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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3737-19**

JAMES BAXTER,

Appellant,

v.

**NEW JERSEY STATE
PAROLE BOARD,**

Respondent.

Submitted March 30, 2022 – Decided May 24, 2022

Before Judges Gilson and Gummer.

On appeal from the New Jersey State Parole Board.

Law Froelich & Landesman, attorneys for appellant (Charles H. Landesman on the brief; James Baxter, on the pro se brief).

Matthew J. Platkin, Acting Attorney General, attorney for respondent (Jane C. Schuster and Melissa H. Raksa, Assistant Attorneys General, of counsel; Christopher C. Josephson, Deputy Attorney General, on the briefs).

PER CURIAM

James Baxter, a state prison inmate, appeals from the April 22, 2020 final agency decision of the New Jersey State Parole Board (Board), denying his application for parole and establishing a ninety-six-month future eligibility term (FET). Because the Board deprived Baxter of a fair hearing, we vacate the Board's decision and remand for a new hearing.

I.

We begin with a summary of the relevant facts and tortured procedural path this case has taken.

Based on crimes he committed in 1989, Baxter was convicted in 1991 of murder, robbery, theft, and possession of a weapon for an unlawful purpose. He was sentenced to an aggregate term of life imprisonment, with a mandatory minimum term of thirty years. He became eligible for parole on August 18, 2019.

On May 23, 2019, the Department of Corrections issued a pre-parole report. According to Baxter, the report, which he did not receive until June 4, 2019, did not accurately set forth Baxter's "program completions." For example, the "EDUCATIONAL/VOCATIONAL" section of the pre-parole report stated Baxter "has not participated in any education programs since admission to, or transfer to, this correctional facility" and the "ADULT BASIC EDUCATION,"

"VOCATIONAL TRAINING," AND "HIGHER EDUCATION" subsections of that form were blank. Reading that section of the report, one would think Baxter had made no effort to improve himself through educational or vocational training while incarcerated. In fact, he had earned his GED credential in 2007, had taken courses at Penn Foster State College in 2007 and 2008, and had obtained vocational certificates in subjects including barbering, barber-styling, wheelchairs, and lamination. The "WORK" section of the pre-parole report referenced only "cleaning day room [and] showers." It made no mention of his work as a barber while incarcerated. Baxter forwarded to the Board an "inmate statement" dated June 6, 2019, correcting and updating his program completions, and submitted a "parole package," which included an employment-offer letter and letters of support from family members and friends.

Baxter's initial parole hearing took place on June 12, 2019, before a single hearing officer, who referred the case to a Board panel. According to Baxter, the hearing officer's case file did not include a copy of his submission. After that initial hearing, Baxter received a letter dated June 17, 2019, from the director of the Board's Division of Release (Division), who confirmed receipt of Baxter's packet and "assured" Baxter it would be placed in the Board's files "for review by members of the Board." The timing of that letter supports Baxter's

assertion that the case file the single hearing officer had was incomplete and inaccurate and did not include a copy of his submissions.

After a hearing conducted on July 25, 2019, a two-member Board panel issued a notice of decision, denying Baxter's parole application. The panel found, among other things, that Baxter had "[i]nsufficient problem resolution" and "still need[ed] to address many [sic] of his criminal thinking." The panel referred the matter to a three-member Board panel to set a FET outside the standard twenty-seven months provided by administrative guidelines.

Baxter wrote a "letter of mitigation," dated August 23, 2019, asserting errors in the two-member Board panel's decision. Among other things, Baxter contended the panel had relied on a case assessment file that contained inaccuracies regarding "summary of prior adjudication/convictions, prior probation/parole history, program completion, promise of employment, and letters of support" and had "include[d] . . . another inmate[']s records in [his] file." According to Baxter, the case assessment file had not been amended to include information about "the mitigating factors" he had raised regarding his pre-parole package. Baxter "request[ed] a [reh]earing or in the alternative [that he] be considered [for] a recommendation to a drug rehabilitation program," which would "help [him] properly prepare for reentry"

In an October 22, 2019 letter, the Division director advised Baxter that, because he had asserted the case assessment prepared for his hearing contained errors, the Division had reviewed the case assessment and determined it should be amended. The director provided a copy of the amended case assessment but did not describe in the letter how it was amended. He did not respond to Baxter's request for a new hearing but advised him the amended case assessment would be provided to the three-member Board panel that was reviewing his case to establish a FET.

A comparison between the original case assessment and the amended case assessment reveals significant changes. The number of prior adult incarcerations went from two to zero. Information regarding two prior sentences was changed. The program-participation section was amended to include twenty-one additional programs that had been completely omitted from the original assessment. The subject matters of those programs included anger management, focusing on the victim, parenting, cognitive behavioral change, and ethics.

In a November 1, 2019 letter to the Board, Baxter requested a new hearing in light of the Division's finding the case assessment had to be amended. Baxter

also asserted the amended case assessment contained inaccurate findings regarding his "prior probation/parole history."

Based on the Division director's letter, Baxter may have understood his case and the amended case assessment were being sent to the three-member Board panel. Instead, the two-member panel issued an amended notice of decision dated October 30, 2019, again denying Baxter's parole application. The record does not contain any indication that Baxter was provided notice his case would be sent back to the two-member Board panel or that he was given an opportunity to appear before the panel. The record also does not indicate which case assessment the panel considered before issuing its amended decision.

In a November 6, 2019 letter, the director of the Board's Legal Support Unit provided Baxter with a copy of the amended notice of decision. In that letter, she explained the two-member Board panel had "administratively reviewed [his] case in anticipation of review by the three-member Board panel" and had "elected to amend the July 25, 2019 Notice of Decision to clarify the factors that were in the record at the time [his] case was assessed and that were relied upon by the Board Members in rendering the decision to deny [him] parole." She did not cite any statute or regulation authorizing the two-member Board panel to review again his case "in anticipation of review by the three-

member Board panel" and did not explain how the panel had amended the notice of decision or in what way it had clarified the factors on which it had relied.

A comparison of the two-member Board panel's original notice of decision and its amended notice of decision provides no insight into how the panel purportedly clarified the factors on which it had relied. The panel found the same mitigating factors in its amended decision as it had in its original decision. The primary difference between the decisions was the addition of a "reason[] for denial": "lack of insight into criminal behavior." The panel did not explain how it could find a completely new additional reason for denial when the information Baxter submitted and the amendments to the case assessment were favorable to Baxter and could not have led to a finding of "lack of insight into criminal behavior."

In a November 13, 2019 letter of mitigation to the three-member Board panel, Baxter asserted he had been denied a fair and impartial hearing because the two-member Board panel had based its decision on an incomplete and inaccurate record the Board had since conceded required amendment. He again requested "de novo review."

In a letter dated December 3, 2019, the Division director responded to Baxter's November 1, 2019 letter. He advised Baxter the Division had "further

reviewed the amended [c]ase [a]ssessment prepared on October 22, 2019," and, as a result of that review, had "determined that additional amendments to the amended [c]ase [a]ssessment were warranted." He enclosed a copy of the second amended case assessment but did not describe what amendments had been made. He did not respond to Baxter's request for a new hearing but advised Baxter the Board would provide the second amended case assessment to the three-member Board panel for its consideration in setting the FET.

A comparison between the amended case assessment and second amended case assessment shows an additional adult conviction in New Jersey in 1982. The initial case assessment listed only one adult conviction in New Jersey in 1982: "RECEIV STOLEN PROP." The amended case assessment also listed only one adult conviction in New Jersey in 1982 but described it as "Theft by Receiv Stolen Prop." The second amended case assessment listed two adult convictions in New Jersey in 1982, describing them as "Theft by Receiv Stolen Prop" and "Receiving Stolen MV." While the initial and amended case assessments showed Baxter had a history of parole from county jail, the second amended case assessment shows no history of parole from county jail. The second amended case assessment includes a February 7, 1985 sentence of a year in probation and 180 days in Burlington County jail that was not included in the

prior case assessments. In the second amended case assessment, the stated number of adult prior convictions was ten but was nine in the prior case assessments.

The two-member Board panel apparently did not review the second amended case assessment or reconsider Baxter's case based on the second amended case assessment. Instead, in a January 15, 2020 notice of decision, the three-member Board panel established a ninety-six-month FET. In a January 16, 2020 letter, the Division director advised Baxter the three-member Board panel had convened the day before and had established a ninety-six-month FET. He also told Baxter the three-member Board panel was "in the process of preparing a written Notice of Decision that will explain the basis of the decision"

In a January 23, 2020 notice of decision, the three-member Board panel stated it had reviewed Baxter's correspondence "as well as the amended [c]ase [a]ssessments." The panel identified its "particular reasons for establishing a [FET] outside of the administrative guidelines," including the "facts and circumstances of Baxter's offense," "specifically, that [Baxter] participated in a robbery, resulting in the victim being shot in the head . . . [and] [t]he victim died"; Baxter's "extensive and repetitive" prior offense record; the escalation of

Baxter's criminality to murder; Baxter's incarceration for multiple offenses; Baxter's commission of a new offense while on community supervision and the failure of his prior community supervision and incarcerations to deter his criminal behavior; Baxter's institutional infractions, including one serious infraction *.009 (misuse of electronic equipment).¹ The three-member Board panel also based its decision on Baxter's "insufficient problem resolution," which was premised on a finding Baxter "lack[ed] insight into [his] criminal behavior." In discussing that finding, the panel referenced subsequently-dismissed charges made in 1993 involving Baxter's alleged involvement in "a scheme selling narcotics inside the prison walls."

Under a section labeled "specific reasons for the imposition of the [ninety-six]-month [FET]," the three-member Board panel found "the factors supporting the denial of parole, collectively, are of such a serious nature as to warrant the setting of a [FET] which differs from the presumptive term of twenty-seven (27) months" The three-member panel found that Baxter had "present[ed] as not understanding the dynamics to [his] negative personality defects as they relate to [his] criminal thinking" and "as not having made adequate progress in

¹ "Prohibited acts preceded by an asterisk (*) are considered the most serious and result in the most severe sanctions." N.J.A.C. 10A:4-4.1.

the rehabilitative process to ensure criminal behavior and decision-making does not occur again in the future." The panel recognized Baxter had taken "programming geared toward behavioral issues," but because Baxter had engaged in "infractions and incidents wherein [he] chose to knowingly break the rules and regulations of the prison for personal gain and monetary profit," the panel concluded "the programming [Baxter had] taken ha[d] given [him] limited insight into [his] conduct to prepare [him]self for assimilation into society." The three-member Board panel projected Baxter would be eligible for parole in March 2024.

Baxter appealed the two- and three-member Board panels' decisions to the full Board. Among other things, Baxter specifically faulted the panels' reliance on the alleged drug scheme, asserting he had not been administratively charged with a violation and maintained "this information [could not] be used by the [t]hree[-m]ember panel to justify a [ninety-six-month] FET." Baxter argued the three-member Board panel had "failed to investigate material facts before determining a [FET] based on facts that are unsupported by the record."

In an April 22, 2020 final agency decision, the Board affirmed the two-member Board panel's July 25, 2019 decision denying parole and the three-member Board panel's January 15, 2020 decision setting a ninety-six-month

FET. Rejecting Baxter's assertion that the Board panels had failed to consider material facts and had based their decisions on facts not supported by the record, the Board found "the Board panel," not specifying which panel, "appropriately considered the facts and circumstances of [his] case, specifically [his] commission of the offense of Murder, 1st degree and Robbery, 1st degree," and "appropriately considered [his] entire record in assessing [his] case." The Board agreed with the Board panel's determination that "a preponderance of evidence indicated a substantial likelihood that [he] would commit a crime if released at this time," citing "[o]f concern" Baxter's three prior juvenile adjudications, ten prior adult convictions, two prior opportunities for community release, and nine institutional infractions. Regarding the ninety-six-month FET, the Board "concur[red] with the two-member Board panel's determination that [Baxter had] demonstrated a lack of satisfactory progress in reducing future criminal behavior" and with the three-member Board panel's establishment of a ninety-six-month FET.

In a brief he prepared himself, Baxter raised the following issues on appeal:

POINT I

**THE FULL BOARD ERRED IN NOT GRANTING
[BAXTER] A NEW PAROLE RELEASE HEARING**

AFTER IT WAS DISCOVERED THAT THERE WERE NUMEROUS ERRORS AND INACCURACIES PRESENT IN THE RECORD BEFORE THE PAROLE PANEL.

POINT II

THE PAROLE BOARD ENGAGED IN IMPROPER AD HOC RULEMAKING IN USING "LACK OF INSIGHT" AS BASIS FOR DENYING PAROLE.

In a supplemental counseled brief, Baxter argued:

POINT I

THE FACTUAL RECORD OF THIS CASE DOES NOT SUPPORT THE PAROLE BOARD'S DETERMINATION THAT THERE IS A SUBSTANTIAL LIKLIHOOD THAT [BAXTER] WOULD COMMIT A CRIME IF RELEASED.

POINT II

THE NEW JERSEY STATE PAROLE BOARD HAS NOT ESTABLISHED BY A PREPONDERANCE OF EVIDENCE THAT [BAXTER] WOULD COMMIT A CRIME IF RELEASED ON PAROLE.

POINT III

THE PAROLE BOARD ENGAGED IN AD HOC RULEMAKING WHEN IT USED "LACK OF INSIGHT INTO CRIMINAL BRHAVIOR" AS THE BASIS FOR DENYING PAROLE TO [BAXTER].

POINT IV

[BAXTER] HAS SHOWN THAT HE DOES NOT LACK INSIGHT INTO HIS CRIMINAL BEHAVIOR.

POINT V

THE IMPOSITION OF A 96 MONTH PAROLE ELIGIBILITY TERM BY THE PAROLE BOARD WAS ARBITRARY AND CAPRICIOUS BECAUSE THE BOARD DID NOT REBUT THE PRESUMPTION THAT [IT] IS HIGHLY UNLIKELY THAT [BAXTER] WOULD COMMIT A CRIME IF RELEASED ON PAROLE.

In a counseled confidential letter brief, Baxter argues:

THE IN-DEPTH PSYCHOLOGICAL EVALUATION OF DR. DIONE JOHNSON-WILLIAMS, PhD. DOES NOT SUPPORT A FINDING THAT [BAXTER] WOULD BE SUBSTANTIALLY LIKELY TO COMMIT A CRIME IF HE WERE RELEASED ON PAROLE.

A review of the record convinces us the Board did not provide Baxter a fair hearing. We therefore vacate the Board's decision and remand for a new hearing.

II.

"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). We do not, however, rubber-stamp the Board's decisions. Trantino v. N.J. State Parole Bd. (Trantino VI), 166 N.J.

113, 173 (2001) (holding the Board is subject to "the well-established principle that a court may review the actions of an administrative agency to determine if its power is being exercised arbitrarily or capriciously" (quoting In re Application, 98 N.J. 108, 112 (1984))). "The Parole Board's decision is entitled to deference -- but not blind deference." Acoli v. N.J. State Parole Bd., ___ N.J. ___, ___ (2022) (slip op. at 4). "However deferential the standard of review may be, our courts are the ultimate arbiters of whether the Board has acted within the bounds of the law." Id. at ___ (slip op. at 31).

Reviewing a final decision of the Board, we consider: (1) whether the Board's action is consistent with the applicable law; (2) whether substantial credible evidence in the record supports the Board's findings; and (3) whether in applying the law to the facts, the Board erroneously reached a conclusion that could not have been reasonably made based on the relevant facts. Trantino v. N.J. State Parole Bd. (Trantino IV), 154 N.J. 19, 24 (1998). "We 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); see also Trantino VI, 166 N.J. at 199 (explaining appellate review of a parole determination "focuses upon whether the factual findings made by the Parole

Board could reasonably have been reached on sufficient credible evidence in the record"). "Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances." Perry v. N.J. State Parole Bd., 459 N.J. Super. 186, 193 (App. Div. 2019) (quoting Trantino VI, 166 N.J. at 201).

In cases in which the crime for which the inmate is incarcerated took place before August 19, 1997, "the Board panel shall determine whether . . . by a preponderance of the evidence together is a substantial likelihood that the inmate will commit a crime under the laws of the State of New Jersey if released on parole." N.J.A.C. 10A:71-3.10(a); see also Perry, 459 N.J. Super. at 194. Thus, when an inmate becomes eligible for parole, there is a "presumption in favor of parole," In re Application of Trantino (Trantino II), 89 N.J. 347, 356 (1982), and the State must "prove that the prisoner is a recidivist and should not be released." Trantino VI, 166 N.J. at 197 (quoting N.J. State Parole Bd. v. Byrne, 93 N.J. 192, 205 (1983)). "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, ___ N.J. at ___ (slip op. at 32-33).

Additionally, "the punitive aspects of a sentence may no longer be considered as an independent ground for denying parole" Trantino II, 89 N.J. at 372; see also Kosmin v. N.J. State Parole Bd., 363 N.J. Super. 28, 40-41 (App. Div. 2003) ("[T]he punitive aspect of the sentence imposed on the defendant is deemed to be satisfied by the time the parole eligibility date is reached."). Rather, the seriousness of the crime may be weighed "as an element in determining whether the offender's punishment has been adequate to insure his individual progress toward rehabilitation," insofar as it reflects on his or her likelihood to recidivate. Trantino II, 89 N.J. at 373-74. "[T]he Board [must] focus its attention squarely on the likelihood of recidivism." McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 565 (App. Div. 2002).

Although parole hearings are "informal," N.J.A.C. 10A:71-3.13(a), the Board must follow certain procedures in conducting the hearings and the inmates have certain rights in connection with the hearings. For example, "[t]he hearing officer, Board panel or Board shall receive as evidence any relevant and reliable documents or testimony," N.J.A.C. 10A:71-3.13(c), and "[t]he inmate shall have the right to rebut any evidence and shall have the right to present evidence on his or her own behalf," N.J.A.C. 10A:71-3.13(e).

The hearing officer, Board panel, or Board must base a parole decision "solely on the evidence presented at the hearing," N.J.A.C. 10A:71-3.13(j), including "material supplied by the inmate and reports and material which may be submitted by any persons or agencies which have knowledge of the inmate," N.J.A.C. 10A:71-3.11(a). They may not rely on selective portions of the record that support a determination of likely recidivism while overlooking or undervaluing conflicting information. Trantino VI, 166 N.J. at 189-90.

The hearing officer, Board panel, or Board must consider the applicable factors enumerated in N.J.A.C. 10A:71-3.11(b) in making a parole decision. McGowan, 347 N.J. Super. at 561. One of those factors is "[p]articipation in institutional programs which could have led to the improvement of problems diagnosed at admission or during incarceration," including "academic or vocational education programs" and "work assignments that provide on-the-job training" N.J.A.C. 10A:71-3.11(b).

When a Board panel denies parole to an inmate serving a sentence for murder, the standard FET is twenty-seven months. N.J.A.C. 10A:71-3.21(a)(1). If a two-member Board panel denying parole believes the standard FET "is clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior," the panel must refer the case to a

third Board panel member and the three-member Board panel will determine the FET. N.J.A.C. 10A:71-3.21(d).

Having reviewed the record, we conclude the Board's decision, as well as the prior hearing-officer, two-member, and three-member panel decisions, resulted from an unfair process in which Baxter had no opportunity to respond to an accurate and complete case assessment. The record bespeaks of arbitrariness and capriciousness. Given the repeated omissions, inaccuracies, and corrections, we have no confidence the information ultimately reviewed by the three-member Board panel was complete or correct. Assuming for the sake of argument the final version of the case assessment was accurate, we know the hearing officer and two-member panel – both times it considered Baxter's case – reviewed a version of the case assessment the Board later conceded was inaccurate and in need of revision.

We know the two-member Board panel when it first heard Baxter's case failed to consider "material supplied by the inmate," including material regarding his "[p]articipation in institutional programs which could have led to the improvement of problems diagnosed at admission or during incarceration," "academic or vocational education programs," and "work assignments that provide on-the-job training," contrary to N.J.A.C. 10A:71-3.11(a) and -3.11(b).

We know the two-member Board panel when it considered Baxter's case a second time did not base its decision "solely on the evidence presented at the hearing," contrary to N.J.A.C. 10A:71-3.13(j), because it did not conduct a hearing at which the additional evidence could be presented, in spite of Baxter's request for a new hearing, thereby depriving Baxter of his rights "to rebut any evidence and . . . to present evidence on his . . . own behalf," contrary to N.J.A.C. 10A:71-3.13(e). We are at a loss to explain how the two-member Board panel when it considered Baxter's case a second time, assuming it considered the amended case assessment, revised its decision to add "lack of insight into criminal behavior" as another reason for denying Baxter's application given the mitigating nature of the additional information contained in the amended case assessment and that none of that additional information supported a finding of "lack of insight into criminal behavior." We know the two-member Board panel did not review the second amended case assessment when it decided to refer the case to a three-member Board panel for imposition of a FET in excess of the standard FET.

We are left with the firm sense that the two-member Board panel received an incomplete and unfair picture of Baxter at the only hearing it conducted and was unwilling to change its mind when confronted with additional evidence. We

are convinced the panels' and the Board's conclusion that defendant lacks "insight into [his] criminal behavior" was reached through a process that did not give defendant a fair opportunity to prove otherwise.

And we have other concerns. The three-member Board panel minimized its consideration of the "programming geared toward behavioral issues" Baxter had taken because Baxter had engaged in "infractions and incidents wherein [he] chose to knowingly break the rules and regulations of the prison for personal gain and monetary profit," apparently referencing the subsequently-dismissed charges made in 1993 involving Baxter's alleged involvement in "a scheme selling narcotics inside prison walls." The factors enumerated in N.J.A.C. 10A:71-3.11 include "[c]ommission of serious disciplinary infractions." They do not include dismissed charges.

In agreeing with the Board panel's determination that "a preponderance of evidence indicated a substantial likelihood that [he] would commit a crime if released at this time," the Board cited "[o]f concern" Baxter's three prior juvenile adjudications, ten prior adult convictions, two prior opportunities for community release, and nine institutional infractions, only one of which was serious. The Board's focus on those events, the most recent of which occurred about fifteen years before the Board's decision makes us concerned that the Board was

improperly considering the punitive aspects of Baxter's sentence, see Trantino II, 89 N.J. at 372, and was not "focus[ing] its attention squarely on the likelihood of recidivism." McGowan, 347 N.J. Super. at 565.

For the reasons outlined above, we vacate the April 22, 2020 Board decision and remand to the Board for an immediate review of the case assessment to determine and ensure its completeness and accuracy. We direct the Board to schedule as expeditiously as possible a new parole hearing before a two-member Board panel made up of Board members who were not on the two- or three-member Board panels that previously reviewed Baxter's case. We expect the Board to give Baxter an opportunity "to rebut any evidence and . . . to present evidence on his . . . own behalf," consistent with N.J.A.C. 10A:71-3.13(e), and that the Board will base its reconsideration of this case on the facts and the governing law, which includes, as set forth above (1) a presumption in favor of parole and (2) the burden on the State to prove, by a preponderance of the evidence, that there is a substantial likelihood the inmate will commit a crime if released on parole. The Board shall issue a complete and meaningful explanation of the reasons for whatever action it takes.

Vacated and remanded. We do not retain jurisdiction but state the obvious right that defendant can appeal from the Board's new parole determination.

