

Administrative Appeal Decision Notice

Inmate Name: Botting, Rebecca
NYSID No.: 9395848Y
Dept. DIN#: 01G1258

Facility: Albion Fem. CF
Appeal Control #: 09-335-06

Appearances:

For the Division, the Appeals Unit

For Appellant:

Cheryl L. Kates, Esq.
PO Box 711
Honeoye, New York 14471

Board Member(s) who participated in appealed from decision: **Smith, Gallivan, Hernandez**

Decision appealed from: September 2006 denial of discretionary release with imposition of 24 month hold.

Pleadings considered:

Brief on behalf of the appellant submitted on November 2, 2006.
Statement of the Appeals Unit's Findings and Recommendation

Documents relied upon:

Presentence Investigation Report, Inmate Status Report, Interview Transcript, Board Release Decision Notice (Form 9026).

Final Determination: The undersigned have determined that the decision from which this appeal was taken be and the same is hereby

Affirmed

Modified

Reversed



Commissioner



Commissioner



Commissioner

If the Final Determination is at variance with findings and recommendation of Appeals Unit, the written reasons for such determination shall be annexed hereto.

This Final Determination, the related Statement of the Appeals Unit's Findings and separate findings of the Board, if any, were mailed to the Inmate and the Inmate's Counsel, if any, on 4/16/07.

Distribution: Appeals Unit – Inmate - Inmate's Counsel - Inst. Parole File - Central File

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STATEMENT OF APPEALS UNIT FINDINGS & RECOMMENDATION**Inmate Name:** Botting, Rebecca **Facility:** Albion CF - Female**NYSID No.:** 9395848Y **Appeal Control #:** 09-335-06**Dept. DIN#:** 01G1258**Findings:**

The appeal of the Parole Board's denial of discretionary release with a 24 month hold argues that the New York State Parole Board ignored the provision of Correction Law §805 in rendering their decision. Specifically, the appellant argues that upon receipt of an Earned Eligibility Certificate creates the presumption in favor of parole release once the appellant has served her minimum term. The appellant's receipt of an Earned Eligibility Certificate (EEC) does not automatically entitle her to parole release. The Parole Board may deny release to parole on a finding that "there is a reasonable probability that if released, the inmate will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society." Matter of Walker v. Russi, 176 A.D.2d 1185, 576 N.Y.S.2d 51 (3d Dept. 1991). While Correction Law §805 uses mandatory language to create a presumption in favor of release, the due process clause only requires that the inmate be afforded an opportunity to be heard, and that upon the denial of parole, the Board inform him of the reasons for the denial of parole. The Board still possesses the discretion to determine whether the parole candidate has met the statutory criteria and deserves release. Matter of Rhoden v. New York State Div. of Parole, 270 A.D.2d 550, 704 N.Y.S.2d 521 (3d Dept. 2000); Matter of Howard v. New York State Div. of Parole, 270 A.D.2d 539, 704 N.Y.S.2d 326 (3d Dept. 2000); Heitman v. New York State Board of Parole, 214 A.D.2d 673, 625 N.Y.S.2d 264 (2d Dept. 1995); Matter of Salcedo v. Ross, 183 A.D.2d 771, 583 N.Y.S.2d 502 (2d Dept. 1992).

The appellant further argues that the Parole Board based their decision solely on the instant offense and her lack of memory regarding the offense. In denying parole release, the Board did place significant weight on the gravity of the instant offense and the appellant's failure or inability to recall the events associated with the instant offense. See Matter of Ramahlo v. Travis, 290 A.D.2d 911, 737 N.Y.S.2d 160 (3d Dept. 2002), lv. denied, 98 N.Y.2d 601, 744 N.Y.S.2d 761 (2002). From a review of the pre-sentence investigation report, it appears that the appellant recalled few of the events from that day on which she committed the acts for which she is now incarcerated. In addition, medical records submitted by counsel for the appellant on this appeal show that on August 1, 2000, the appellant was diagnosed as being "positive [for] amnesia". Given appellant's maintained inability to recall the events of August 1, 2000 coupled with what is indicated by way of the aforementioned medical report, it would be best for the Board to assess her inability to discuss certain events associated with her crimes of conviction against this record before deciding the appropriateness of her release to parole supervision.

Recommendation:

It is recommended that the appealed from decision be reversed and that the appellant be afforded a *de novo* release interview.