RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0279-21

C.R.,

Appellant,

v.

NEW JERSEY STATE
PAROLE BOARD,

Respondent.

Argued December 20, 2022 - Decided January 27, 2023

Before Judges Messano and Paganelli.

On appeal from the New Jersey State Parole Board.

Louis C. Dodge Jr. argued the cause for appellant (Faegre Drinker Biddle & Reath LLP, attorneys; Stuart A. Law Jr., Diego Rosado, and Louis C. Dodge Jr., on the briefs).

Christopher Josephson, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Donna Arons, Assistant Attorney General, of counsel; Jordan Viana, Deputy Attorney General, on the brief).

PER CURIAM

C.R. appeals the final decisions of the New Jersey Parole Board (Board): (1) imposing a special condition of parole restricting her Internet access and (2) revoking her parole.[1] We affirm.

I.

On May 20, 2010, C.R. was arrested and charged with aggravated assault, endangering the welfare of a child, and lewdness. The charges emanated from a sexual relationship with a minor male and the creation of a fake Myspace account, where she solicited and received nude photos of another minor male. C.R. pled guilty to aggravated sexual assault and the other charges were dismissed. She was sentenced to a five-year term of incarceration and placed on parole of supervision for life (PSL). She was released to parole supervision on January 23, 2013.

On September 24, 2013, C.R. was taken into custody for violating PSL. C.R. had: (1) left the state without permission; (2) failed to complete an appropriate counseling program; (3) used a computer or device to socially network; (4) was in contact with a minor; (5) did not participate in mental health counseling; and (5) used alcohol. Her PSL supervision was revoked, and she

[1] We use initials throughout this opinion pursuant to Rule 1:38-3.

was sentenced to a twelve-month term of incarceration. She was released on September 23, 2014, and resumed PSL.

On June 15, 2017, C.R. was again taken into custody for another PSL violation. She had failed: (1) to advise a parole officer about an arrest; (2) operated a motor vehicle without a driver's license; (3) used social networking; and (4) viewed sexually explicit material on the Internet for a two-year period. Her PSL supervision was revoked, and she was sentenced to a fourteen-month term of incarceration. She was released on August 18, 2018, and agreed to abide by various conditions including an Internet special condition.

On October 23, 2018, C.R. again admitted to violating her PSL. She told a parole officer that she had a smartphone that was capable of Internet access. While she initially advised the parole officer that her employer gave her the phone, she admitted to "purchasing the smart phone for her personal use." C.R. was advised to discard the phone and not possess any devices that allowed Internet access. She was warned that any further violations could lead to her incarceration.

On March 27, 2019, C.R. was arrested for allegedly exchanging images of child pornography over the Internet, and for violating her PSL conditions. On April 10, 2019, she was released from custody, but was later indicted for

"conspiracy to distribute child pornography - sexual exploitation material, distribution of child sexual exploitation material and possession of child sexual exploitation material."

On July 10, 2019, C.R. denied using social networking sites. However, a Google search revealed that she had an active Facebook page. Ultimately, C.R. admitted "using Facebook and Grind[]r through [her] mother's phone." C.R. was not taken into custody but was to be monitored closely and warned of the consequences of the continued use of social networking.

On February 26, 2021, C.R. was served with Internet special conditions. She was to "refrain from the possession and/or utilization of any computer and/or device that permits access to the Internet unless specifically authorized by the District Parole Supervisor or designated representative." Further, she was to "refrain from purchasing, viewing, downloading, possessing, and/or creating a picture, photograph, negative, film, movie, videotape, Blu-ray, DVD, CD, DC-ROM, streaming video, video game, computer generated or virtual image or other representation, publication, sound recording or live performance that is predominantly oriented to descriptions of sexual activity." The justification for the Internet special condition was:

> You currently have pending charges for Endangering the Welfare of a Child for distributing

> images to another sex offender in state prison via the Internet, (photographs depicting the sexual exploitation or abuse of a child). Use of the Internet is an identified trigger as abuse of same dates back to the time of your commitment offense as well involving admitted child pornography use. Imposition of this condition is aimed to promote a positive parole trial and reduce opportunities for recidivism.

C.R. executed a Notice of Imposition of Special Condition. Therein she indicated that:

> 3. I understand that if I do not contest the allegation(s), the conclusion(s) to be drawn or the justification that supports the basis for the imposition of Internet special condition that said condition will take effect immediately.
>
> 4. I understand that if I do contest the allegation(s), the conclusion(s) to be drawn or the justification that supports the basis for the imposition of Internet special condition I must certify to the State Parole Board my denial of the allegation(s), conclusion(s) or justification and must submit a written certification with my comments or statements explaining why I am contesting the imposition of said condition in my case.
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> 5. I understand that if I contest this matter my written certification with comments or statements must be submitted to the District Parole Office within ten (10) business days.
>
> . . . .
>
> 7. I understand that if I contest this matter and submit my written certification with my comments or

> statements within the prescribed time period, the State Parole Board will proceed to review the matter.

On March 31, 2021, a parole officer learned that C.R. had an Instagram account named boujeewithabitofclass. On April 14, 2021, C.R. provided a statement indicating:

> June 2020, I created an Instagram account boujeewithabitofclass. I've been accessing the account via multiple devices of friends and some family members and I chat with friends, relatives and associates. A part of a pilot group chat everyone is above [eighteen-years] old. Also[,] I'll post pics of myself and photos of whatever I'm feeling that day. And I also use Grindr sometimes[;] I haven't had a hookup. Last year I had a hookup but accessed it last week. Sometimes at work I would ask a friend and or coworker I became cool with if I can use their cellphone device to access Instagram to check my messages or to post a picture.

C.R. was served with notice of a probable cause hearing, but represented by counsel, she waived the probable cause hearing and proceeded directly with the final revocation hearing.

C.R. pled guilty to a violation of the Internet special condition but offered that: (1) she was going through gender identification issues; (2) dealing with social media addiction; (3) seeking counseling; (4) used websites; (5) was struggling during the pandemic; (6) maintaining several jobs; (7) had outside interests; (8) was willing to work with a social worker and counselor; (9) there

was no evidence she had any contact with minors; (10) no evidence that anything pornographic was transmitted; (11) that she was working to better herself; and (12) that her positive strides should not have been for naught.

The hearing officer revoked parole finding that: (1) C.R.'s PSL status had been revoked on two prior occasions; (2) there was a problematic history involving the use of pornography and the Internet dating back to the initial offense; (3) C.R. continued to access the Internet and create and use accounts even after the Internet special condition was re-imposed; (4) C.R.'s use of others' devices was more devious and more difficult to detect; and (5) her use of an Internet application to meet up with strangers for sex was extremely alarming. The hearing officer concluded that the violation was serious, and revocation was desirable.

C.R. did not contest the hearing officer's finding of facts but instead challenged the conclusions. C.R. asserted that: (1) she should be allowed to engage in a normal sexual relationship; (2) she was going through gender counseling; (3) there was no serious violation; (4) she did not have regular computer equipment and was not regularly on the Internet; (5) the hearing officer failed to take into account the positive aspects of Internet accessibility during the COVID pandemic; and (6) there was no danger to the public.

The Board panel concluded that there was clear and convincing evidence that C.R. violated the Internet special condition. The panel concluded the violation commission was serious, revoked parole, and imposed a sixteen-month term of incarceration.

The panel found:

> The commission of the . . . violation(s) is serious and revocation is desirable for the following reason(s): you are a [thirty-one-]year-old individual who is serving a term of PSL for the offense of Sexual Assault, second degree. Your PSL status has been revoked on two prior occasions. You have a problematic history involving the use of pornography and the Internet dating back to your commission of the instant offense. During the current term of supervision, a special condition was imposed prohibiting your use of Internet-capable devices as a result of this history, and because you incurred new criminal charges related to the transmission of child pornography over the Internet. Yet, you still accessed the Internet to create accounts on Instagram and Grindr, and you continued to use these accounts even after the Internet-capable devices special condition was re-imposed. Your subversion of the special condition by using other people's devices to hide your activity is devious, and your use of an Internet application to meet up with strangers for sex is extremely alarming given your history. Your conduct has demonstrated that you are a danger to the public safety and you are not amenable to community supervision.
>
> The Board panel finds that your commission of the above-noted violation(s) is serious and that revocation is desirable.

C.R. administratively appealed the Board panel's decision. The Board determined that the "Board panel reviewed and considered all relevant facts pertaining to [C.R.'s] violation of a condition of h[er] parole supervision for life and determined that there was clear and convincing evidence that [s]he violated the . . . condition of h[er] supervision." Moreover, "[C.R.] admitted that [s]he failed to refrain from using any computer and/or device that permits access to the Internet." Further, "[C.R.'s] statements and evidence in mitigation of the cited violation were noted . . . and were considered by the Board panel." Lastly, "the Board f[ound] that [C.R.'s] violation was sustained and determined to be serious in nature."

In addition, the Board found "that [C.R.] was afforded a parole revocation hearing before a neutral and detached hearing officer and given the opportunity to testify on h[er] own behalf, to cross-examine witnesses, to argue against the violation charged[,] and to present evidence and witness testimony." Moreover,

> the Board f[ound] that the Board panel has appropriately reviewed the facts of [C.R.'s] case, has documented that clear and convincing evidence exists that [s]he has seriously violated a condition of parole supervision for life and that revocation of h[er] parole supervision for life is desirable. The Board agrees with those findings and conclusions and finds your contention that the Board panel failed to consider the entire record in this matter, to be without merit."

Further, "the Board finds that the Board panel did not make the determination to revoke the parole supervision for life status of [C.R.] due to a new criminal conviction, nor did the Board panel find h[er] violation to be persistent."

> The Board notes that [C.R.'s] parole supervision for life status had been revoked on two (2) prior occasions and that [s]he has a problematic history involving the use of pornography and the Internet dating back to h[er] instant offense. During the current term of supervision, a special condition was imposed prohibiting [C.R.'s] use of Internet-capable devices as a result of this history, and due to the fact that [s]he incurred new criminal charges related to the transmission of child pornography over the Internet while on supervision. However, [C.R.] continued to access the Internet creating accounts on both Instagram and Grindr, and [s]he continued to utilize these accounts even after the Internet-capable devices condition was re-imposed. [C.R.'s] subversion of the special condition by using other people's devices to hide h[er] activity is devious, and h[er] use of an Internet application to meet up with strangers for sex is extremely alarming given h[er] history.

Moreover,

> the Board finds that the Board panel has fully documented and supported its decision . . . . Additionally, in assessing [C.R.'s] case, the Board concurs with the determination of the Board panel that clear and convincing evidence exists that [s]he has seriously violated a condition of parole supervision for life and revocation of h[er] parole supervision for life status is desirable.

II.

"Our role in reviewing an administrative agency's decision is limited." Malacow v. N.J. Dep't of Corr., 457 N.J. Super. 87, 93 (App. Div. 2018) (citing Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 9 (2009)). "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 that "[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 v. N.J. State Parole Bd., 166 N.J. 113, 201 (2001) (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. 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) (citing Trantino v. N.J. State Parole Bd., 154 N.J. 19, 24-25 (1998)).

III.

C.R. argues that the Board acted arbitrarily and capriciously by re-imposing the Internet special condition. She asserts that "the total ban . . . was overly restrictive, as other conditions would have adequately protected public safety and the conditions must have been specifically designed to address the goals of recidivism, rehabilitation, and public safety."

We decline to consider this argument since she failed to exhaust her administrative remedies and her arguments on appeal were never presented to the Board. See, N.J.A.C. 10A:72-14.2(c) and ZRB, LLC v. N.J. Dep't of Env't. Prot., 403 N.J. Super. 531, 536 n.1 (App. Div. 2008) (citing Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)).

C.R. acknowledged and understood that: (1) she had the right to contest the allegations, conclusions and justifications for the imposition of the Internet special condition; (2) she could submit a written certification explaining why she contested the imposition; and (3) that the State Parole Board would review the matter.

"Exhaustion of administrative remedies before resort to the courts is a firmly embedded judicial principle." Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. 549, 558-59 (1979). "This principle requires exhausting

available procedures, that is, 'pursuing them to their appropriate conclusion and, correlatively . . . awaiting their final outcome before seeking judicial intervention.'" Id. at 559 (quoting Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 767 (1947)).

"The requirement of administrative exhaustion serves several purposes. First, it 'is a rule of practice designed to allow administrative bodies to perform their statutory functions in an orderly manner without preliminary interference from the courts.'" Paterson Redevelopment Agency v. Schulman, 78 N.J. 378, 386-87 (1979) (quoting Brunetti v. Borough of New Milford, 68 N.J. 576, 588 (1975)).

> A second reason for requiring exhaustion of administrative remedies is to further the general policy of avoiding unnecessary adjudication. The administrative process provides a statutory framework in which the issues may often be settled on statutory grounds without judicial adjudication of constitutional claims. The Agency decision may, in many cases, satisfy the claimant, thus obviating the need for the courts to act and alleviating their caseload burden.
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> [Id. at 387.]

However, C.R. did not contest the imposition of the Internet special condition in February 2021 or thereafter. She made no attempt to dispute the imposition of the Internet special condition throughout the administrative

proceedings. Instead, while admitting to continuously violating the Internet special condition, she sat silently on the actual imposition issue. It is only after she admitted to her violation, and after the Board determined to revoke her parole, that she now seeks to contest the actual imposition of the Internet special condition. Her silence and failure to contest precluded the Board from having an opportunity for review. See N.J.A.C. 10A:72-14.2(c).

We recognize that "[t]he exhaustion doctrine is not an absolute." Garrow, 79 N.J. 561. "Exceptions exist when . . . the administrative remedies would be futile." Ibid. (citing Naylor v. Harkins, 11 N.J. 435, 444 (1953) ("[W]here those remedies are futile, illusory or vain, elemental considerations of justice will dictate that the courts reject their invocation as a barrier to judicial relief against arbitrary or illegal action.")). C.R. avers that an application to modify or rescind, see N.J.A.C. 10A:71-6.6, the Internet special condition would have been futile. We additionally take her argument to mean that a contest to the February 2021 imposition of the Internet special condition would similarly have been futile. She argues that because: (1) "[t]he same condition had been in effect since at least 2018"; (2) "[t]he Board had since reimposed the same conditions twice and did so even in the face of an unprecedented pandemic"; and (3) the Board "completely and utterly fail[ed] to acknowledge the presence

of any mitigating circumstances" any pursuit of relief before the Board would have been futile. We reject this contention. There is no evidence that availing herself of the administrative procedures would have been futile, illusory or in vain. Naylor, 11 N.J. at 444. Indeed, our review of the administrative record reveals a comprehensive process.

Further, there is an exception to the exhaustion doctrine "when irreparable harm would result." Garrow, 79 N.J. at 561 (citing Roadway Express, Inc. v. Kingsley, 37 N.J. 136, 142 (1953)). C.R. argues that she would "suffer irreparable harm . . . [g]iven that [she] already served more than a year in prison . . . [and] . . . a holding in favor of the Board on exhaustion grounds would amount to a substantial injustice without a remedy at law. Such a holding would effectively moot this case . . . ." We disagree. The exhaustion doctrine only denies her remedy to vacate the imposition of the Internet special condition. The doctrine is inapplicable to her argument that the Board's decision to revoke parole was incorrect. There is no evidence of "irreparable harm." Ibid.

Since C.R. failed to exhaust her administrative remedies, we decline to consider her argument that we should "vacate the Board's February 21 reimposition of the special condition."

Further, "[i]t is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented . . . when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to jurisdiction of the trial court or concern matters of great public interest.'" Nieder, 62 N.J. at 234 (quoting Reynolds Offset Co., v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959)). See ZRB, LLC, 403 N.J. Super. at 536 n.1 ("We decline to address this issue because appellant failed to raise it before the agency."). Here, there is neither a question of "jurisdiction" nor a "great public interest." Nieder, 62 N.J. at 234

Therefore, we decline to address C.R.'s arguments regarding the February 26, 2021, imposition of the Internet special condition.

IV.

When the Board revokes parole, its decision must be supported by clear and convincing evidence. N.J.A.C. 10A:71-7.12(c)(1). Evidence is clear and convincing when:

> [T]he trier of fact can rest "a firm belief or conviction as to the truth of the allegations sought to be established." It must be "so clear, direct and weighty and convincing as to enable either a judge or jury to come to a clear conviction, without hesitancy, of the truth of the precise facts at issue."

> [In Re Registrant J.G., 169 N.J. 304, 330-31 (2001) (first quoting In re Purrazzella, 134 N.J. 228, 240 (1993); and then quoting In Re Registrant R.F., 317 N.J. Super. 379, 384 (App. Div. 1998)).]

There was clear evidence that C.R. violated the conditions of her parole. Indeed, she admitted to the violations. Nonetheless, the Board should only revoke parole for serious and persistent violations of parole. N.J.A.C. 10A:71-7.12(a)(1); see also Hobson v. State Parole Bd., 435 N.J. Super. 377, 391 (App. Div. 2014) ("Absent [a] conviction of a crime, the Board has [revocation] authority only if the parolee 'has seriously or persistently violated the conditions of h[er] parole." (quoting N.J.S.A. 30:4-123.60)). Further, the Board must determine "[w]hether [the] revocation of parole is desirable." N.J.A.C. 10A:71-7.12(c)(2).

The record adequately supports the Board's determination that C.R. seriously and persistently violated the terms of parole and that revocation is desirable. On two prior occasions, September 24, 2013 and June 15, 2017, C.R.'s parole was revoked for violations. Moreover, on two other occasions, October 23, 2018 and July 10, 2019, C.R. was warned that violations could result in revocation and a return to custody. Despite this history, C.R. admitted to continued violations dating back to June 2020.

Having considered the record in light of the applicable legal principles we affirm the revocation of parole for the reasons expressed in 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