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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1056-20**

DANIEL MCBREARTY,

Appellant,

v.

**NEW JERSEY STATE
PAROLE BOARD,**

Respondent.

Submitted October 26, 2022 – Decided November 30, 2022

Before Judges Gooden Brown and Mitterhoff.

On appeal from the New Jersey State Parole Board.

Starkey, Kelly, Kenneally, Cunningham & Turnbach,
attorneys for appellant (Clifford P. Yannone, on the
brief).

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

PER CURIAM

Daniel McBrearty, a state prison inmate, appeals from a November 18, 2020 final decision of the New Jersey State Parole Board (Board) denying his parole and establishing a 156-month future parole eligibility term (FET). On appeal, McBrearty raises the following points for our consideration:

POINT I

THE STATE PAROLE BOARD ERRED IN DENYING [MCBREARTY] PAROLE BECAUSE THE DECISION WAS NOT SUPPORTED BY A PREPONDERANCE OF THE CREDIBLE EVIDENCE IN THE RECORD, AND THE BOARD DID NOT FULLY CONSIDER ALL RELEVANT FACTORS UNDER N.J.A.C. 10A:71-3.11(B).

POINT II

THE STATE PAROLE BOARD ERRED IN IMPOSING A 156[-]MONTH [FET] ON [MCBREARTY] IN EXCESS OF THE ADMINISTRATIVE GUIDELINES SET FORTH UNDER N.J.A.C. 10A:71-3.21.

Having considered the arguments and applicable law, we affirm.

We glean these facts from the record. Following a 1990 jury trial, McBrearty was convicted of murder, N.J.S.A. 2C:11-3, and related weapons offenses, N.J.S.A. 2C:39-4(d) and 2C:39-5(d), and was sentenced to an aggregate term of life in prison with a thirty-year period of parole ineligibility.

The convictions stemmed from McBrearty fatally stabbing his girlfriend over seventeen times following an argument fueled by the consumption of alcohol.

McBrearty became eligible for parole for the first time on May 23, 2020, and received an initial hearing on March 5, 2020. The hearing officer then referred the matter to a Board panel for a hearing. On March 16, 2020, a two-member Board panel denied parole and referred the matter to a three-member panel for the establishment of an FET outside of the administrative guidelines. Specifically, the two-member panel determined "a substantial likelihood existed that [McBrearty] would commit a new crime if released on parole at this time" and a presumptive FET would be inappropriate due to McBrearty's "lack of satisfactory progress in reducing the likelihood of future criminal behavior."

In rendering its decision, the two-member panel found the following mitigating factors: "[n]o prior offense record"; "[p]articipation in program(s) specific to behavior"; "[p]articipation in institutional program(s)"; "[i]nstitutional reports reflect[ing] favorable institutional adjustment"; "[a]ttempt made to enroll and participate in program(s) but . . . not admitted"; "[m]inimum custody status achieved [and] maintained"; "[r]isk assessment" score indicating a low risk of reoffending; and "[c]ommunity time restored."

The two-member panel weighed those factors against the following aggravating factors: the "[f]acts and circumstances of [the] offense(s)"; the fact that McBrearty was committed to incarceration for multiple offenses; McBrearty's commission of an "[i]nstitutional [disciplinary] infraction[]" on November 14, 2008 by refusing to obey an order, resulting in sixty days' "loss of commutation time" and ten days' "confinement in detention"; and "[i]nsufficient problem[] resolution" skills, including McBrearty's "lack of insight into [his] criminal behavior" and failure to "sufficiently address[]" his "substance abuse problem," as demonstrated in both the panel interview and documentation in the case file.

As to McBrearty's insufficient problem resolution skills, the panel noted:

McBrearty had a serious drug and alcohol problem and says he was intoxicated when he committed the offense. He has taken no drug/alcohol classes in the [twenty-nine] years he has been incarcerated. He relies on religion to prevent future crime, but doesn't have an understanding of what allowed him to commit his crime.

On June 3, 2020, a three-member panel established a 156-month FET. The panel explained its reasoning in a ten-page narrative decision and concluded that, "[b]ased upon a review of the entire record," McBrearty "continue[d] to remain a substantial threat to public safety," which justified setting an FET in

excess of the presumptive term. Significantly, the three-member panel based its decision on the same factors relied on by the two-member panel, particularly McBrearty's insufficient problem resolution skills and his failure to sufficiently address his substance abuse problem. The three-member panel also considered the same mitigating factors acknowledged by the two-member panel and reviewed two letters of mitigation submitted by McBrearty.

In the letters, McBrearty acknowledged that he had been a "functional alcoholic" and had used illicit drugs occasionally, but stressed that he had abstained from both since 2001 after experiencing a religious awakening. He also asserted that he had addressed his alcoholism "in individual counseling and Gamblers Anonymous," which followed the same twelve-step premise as Alcoholics and Narcotics Anonymous. McBrearty maintained that despite having no recollection of stabbing his girlfriend, he took full responsibility for his actions and, through counseling, had come to realize that his actions were fueled by stress, rage, lack of impulse control, and alcohol. He stated further that by attending numerous classes and counseling programs, he had addressed his anger issues constructively and demonstrated significant rehabilitation by assisting other inmates as a teacher's aide and palliative care volunteer.

In rejecting McBrearty's contention that he was sufficiently rehabilitated, the three-member panel pointed out that "[t]hroughout the hearing[, McBrearty] blamed [his] anger, [his] intoxication and [his] lack of impulse control as contributing factors in . . . committing . . . [the] offenses." The panel found that after thirty years of incarceration:

[McBrearty] present[s] as not understanding the full extent of [his] actions, nor do[es he] present as understanding what caused [his] actions resulting in [him] stabbing [his] girlfriend resulting in her death. [He] put[s] forth a stance wherein the crimes occurred due to factors out of [his] immediate control. The Board finds that it is clear that [he] must develop a better understanding to the specifics of [his] anger and why it caused [him] to commit a violent crime; and

[McBrearty] present[s] as not having made adequate progress in the rehabilitative process. The Board panel notes [his] participation in programming/counseling However, the Board panel finds [his] emphasis that [he was] lacking impulse control is deficient. The Board panel finds that [he] fail[s] to recognize how personality defects played a role in [his] poor conduct. The Board panel finds [he] must develop a better understanding to the emotional dynamics that influenced [his] behavior; and

[McBrearty has] an admitted substance abuse history consisting of alcohol and heroin use. The Board panel notes that [he] admit[s] being under the influence of alcohol at the time of the current offense. However, the Board panel finds that [he has] failed to fully address [his] substance abuse problem and [has] not come to a realization of [his] addiction problem and the

depths to which it has affected [his] life and the victim's life. The Board panel finds that [he] must address [his] substance abuse history, specifically, [his] use of alcohol and narcotics, and how that impacts directly to [him] acting in a criminal manner.

McBrearty administratively appealed the panels' respective decisions to the full Board. On November 18, 2020, the Board affirmed the panels' decisions to deny McBrearty parole and establish a 156-month FET, which extended McBrearty's projected parole eligibility date to May 13, 2027, after applicable credits. In its decision, the Board rejected McBrearty's contention that the mitigating factors, including McBrearty's participation in "numerous institutional and educational programs" and continuous "employment in the state prison system," outweighed "the reasons cited for the denial of parole." The Board pointed out that

program participation is one factor of many considered by the Board panel and is not the only indicator of rehabilitation. Further, the Board finds that . . . McBrearty's program participation does not negate the fact that he still lacks insight into his criminal behavior and that his substance abuse problem has not been sufficiently addressed.

Additionally, the Board explained:

[T]he determination as to whether an offender is suitable for parole release requires a consideration of the aggregate of all pertinent factors as provided in N.J.A.C. 10A:71-3.11. Consequently, no particular

weight is afforded to any one factor over another factor, nor is there a quantitative assessment of the factors. The Board finds that, pursuant to N.J.A.C. 10A:71-3.11(b)(5), and (6), in assessing . . . McBrearty's suitability for parole, the Board panel may consider, among other factors and respectively, the facts and circumstances of his offenses, and the aggravating and mitigating circumstances surrounding his offenses. The Board finds that the Board panel appropriately considered . . . McBrearty's entire record, in making its determination on his suitability for parole.

Further, the Board reasoned:

In addition, although it appears that . . . McBrearty has made some progress, the Board finds that he has a serious and extensive substance abuse problem history that commenced at sixteen . . . years of age and that alcohol contributed to the commission of . . . McBrearty's present offenses. The Board notes that while acknowledging the serious consequences of his criminal activity is a step towards rehabilitation, it represents only an initial effort at rehabilitation. The Board further finds that . . . McBrearty's admission of guilt may help him to develop insight into the causes of his criminal behavior, but does not equate to a change in his behavior. Therefore, in assessing . . . McBrearty's case, the Board concurs with the determination of the Board panel that, based on the aggregate of all relevant factors, there is a substantial likelihood that . . . McBrearty will commit another crime.

Likewise, "the Board concur[red] with the determination of the three-member Board panel to establish a [FET] pursuant to N.J.A.C. 10A:71-3.21(d)"

for the reasons set forth in the three-member panel's ten-page narrative decision. This appeal followed.

Our scope of review of a Parole Board's decision is limited and deferential. Hare v. N.J. State Parole Bd., 368 N.J. Super. 175, 179-80 (App. Div. 2004). "Parole Board decisions are highly 'individualized discretionary appraisals,'" Trantino v. N.J. State Parole Bd. (Trantino VI), 166 N.J. 113, 173 (quoting Beckworth v. N.J. State Parole Bd., 62 N.J. 348, 359 (1973)), modified, 167 N.J. 619 (2001), and "should only be reversed if found to be arbitrary or capricious," Hare, 368 N.J. Super. at 180; see also Acoli v. N.J. State Parole Bd., 224 N.J. 213, 222-23 (2016) ("Judicial review of the Parole Board's decisions is guided by the arbitrary and capricious standard that constrains other administrative action.").

In our review, we "may not substitute [our] judgment for that of the agency, and an agency's exercise of its statutorily-delegated responsibilities is accorded a strong presumption of reasonableness." McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002) (citation omitted). In particular, "[t]he decision to grant or deny parole has been granted to a legislatively created administrative body comprised of persons having a combined background deemed suitable by the Legislature to make exceedingly

difficult predictive pronouncements about an individual's likelihood to reoffend." Acoli, 224 N.J. at 226. Accordingly, in challenging the Parole Board's decisions, "[t]he burden of showing that an action was arbitrary, unreasonable or capricious rests upon the appellant." 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. (Acoli II), 250 N.J. 431, 455 (2022) (citing Trantino VI, 166 N.J. at 173). "[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). Thus, 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)).

Under the Parole Act of 1979, which governs McBrearty's parole, "[t]he Parole Board must determine by a preponderance of the evidence whether there is a substantial likelihood the inmate will commit another crime if released." Hare, 368 N.J. Super. at 180; see also N.J.S.A. 30:4-123.53(a). "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." Acoli II, 250 N.J. at 456. "The administrative regulations contain a non-exhaustive list of multiple factors the Board may consider in determining whether an inmate should be released on parole." Hare, 368 N.J. Super. at 180 (citing N.J.A.C. 10A:71-3.11(b)).

As the Court in Acoli II 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.

[250 N.J. at 457 (citing N.J.A.C. 10A:71-3.11(b)).]

Evidently, "[t]he determination whether there is a substantial likelihood that an inmate will commit another crime if released is largely factual in nature," and "[we] must determine whether the factual finding could reasonably have been

reached on sufficient credible evidence in the whole record." Hare, 368 N.J. Super. at 179-80 (citation omitted).

After denying parole, the Board must establish an FET. N.J.S.A. 10A:71-3.21(a). When a Board panel denies parole to an inmate serving a sentence for murder, under N.J.A.C. 10A:71-3.21(a)(1), the standard FET is twenty-seven months. Pursuant to N.J.A.C. 10A:71-3.21(c), the standard FET "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." However, the Board can exceed the FET guidelines enumerated in N.J.A.C. 10A:71-3.21(a) and (c) if it determines that the presumptive term "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 so doing, the Board shall consider the same non-exhaustive factors enumerated in N.J.A.C. 10A:71-3.11 when determining whether the inmate is suitable for parole, but the focus must be "squarely on the likelihood of recidivism." McGowan, 347 N.J. Super. at 565.

Applying our deferential standard of review, we are satisfied that the Board's conclusion that there is a substantial risk that McBrearty will commit

another crime if released is amply supported by sufficient credible evidence in the record, and we find no basis to disturb the Board's decision. Likewise, the Board's decision to exceed the FET guideline based on McBrearty's lack of satisfactory progress in reducing the likelihood of future criminal behavior is supported by substantial evidence. See id. at 558, 565 (finding the Parole Board's "decision to impose a thirty-year FET [was] within the Board's discretion and [was] supported by substantial evidence" where the inmate had demonstrated "little progress in addressing the issues that led to the commission of the crime").

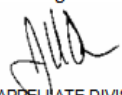
McBrearty argues the Board's decision was not supported by a preponderance of the credible evidence "in light of the overwhelming mitigation and [rehabilitation] evidence . . . in the record," including his successful completion of "over two dozen" "educational, vocational, and rehabilitative programs" while incarcerated, his almost unblemished institutional disciplinary record, his exemplary work history at the prison, his low risk assessment score, and his religious awakening. Relying on the fact that he had no prior criminal record, McBrearty asserts the Board placed undue "emphasis on the facts and circumstances" surrounding his offenses and erred in finding that he failed to demonstrate sufficient "problem resolution" skills and "insight into his criminal

behavior," or "address [his] substance abuse issues." McBrearty further argues that the Board's "deviation from the presumptive [FET] of [twenty-seven] months" was excessive, arbitrary and capricious, and not supported by his model institutional and rehabilitation record.

On the contrary, we have carefully reviewed the record and conclude the Board was neither arbitrary, capricious, nor unreasonable in denying McBrearty parole and setting an FET in excess of the presumptive term. The Board "follow[ed] the law" as set forth by N.J.A.C. 10A:71-3.11(b) and N.J.A.C. 10A:71-3.21(d), "bas[ed] its decision on substantial credible evidence," and "appl[ied] the relevant legislative policies to the facts." McGowan, 347 N.J. Super. at 565. As such, we discern no basis to intervene.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION