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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3499-20**

LUIS ANGEL RIVERA,

Appellant,

v.

**NEW JERSEY STATE
PAROLE BOARD,**

Respondent.

Submitted December 14, 2022 – Decided July 18, 2023

Before Judges Enright and Bishop-Thompson.

On appeal from the New Jersey State Parole Board.

Luis Angel Rivera, appellant pro se.

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

PER CURIAM

Appellant Luis Angel Rivera challenges a final decision of the New Jersey State Parole Board (Board) denying his parole and establishing a sixty-month future parole eligibility Term (FET). We affirm.

In 1990, Rivera left his home, armed with a .22 caliber rifle with a sawed-off stock and filed down barrel. Rivera spoke with two individuals and stated he was going to "shoot and kill Corey." Earlier that evening, Rivera encountered fourteen-year-old Corey, and Rivera claimed forty dollars was taken from him during a drug transaction with Corey. Rivera shot Corey in the back, killing him.

Rivera was indicted by a Mercer County grand jury and charged with murder, N.J.S.A. 2C:11a-3a(1) and N.J.S.A. 2C:11a-3a(2), and possession of an unlawful weapon, N.J.S.A. 2C:39-4a. Following a jury trial, he was found guilty on both charges. At Rivera's 1992 sentencing, the weapons charge was merged into the murder charge, and the judge imposed a life imprisonment term with a thirty-year period of parole ineligibility.

During his incarceration, Rivera committed six institutional infractions. These infractions included "asterisk" infractions, which are considered the most serious offenses for inmates to commit in prison. See Mejia v. N.J. Dep't of Corr., 446 N.J. Super. 369, 372 n.3 (App. Div. 2016) (citing N.J.A.C. 10A:4-

4.1(a) and -5.1(a)). Specifically, Rivera's infractions were: *.004, fighting with another inmate; *.202, possession or introduction of a weapon;¹ 256, refusing to obey an order; .709, failure to comply with written rules; .210, possession of contraband; and .402, being in an unauthorized area. He received sanctions for these infractions, including thirty-five days confinement in detention, administrative segregation, and 485 days' loss of commutation credits.

Rivera became eligible for parole for the first time on June 3, 2020, and received an initial hearing on April 15, 2020. The hearing officer referred the matter to a two-member Board panel for a three-member panel hearing. The two-member panel denied parole and determined Rivera demonstrated insufficient problem resolution. Specifically, the panel concluded Rivera had not addressed his criminal thinking and behavior and needed to work on his issues to prepare himself for life after prison. The panel found that the following aggravating factors applied to Rivera: facts and circumstances of the offense; prior offense record is extensive; offense record is repetitive; prior offense record noted; nature of criminal record increasingly more serious; committed to

¹ Under the current rules, refusing to obey an order is a Category B asterisk offense. N.J.A.C. 10A:4-4.1(a)(2)(xvii). However, in 2010, when Rivera received the charge, it was a Category D non-asterisk offense. See N.J.A.C. 10A:4-4.1(a)(4) (defining Category D offenses). It was upgraded to Category B, effective May 2021. See 53 N.J.R. 923(a).

incarceration for multiple offenses; prior incarceration did not deter criminal behavior; institution infractions are numerous and persistent, resulting in confinement in detention and administrative segregation, last infraction occurring on October 14, 2010; and insufficient problem resolution based on his interview, pre-parole reports, documentation in case file, and confidential report; lack of adequate parole plan; and risk assessment evaluation.

The panel found the following mitigating factors: participation in program(s) specific to behavior; participation in institutional program(s); and institutional reports reflect favorable institutional adjustment.

On June 4, 2020, Rivera-received notice the two-member panel denied his request for parole "due to [his] lack of satisfactory progress in reducing the likelihood of future criminal behavior." The notice also stated Rivera's case would be referred to a three-member Board panel for review and establishment of future parole eligibility. Additionally, the notice stated Rivera had thirty days to submit a letter of mitigation to the three-member panel.

On June 6, 2020, Rivera submitted a letter of mitigation, asserting he was less likely to commit another violent crime if released as an older offender, his crime was not predatory, and he was deprived of the opportunity to take certain programs based on his educational disability.

On August 5, 2020, a three-member panel convened and established a sixty-month FET. That panel explained its reasoning in a seven-page narrative decision and, like the two-member panel, pointed to Rivera's insufficient problem resolution as well as his failure to understand his negative thinking as that related to his criminal conduct, and his prison infractions. It also considered confidential documents and Rivera's letter of mitigation.

Rivera administratively appealed the three-member panels' decision to the full Board. On February 24, 2021, the full Board affirmed the denial of parole and imposition of a sixty-month FET. It found the three-member panel reviewed the entire record, considered the risk assessment, which indicated a high rate of recidivism and Rivera's infraction history. The Board determined the three-member panel "appropriately noted as mitigation on the Notice of Decision, participation in programs specific to behavior, participation in institutional programs, average to above average institutional reports, and attempts made to participate in programs but was not admitted." The Board therefore concluded the panel based its decision on the entire record governed by the "factors set forth in the statutory requirements and N.J.A.C. 10A:71-3.11."

The Board also found Rivera's arguments that he was twenty-five years old when he committed the offense and that he suffered from mental disabilities

since childhood to be without merit. The Board found that Rivera's mental health was a part of the record at the time of his hearing, documented in the Pre-Sentence Report and discussed by Rivera at the time of the hearing. Accordingly, the Board concluded Rivera's mental health issues were properly considered.

The Board also found no merit to Rivera's contention that the three-member panel's decision was in violation of the Americans with Disabilities Act (ADA) because he was unable to complete programs recommended by the Board panel since the Department of Corrections (DOC) did not provide instructors or counselors who spoke Spanish. Moreover, the Board determined the DOC, and not the Parole Board, was responsible for program offering and staffing, and Rivera's program participation and completion of programs were considered by the Board panel in assessing his suitability for parole release, but these factors did not result in Rivera's denial of parole.

On appeal, Rivera contends the Board's decision was a violation of his Fourteenth Amendment due process rights and the ADA.

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 (App. Div. 2004); 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)). "Appellate review of parole determinations focuses upon whether the factual findings made by the Parole Board could reasonably have been reached on sufficient credible evidence in the record." Perry v. N.J. State Parole Bd., 459 N.J. Super. 186, 193 (App. Div. 2019) (internal quotation marks omitted). The Board renders more "individualized discretionary appraisals" than other state agencies. Ibid. (quoting Trantino v. N.J. State Parole Bd., 166 N.J. 113, 173 (2001)). Therefore, Board decisions may only be reversed if "arbitrary and capricious." Ibid; 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.").

A parole decision is arbitrary and capricious if it is "'willful and unreasoning . . . without consideration and in disregard of circumstances.'" Perry, 459 N.J. Super. at 193 (citations and internal quotation marks omitted). "The burden of showing the agency's action was arbitrary, unreasonable[,] or capricious rests upon the appellant." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 304 (App. Div. 1993). Board decisions are "accorded a strong presumption of reasonableness." McGowan, 347 N.J. Super. at 563. Questions of law are reviewed de novo. See Perry, 459 N.J. Super. at 193-94.

Having thoroughly reviewed the record pursuant to these principles, we affirm substantially for the reasons expressed in the Board's final agency decision. We add the following comments to address the assertion that the sixty-month FET was arbitrary and capricious.

After denying parole, the Board must establish an FET. N.J.A.C. 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 doing so, 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 finding of a substantial likelihood Rivera would commit another crime if granted parole is amply supported by the record. Thus, we find no basis to disturb the Board's decision. Likewise, the Board's decision to exceed the FET guideline based on Rivera's lack of satisfactory progress in reducing the likelihood of future criminal behavior is supported by substantial evidence. The facts and circumstances of the offense, as well as Rivera's prison infractions, persuade us the Board's decision was not arbitrary, capricious, or unreasonable.

We do not address Rivera's remaining arguments as they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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



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