITHOUT THE  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-0493-20**

R.M.,

Appellant,

v.

NEW JERSEY STATE  
PAROLE BOARD,

Respondent.

---

Submitted September 20, 2022 – Decided November 9, 2022

Before Judges Gilson and Rose.

On appeal from the New Jersey State Parole Board.

Center for Social Justice Seton Hall Law School, attorneys for appellant (Jennifer B. Condon, on the briefs; Briana L. McKenna and Giancarlo G. Piccinini, law students, appearing pursuant to Rule 1:21-3(b), on the briefs).

Matthew J. Platkin, Acting Attorney General, attorney for respondent (Sookie Bae-Park, Assistant Attorney General, of counsel; Suzanne Davies, Deputy Attorney General, on the brief).

## PER CURIAM

Appellant R.M. has served over thirty-two years in prison for a murder conviction.<sup>1</sup> He appeals from final agency decisions by the State Parole Board (Board), which denied his request for parole and imposed a ten-year (120-month) future eligibility term (FET). We vacate the Board's August 26, 2020 and February 9, 2022 decisions and remand for a new parole hearing and a new decision by the Board consistent with the Supreme Court's instructions in Acoli v. N.J. State Parole Bd., 250 N.J. 431 (2022).

### I.

R.M. is currently sixty-four years old. In 1989, he murdered a woman with whom he had had an extramarital affair.<sup>2</sup> R.M. and the victim had been co-workers. After their affair ended, their relationship deteriorated, and R.M. had assaulted the victim by throwing coffee in her face and punching her in her face while at work. Because of the assault, R.M. was fired.

---

<sup>1</sup> We use initials to protect the appellant's privacy interests because the appeal requires that we discuss the appellant's mental health records. We also note that counsel for appellant and the Board signed a consent protective order to guard the confidentiality of the mental health records.

<sup>2</sup> Neither R.M. nor the Board provided us with the trial transcripts, but the basic facts surrounding the murder were established at trial and are summarized in reports included in the record.

In November 1989, while R.M. was in his car, he saw the victim and her then eight-year-old daughter crossing a street. R.M. drove his car into the victim and the daughter. Thereafter, R.M. got out of his car, saw that the victim was still alive, went back to his car, got out a butcher's knife, rolled the victim on to her back, and stabbed her eight times. The daughter survived but witnessed the murder of her mother.

At trial, R.M. claimed insanity and diminished capacity. The jury rejected those defenses and found R.M. guilty of first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2), third-degree possession of a weapon for unlawful purposes, N.J.S.A. 2C:39-4(d); and disorderly persons simple assault, N.J.S.A. 2C:12-1(a)(1). In 1993, R.M. was sentenced to an aggregate term of life imprisonment plus six months, with a mandatory minimum term of thirty years. The sentence was imposed before the enactment of the No Early Release Act, N.J.S.A. 2C:43-7.2.

R.M. became eligible for parole in January 2020. In anticipation of his parole eligibility, on July 2, 2019, Dr. Andrew Greenberg conducted a mental health parole eligibility evaluation of R.M. (the Greenberg Evaluation). Dr. Greenberg noted that R.M. had been diagnosed with "Major Depressive Disorder, recurrent, severe, with psychotic features in remission." Dr.

Greenberg explained, however, that R.M. presently had "no acute psychiatric concerns to be considered if [R.M.] is released." In that regard, Dr. Greenberg noted R.M.'s "satisfactory, emotional and behavioral control for more than twenty-five years" while incarcerated. The doctor also noted R.M.'s "capacity to manage the demands of independent living, in an unstructured and unsupervised setting (the community) in a [functional] and law-abiding manner."

In assessing R.M.'s risk of recidivism, Dr. Greenberg cited R.M.'s "mental health problems," but noted that those problems were well-treated and had been stable for over twenty-five years. Dr. Greenberg also noted that R.M.'s anger issues had played a role in his offenses, but that his anger was no longer an impediment to his release. Indeed, Dr. Greenberg found R.M.'s "probable need for anger management services" to be "low."

Dr. Greenberg cited a variety of strengths indicating R.M.'s likely success on parole, which included: his minimal criminal history; above average adjustment to incarceration; college education; positive work history; positive support in the community; expressed family and religious values; and an expressed motivation to make changes in lifestyle and behavior.

Dr. Greenberg determined that R.M. presented "a low-risk of recidivism" based on a score of eleven on his Level of Service Inventory-Revised (LSI-R). Accordingly, Dr. Greenberg concluded that R.M. "presents as able to function independently in the community with assistance of family members to aid in his transition to the community."

On November 18, 2019, a two-member panel of the Board considered appellant's eligibility for parole. R.M. submitted seven letters of support and certifications from various programs he had completed while in prison. Although the Greenberg Evaluation was available to the two-member panel, the panel never discussed or cited to it. Instead, the panel focused on its interview of R.M.

The two-member panel denied R.M. parole. The decision was memorialized in a standard checklist sheet. The Board panel checked five mitigating factors: no prior offense record; participation in programs specified to behavior; participation in institutional programs; institutional reports reflecting favorably to institutional adjustment; and R.M.'s attempt to enroll and participate in programs. The panel checked a box that it had determined "a substantial likelihood existed" that R.M. would commit a new offense if released on parole. The panel briefly described R.M.'s "insufficient problem resolution,"

and concluded that R.M. "lacks insight into why he acted violently, resulting in the death of the victim. He appears to be in the beginning stages of understanding his anger issues. More work is needed."

On February 5, 2020, a three-member Board panel established a 120-month FET. After reviewing the record developed before the two-member panel, the three-member panel issued a decision setting forth its reasons for establishing the FET. The three-member panel identified the same reasons for denying parole as the two-member panel.

R.M. administratively appealed the panels' decisions. In his appeal to the full Board, R.M. cited his thirty-three years of therapy, twenty-nine years of medication, and thirty years of behavior without anger or violence as indicators of his parole readiness.

The full Board issued its final decision on August 26, 2020. The Board affirmed the panel decisions to deny parole and to set a 120-month FET.

In October 2020, appellant filed an appeal with us. Initially, R.M. represented himself, and later the Seton Hall Law School Center for Social Justice entered an appearance and submitted papers on behalf of R.M.

While the appeal was pending, the Board moved to remand the case to assess the Greenberg Evaluation. The Board maintained that it had considered

all the relevant evidence, including the Greenberg Evaluation, but noted that it had not specifically addressed the Greenberg Evaluation.

We granted the remand. On January 28, 2022, the Board panels met for the purpose of reviewing R.M.'s mental health issues and the Greenberg Evaluation. The panels then affirmed their prior determinations and provided a written addendum to their earlier decisions. The Board panels explained that they discounted the Greenberg Evaluation based on R.M.'s statements made before the two-member panel. The Board panels also noted that R.M.'s Major Depressive Disorder was, in their assessment, only in partial remission because R.M. had stated in his interview that he had a hallucination in 2003. Moreover, the Board panels expressed concern that R.M. had disclosed several details in his interview that he had failed to discuss with Dr. Greenberg. Consequently, the Board panels placed limited weight on the Greenberg Evaluation and its determination that R.M. posed a limited risk of committing a new crime if released on parole.

On February 9, 2022, the full Board reviewed the addendum prepared by the panels and concurred with the panels' assessment of the Greenberg Evaluation. The full Board then affirmed its prior determination to deny parole and establish a 120-month FET.

## II.

On appeal, appellant argues that the Board's decisions were arbitrary, capricious, and unreasonable because there was no substantial credible evidence to support its conclusion that he would likely commit another offense if paroled. R.M. also contends that the Board improperly gave no weight to his decades of counseling, treatment, and medication, and disregarded the Greenberg Evaluation and R.M.'s LSI-R score. R.M. also challenges the 120-month FET as an excessive deviation beyond the standard twenty-seven-month FET. Finally, R.M. asserts that his due process rights were violated when he was denied access to the Greenberg Evaluation.

An appellate court's review of Board decisions is limited and deferential. Acoli, 250 N.J. at 439. Board decisions are "highly 'individualized discretionary appraisals.'" Trantino v. N.J. State Parole Bd. (Trantino VI), 166 N.J. 113, 173 (2001) (quoting Beckworth v. N.J. State Parole Bd., 62 N.J. 348, 359 (1973)). Accordingly, courts overturn Board decisions only if they are arbitrary and capricious. Ibid. In that regard, Board factual findings will not be disturbed if they "could reasonably have been reached on sufficient credible evidence in the whole record." Hare v. N.J. State Parole Bd., 368 N.J. Super. 175, 179 (App. Div. 2004) (citing Trantino VI, 166 N.J. at 172). We accord such deference



because "[t]he decision of a parole board involves 'discretionary assessment[s] of a multiplicity of imponderables.'" Trantino VI, 166 N.J. at 201 (Baime, J., dissenting) (second alteration in original) (quoting Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 10 (1979)).

"The discretionary power exercised by the Parole Board, however, is not unlimited or absolute." Acoli, 250 N.J. at 455. "[W]hen a parole decision is so far wide of the mark or so manifestly mistaken under the governing statutory standard, intervention is required in the interests of justice." Ibid. (citing Trantino VI, 166 N.J. at 192). A Board decision will not be sustained if it violates legislative policy, is not supported by substantial evidence in the record, or "could not reasonably have been made on a showing of the relevant factors." Ibid. (quoting Trantino v. N.J. State Parole Bd. (Trantino IV), 154 N.J. 19, 24 (1998)).

The Parole Act of 1979, which governs R.M.'s parole, states that a prisoner "shall be released on parole at the time of parole eligibility, unless [it is shown] by a preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime under the law of this State if released on parole at such time." Ibid. (quoting Trantino VI, 166 N.J. at 126 (alternations and omissions in original) (quoting N.J.S.A. 30:4-123.53 (1979))). "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. "Only when the risk of the offending rises to 'a substantial likelihood' may a parole-eligible inmate be denied parole." Ibid. (citing N.J. State Parole Bd. v. Cestari, 224 N.J. Super. 534, 550 (App. Div. 1988)).

Under the 1979 Parole Act, the Board must assess numerous factors in determining whether the person is ready for parole. Ibid. N.J.A.C. 10A:71-3.11(a) states that the grant or denial of parole must "be based on the aggregate of all pertinent factors." That regulation sets forth a list of twenty-four factors that the Board shall consider, in addition to other factors the Board may deem relevant. Id. at 457 (citing N.J.A.C. 10A:71-3.11(b)).

The Court in Acoli recently explained:

Some of those factors include: facts and circumstances related to the underlying crime; offenses and disciplinary infractions committed while incarcerated; participation in institutional programs and academic or vocational education programs; documentation reflecting personal goals, personal strengths, or motivation for law-abiding behavior; mental and emotional health; parole plans; availability of community resources or support services; statements by the inmate reflecting on the likelihood that he [or she] will commit another crime; the failure to rehabilitate; history of employment and education; and statement or testimony of any victim.

[Ibid.]

A. The Parole Decisions.

Even giving the Board's decisions all the deference that they are due, we are constrained to remand this matter for a new hearing. In coming to its conclusion, the Board focused almost entirely on the facts and circumstances of the underlying crime. The Board engaged in no substantive analysis of the other factors.

In its decisions in 2020 and 2022, the full Board relied on the assessment of the two-member panel. The two-member panel, however, did not adequately assess the Greenberg Evaluation or the other factors set forth in the Board's regulations. In its initial decision, the two-member panel never referred to the Greenberg Evaluation. The evaluation, however, was key. The panel accepted that R.M.'s 1989 crimes were committed when he had psychological problems that were not being properly treated or medicated. In his evaluation in 2019, Dr. Greenberg detailed that R.M. had received twenty-five years of treatment and that he exhibited little risk of reoffending. Neither the two-member panel nor the full Board pointed to any material deficiencies in the Greenberg Evaluation. Although the Board noted that R.M. told it a few things not disclosed to Dr. Greenberg, including the hallucination, the doctor was not given the opportunity

to state whether the identified omissions were material. Moreover, the Board had no other expert report and did not have the medical expertise to assess the Greenberg Evaluation. In short, there was only one psychological evaluation and it concluded that R.M. posed little risk of recidivism.

The two-member panel also did not adequately consider R.M.'s actual institutional record. It noted that R.M. had committed two infractions while incarcerated, one of which was considered a "serious" infraction. The two infractions, however, stemmed from the same incident. In 2002, R.M. had been charged with possession of contraband and possession of a weapon for having unauthorized "rabbit ear" television antennas in a package in his cell. Consequently, the panel did not adequately evaluate those charges or accord any weight to the following eighteen years when R.M. had no charges.

The panel also did not discuss or assess the numerous programs R.M. had completed. Nor did the panel discuss and evaluate the unrebutted letters supporting R.M.'s parole. Simply checking a form list does not allow us to review and conclude that the panel and the Board conducted the analysis required by the 1979 Parole Act.

Most critically, the current record does not contain evidence that there is a substantial likelihood that R.M. will commit a crime if paroled. The full Board

relied on the interview conducted by the two-member panel. Although the two-member panel pointed to statements made by R.M. during that interview that raised concerns, the panel never evaluated those concerns in light of the un rebutted Greenberg Evaluation, R.M.'s institutional record, the numerous programs R.M. had completed, or the letters supporting R.M.'s parole.

In addition, neither the full Board nor the panels considered R.M.'s advanced age. In Acoli, the Court noted that "inmates released at age 65 or older had only a 6.5 percentage rate of incurring a new conviction and only a 4.1 percentage rate of reincarceration." 250 N.J. at 470. R.M. turned sixty-four in June 2022. Nevertheless, "[n]othing in the parole Board's decision suggests that the Board considered in any meaningful way the studies on the age-crime curve in denying parole" to R.M. See id. at 470.

In short, the current record does not establish that the Board had evidence establishing that there was a substantial likelihood that appellant would commit another crime if paroled. We, therefore, remand the matter to the Board and direct that within sixty days the Board conduct a new hearing and render a new decision expressly addressing the Greenberg Evaluation and the various factors set forth in the Board's regulations.

B. The 120-Month FET.

In light of our remand, we need not engage in an excessive analysis of the 120-month FET imposed by the Board. After denying parole, the Board must establish an FET. N.J.A.C. 10A:71-3.18(a)(2). When the Board denies parole for a person serving a life sentence, the standard FET is twenty-seven months. N.J.A.C. 10A:71-3.21(a)(1). The Board, however, can exceed the FET guideline if it determines that the presumption "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).

The three-member panel that established the ten-year FET did not adequately articulate the reasons for imposing an FET that was nearly five times the presumptive FET. It simply parroted the language in N.J.A.C. 10A:71-3.21(d) without any real reference to R.M.'s record. Consequently, on remand, if the Board decides to deny R.M. parole, it must also reconsider the appropriate FET and explain the reasons for an FET beyond the statutory presumption of twenty-seven months.

C. R.M.'s Access to the Greenberg Evaluation.

The Board gave R.M.'s counsel access to the Greenberg Evaluation, but it required counsel to sign a protective order under which counsel agreed not to

disclose the evaluation to R.M. Counsel, however, reserved the right to challenge that restriction.

R.M. contends that the Board's refusal to allow him access to the Greenberg Evaluation violated his due process rights. "Due process is flexible and calls for such procedural protections as the particular situation demands." N.J. Parole Bd. v. Byrne, 93 N.J. 192, 209 (1983). "Although parole is not a constitutional right, the prisoner's liberty interest is sufficient to invoke certain procedural protections . . . [including] a limited right to disclosure of prison records in parole proceedings." Thompson v. N.J. State Parole Bd., 210 N.J. Super. 107, 121 (App. Div. 1986).

Under N.J.A.C. 10A:22-2.7, inmates are entitled to their mental health records unless their disclosure "would compromise the safety of the inmate or others, or the security or orderly operation of the correctional facility." In such situations the Board can make the records available to inmate's counsel through a consent protective order.

The Board concedes that N.J.A.C. 10A:22-2.7 calls for a case-by-case analysis of whether the materials would compromise safety, security, or orderly operations. In the record before us, however, there is no indication the Board undertook this analysis. The Board has provided no rationale for withholding

the report from R.M. There is nothing to suggest R.M.'s access to the Greenberg Evaluation would pose a safety or security concern.

Even if the Board had been concerned that R.M. could use the report to manipulate results of future evaluations, that concern, by itself, would not justify withholding the report. See McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 548 (App. Div. 2002) (acknowledging the Board's concerns that an inmate with a history of deception could manipulate future evaluations by reviewing past results but finding the concern outweighed by appellant's need to "understand the extent of the evidence considered by the Board in reaching its determination"). The Board's decision to deny R.M. access to a material and highly favorable psychological evaluation while he was proceeding as a self-represented applicant, without providing any rationale, violated R.M.'s right to due process. On remand, therefore, the Board is to give R.M. access to the Greenberg Evaluation.

Vacated and Remanded. 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