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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2217-18**

PHILLIP A. DIXON, a/k/a
PHILIP DIXON,

Appellant,

v.

NEW JERSEY STATE
PAROLE BOARD,

Respondent.

Submitted April 25, 2022 – Decided May 13, 2022

Before Judges Rose and Marczyk.

On appeal from the New Jersey State Parole Board.

Phillip A. Dixon, appellant pro se.

Matthew J. Platkin, Acting Attorney General, attorney
for respondent (Christopher C. Josephson, Deputy
Attorney General, on the brief).

PER CURIAM

Phillip A. Dixon, a State prison inmate, appeals pro se from a January 29, 2020 final agency decision of the New Jersey State Parole Board, denying parole and establishing a 120-month future eligibility term (FET). We affirm.

Dixon is serving a life sentence for sexually assaulting and bludgeoning to death a thirteen-year-old girl in 1985, when he was eighteen years old. Originally sentenced to death on the murder conviction and a term of incarceration on the noncapital crimes, aggravated criminal sexual contact, hindering apprehension, and weapons offenses, the Supreme Court affirmed defendant's convictions but vacated his death sentence and remanded the matter for resentencing. State v. Dixon, 125 N.J. 223, 265 (1991). In November 1991, the trial judge resentenced defendant to an aggregate life sentence, with a parole disqualifier of thirty-two-and-one-half years.¹

While incarcerated, Dixon has committed forty-one institutional disciplinary infractions, including sixteen "asterisk" infractions. See N.J.A.C. 10A:4-4.1(a) (providing infractions "preceded by an asterisk (*) are considered

¹ Defendant's ensuing applications for various post-conviction relief in state and federal court were denied. See State v. Dixon, No. A-7031-96 (App. Div. Feb. 25, 2000), certif. denied, 165 N.J. 528 (2000); No. A-5246-17 (App. Div. May 22, 2019), certif. denied, 240 N.J. 88 (2019); see also Dixon v. Cathel, 546 U.S. 891 (2005).

the most serious and result in the most severe sanctions"). Dixon attained eligibility for parole on August 24, 2017. Predicated upon that parole status, a hearing officer referred the matter to a two-member panel for review. Procedural irregularities followed.

After consideration of Dixon's eligibility status, on September 28, 2018, the two-member panel denied Dixon parole and referred the matter to a three-member panel to establish an FET outside the presumptive schedule. Having decided the case under the incorrect parole standard, however, the two-member panel vacated its decision on October 18, 2017 and scheduled a de novo hearing.

Following a January 3, 2018 hearing, the two-member panel denied parole under the proper standard in effect when the crimes were committed. Similar to its initial decision, the two-member panel cited: the facts and circumstances of the offense, specifically, the commission of murder and aggravated sexual contact; the commission of numerous, persistent, serious institutional disciplinary infractions, resulting in loss of commutation time and confinement in detention and administrative segregation, with the most recent infraction occurring in June 2016; insufficient problem resolution, including Dixon's denial of the offense and minimization of his conduct; and the results of an objective risk-assessment evaluation indicating his Level of Service Inventory-

Revised (LSI-R) evaluation score was 21. The two-member panel also found several mitigating factors: lack of prior record; "[p]articipation in program(s) specific to behavior"; "participation in institutional program(s)"; "[i]nstitutional reports reflecting favorable institutional adjustment"; and attempts to enroll in certain programs but was placed on a waiting list. The panel's decision noted consideration of "confidential material/professional report."

The two-member panel referred the matter to the three-member panel for imposition of an FET outside the presumptive schedule. The three-member panel thereafter established a 120-month FET, explaining its reasons in a seven-page May 15, 2018 Notice of Decision. Similar to the two-member panel's reasons for denying parole, the three-member panel considered: the facts and circumstances of the offenses, including Dixon's confession to police and later recantation during his trial testimony; the incident involved multiple offenses, including hindering apprehension for fleeing the state after the crime; numerous institutional infractions, including setting a fire; insufficient problem resolution; and lack of an adequate parole plan. The three-member panel also considered Dixon's letter of mitigation, and a confidential document set forth in an undated confidential addendum. Based on its review, the three-member panel concluded "the factors supporting the denial of parole[] are of such a serious nature as to

warrant the setting of a[n] [FET,] which differs from the presumptive term of twenty-seven . . . months ([plus or minus nine] months)." The three-member panel noted a confidential document "play[ed] a significant role in [its] decision."

Dixon filed an administrative appeal to the full Board. On November 21, 2018, the Board issued a final decision, affirming both panels' decisions.

Dixon thereafter appealed from the Board's November 21 decision to this court. In response, in August 2019, the Board filed its Statement of Items Comprising the Record (SICR). See R. 2:5-4(b). The SICR itemized the confidential reports considered by the Board, including a "Confidential In-Depth Psychological Evaluation, dated March 11, 2017."

In his October 31, 2019 merits brief, Dixon raised six points for our consideration, including the improper involvement of Kerri Cody, a Board member who participated in the decisions of the three-member panel and the full Board. See N.J.S.A. 30:4-123.58(a) (providing "any board member who participated in the decision from which the appeal is taken may not participate in the disposition of that appeal"). The Board concurred and moved to remand for re-adjudication of Dixon's administrative appeal, without Cody's participation. On December 16, 2019, we granted the Board's motion.

On January 29, 2020, the full Board re-adjudicated Dixon's administrative appeal pursuant to our remand order and issued a written decision. The Board affirmed the two-member panel's January 3, 2018 determination denying parole and the three-member panel's March 14, 2018 decision establishing a 120-month FET. The Board addressed the issues raised by Dixon, contending the Board failed to:

- consider Dixon's military service and program participation in prison and incorrectly determined Dixon failed to address his personality issues;
- comply with its policy and procedures, including the failure to furnish his parole report prior to the hearing;
- investigate the facts underlying certain infractions;
- consider material facts, including Dixon's parole plans;
- comply with its professional code of conduct, including participation of a Board member with personal interest or bias in the case;
- conduct a parole hearing prior to Dixon's actual parole date;
- refrain from using "fraudulent information" and "special knowledge from a source outside the official record"; and

- consider relevant information and conduct the hearing in a non-adversarial manner.

The Board rejected each of Dixon's claims, detailing its reasons for doing so with references to the panels' decisions. The Board cited Dixon's "responses to questions posed by the Board panel at the time of the hearing and the documentation in the case file," which demonstrated Dixon "exhibit[ed] insufficient problem resolution" by minimizing his conduct and denying the offenses. The Board referenced the mitigating factors found by the panel, including Dixon's participation in treatment, but determined Dixon "gained little insight from these programs." The Board also found the panel "relied on confidential material and, pursuant to N.J.A.C. 10A:71-2.2(c), identified for the record the nature of the confidential information."

The Board also rejected Dixon's due process contentions, finding the record belied his claims that he did not receive his parole report. Acknowledging Dixon's parole hearing was not conducted at least thirty days prior to his eligibility date, see N.J.S.A. 30:4-123.55(c), the Board noted the two-member panel vacated its September 28, 2017 decision and Dixon was afforded a de novo hearing on January 3, 2018. The Board further found Dixon's complaints about the two-member panel's reliance on information outside the record, including references to a jailhouse snitch's testimony, during the

September 28, 2018 initial parole hearing also were mooted by the de novo hearing.

Further, the Board was not persuaded the panel considered information outside the record. Rather, its review of the matter "confirm[ed] that the Board panel appropriately considered all the documentation in [Dixon's] case file, including the [Court's] decision in State v. Dixon, 125 N.J. 223 (1972)." Thus, the Board determined the "panel appropriately considered the facts and circumstances of [Dixon's] offenses and in assessing [his] case, concur[red] with the Board panel's determination to deny parole." The Board also agreed with the three-member panel's imposition of a 120-month FET.

Following the Board's January 29, 2020 decision, Dixon filed a supplemental brief. Dixon renews the arguments raised in his initial merits brief, with the exception of his due process argument concerning Cody's participation in the Board's November 21, 2018 decision:

POINT I

[DIXON] WAS DENIED DUE PROCESS BY THE
USE OF FRAUDULENT INFORMATION.

POINT II

THE PAROLE BOARD FAILED TO COMPLY WITH
ITS OWN RULES AND REGULATIONS.

POINT III

THE DECISION TO DENY PAROLE AND IMPOSE A 120[-]MONTH FET WAS UNSUPPORTED IN THE RECORD.

POINT IV

THE DEC[I]SION OF THE PAROLE BOARD FAILS TO COMPLY WITH THE NEW JER[.]SEY ADMINISTRATIVE CODE.

POINT V

[DIXON] WAS DENIED DUE PROCESS BY THE USE OF UNDISCLOSED CONFIDENTIAL INFORMATION.

In his handwritten reply brief, Dixon further contends:

THE [BOARD'S] RESPONSE IS OFF-POINT; FAILS TO ADDRESS THE ISSUES RAISED BY [DIXON] AND SHOULD BE DEEMED A CONCESSION.

Our review of administrative decisions by the Board 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) (Baime, J., dissenting). "'Parole Board decisions are highly individualized discretionary appraisals,' and should only be reversed if found to be arbitrary or capricious." Hare v. N.J. State Parole Bd., 368 N.J. Super. 175, 179-80 (App. Div. 2004) (quoting Trantino, 166 N.J. at 173). "The burden of showing that an action was arbitrary, unreasonable or

capricious rests upon the appellant." McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002). 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.

Moreover, "[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, 166 N.J. at 201. Thus, 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, 347 N.J. Super. at 563 (internal citation omitted).

Dixon is serving a sentence for an offense committed before August 18, 1997. Accordingly, "the issue before us is governed by the standard in N.J.S.A. 30:4-123.53(a) and 30:4-123.56(c) prior to the amendment of those statutes on that date." Williams v. N.J. State Parole Bd., 336 N.J. Super. 1, 7 (App. Div. 2000). For offenses committed before August 18, 1997, "the Parole Board may deny parole release if it appears from a preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime under the laws of this State if released on parole at such time." Ibid. (internal quotation marks

omitted). The State has the burden to meet the standard. Trantino, 166 N.J. at 197.

In its determination of parole eligibility, the Board must consider the aggregate of all pertinent factors, including the enumerated, non-exhaustive factors set forth in N.J.A.C. 10A:71-3.11(b).² However, a panel need only consider those factors it finds apply in a given case. McGowan, 347 N.J. Super. at 561. "[T]he Board [must] focus its attention squarely on the likelihood of recidivism." Id. at 565. "The determination whether there is a substantial likelihood that an inmate will commit another crime if released is largely factual in nature." Hare, 368 N.J. Super. at 180.

Here, the pertinent factors include: "[c]ommission of serious disciplinary infractions"; "[f]acts and circumstances of the offense"; "[p]arole plans and the investigation thereof"; "[s]tatements by the inmate reflecting on the likelihood that he or she will commit another crime; the failure to cooperate in his or her own rehabilitation; or the reasonable expectation that he or she will violate conditions of parole"; and "[t]he results of the objective risk assessment

² After the Board's final decision was issued in this matter, N.J.A.C. 10A:71-3.11 was amended to add a twenty-fourth factor: "Subsequent growth and increased maturity of the inmate during incarceration." Effective February 16, 2021, paragraph (b)(24) is inapplicable here; Dixon does not argue otherwise.

instrument." N.J.A.C. 10A:71-3.11(b)(2), (5), (14), (17), and (23). The Board thoroughly addressed these factors and acted well within its bounds in finding by a preponderance of the evidence that Dixon would likely commit a new crime if released on parole at this time.

Concerning the FET, an inmate serving a sentence for murder ordinarily is assigned a twenty-seven-month FET after a denial of parole. N.J.A.C. 10A:71-3.21(a)(1). The 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." N.J.A.C. 10A:71-3.21(c). Moreover, a three-member panel may impose an FET in excess of administrative guidelines in cases where an ordinary FET "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); see also McGowan, 347 N.J. Super. at 565.

Although the 120-month FET is lengthy, the Board's decision was reached on sufficient credible evidence amply supported by the record, R. 2:11-3(e)(1)(D), well within the Board's broad discretion, and neither arbitrary nor capricious, Trantino, 166 N.J. at 179-80. The Board carefully weighed the

mitigating and aggravating factors, and acted well within its authority in increasing Dixon's FET. See, e.g., McGowan, 347 N.J. Super. at 547, 565 (upholding the denial of parole and establishment of a thirty-year FET where the inmate was serving a life sentence for the sexual assault and murder of a young girl).

Based on our review of the record, including the psychological evaluation and other materials contained in the Board's confidential appendix, we conclude Dixon's other contentions lack sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E). Pursuant to our limited standard of review, Trantino, 166 N.J. at 200, we affirm the Board's decision denying parole and establishing the FET substantially for the reasons expressed by the Board in its January 29, 2020 final decision. We add the following remarks regarding Dixon's point V.

Dixon acknowledges N.J.A.C. 10A:71-2-2(c) authorizes the Board's use and withholding of confidential information from inmates, but claims the record is devoid of "any identification of the nature of the confidential information used against [him]." Dixon claims he first learned about the Board's use of confidential information in the three-member panel's decision, and he was unaware that the Board relied on more than one confidential document until he

received the SICR. Dixon does not, however, argue the confidential psychological evaluation – or any other confidential document listed in the SICR – should be declassified so he can respond to its contents. Nor does he argue the Board failed to set forth a reason for withholding the confidential documents on which it significantly relied in establishing the FET materials. Instead, he urges us to direct the Board "to adopt a policy of disclosing as much confidential information as possible to afford procedural due process to inmates" similar to that afforded in prison disciplinary hearings. See N.J.A.C. 10A:4-9.15(b)(1)(i) and (ii).³ We decline to do so.

Pursuant to N.J.A.C. 10A:71-2.2(c):

³ N.J.A.C. 10A:4-9.15(b)(1)(i) and (ii) provide:

1. In any case in which the Disciplinary Hearing Officer or Adjustment Committee's decision of guilt is based on evidence which includes confidential information, adjudication shall contain:

i. A concise summary of the facts on which the Disciplinary Hearing Officer or Adjustment Committee concluded that the informant was creditable or his or her information reliable; and

ii. The informant's statement (either in writing or as reported) in language that is factual rather than a conclusion, and based on the informant's personal knowledge of the matters contained in such statement.

Inmates or parolees shall be afforded disclosure of adverse material or information considered at a hearing, provided such material is not classified as confidential by the Board or the Department [of Corrections]. If disclosure is withheld, the reason for nondisclosure shall be noted in the Board's files, and such material or information shall be identified as confidential.

In Thompson v. N.J. State Parole Bd., 210 N.J. Super. 107 (App. Div. 1986), we addressed the Board's necessity, at times, to utilize confidential information in reaching its decision. In doing so, we recognized:

The safe operation of a prison must be taken into account in determining the extent of legal process due a prisoner in the consideration of his parole release. Disclosures threatening to institutional security must be avoided. They may include evaluations and anonymous reports of fellow prisoners and of custodial staff members. Disclosure of therapeutic matters also should be avoided if it would interfere with prisoner rehabilitation and relationships with therapists. Contributions to the parole file solicited by the Board from crime victims may, if disclosed, discourage people to come forward who have already suffered loss and, perhaps, injury at the hands of the prisoner.

[Id. at 123.]

We adopted a procedure to "sufficiently protect the prisoner's due process rights with the least intrusion on the Department of Correction's legitimate concern for confidentiality." Id. at 125-26. We held:

When any document in a parole file is administratively removed from the prisoner's copy of

the file, N.J.A.C. 10A:71-2.1(c) [the predecessor of N.J.A.C. 10A:71-2.2(c)] requires the document to be identified as confidential and the reason for nondisclosure to be noted in the Board's file. We will require the Board, after making a parole decision adverse to the prisoner, to state in its decision whether any document marked confidential played any substantial role in producing the adverse decision, and, if so, to record in its file which of them did so. In the event of an appeal, the Attorney General will include in the [SICR] the Board's statement on the matter, which may be worded in such a way as to effectively preserve the confidentiality of the withheld materials.

. . . .

If the Board states that confidential materials played a substantial role in producing the adverse decision in a case appealed to this court, we will undertake to review the materials and determine the propriety of the decision to withhold them. If we conclude that nondisclosure was improper, the remedy might be a remand for reconsideration without the withheld materials, a remand for reconsideration after disclosure to the prisoner of the withheld materials, or, perhaps, an exercise of our original jurisdiction. The remedy will fit the needs of the individual case.

[Id. at 126.]

In the present matter, the Board placed "significant" reliance on confidential materials. The Board's final decision notes the Board panel "identified for the record the nature of the confidential information." Citing identical handwritten notations in both panels' decisions, the Board stated:

The Board panel noted, "Inmate continues to deny and challenge the official version of the violent and heinous crime. Inmate continues to violate the rules and regulations of the institution, with some charges being aggressive and violent. Inmate does not appear to be motivated for change." The Board panel also considered [Dixon's] risk assessment evaluation and score of 21, which indicates a moderate risk of recidivism.

Both the two-member panel's January 3, 2018 amended decision and the three-member panel's March 14, 2018 decision, indicate these findings, along with Dixon's denial of the crimes and minimization of his conduct, demonstrated insufficient problem solution. Beneath these findings, both decisions checked boxes, indicating their conclusions were "demonstrated by": "interview"; "documentation in case file;" and "confidential material/professional report." Both decisions also reference Dixon's score of twenty-one on the LSI-R.

From our review of the confidential documents and the Board panels' decisions, both panels clearly identified their reliance on Dixon's risk assessment evaluation and LSI-R level. However, neither the panels' decisions nor the Board's final decision referenced the psychological evaluation or other confidential documents, which were identified for the first time in the SICR. Because Dixon has not alleged any prejudice by the Board's delayed disclosure, we decline to disturb the Board's decision.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION