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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
2484CV01599

BRENDA BROUSSEAU

vs.

SHAWN JENKINS, in his capacity as
Interim Commissioner of the Massachusetts Department of Correction

**MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS
FOR JUDGMENT ON THE PLEADINGS**

The plaintiff, Brenda Brousseau ("Brousseau"), is a seventy-two-year-old woman currently incarcerated at MCI Framingham. Pursuant to G. L. c. 249, § 4, she seeks certiorari review of Interim Commissioner of the Massachusetts Department of Correction Shawn Jenkins' ("Jenkins" and/or the "Department") denial of her petition for medical parole pursuant to G. L. c. 127, § 119A. Toward that end, Brousseau filed a Motion for Judgment on the Pleadings. In response, Defendant filed a cross-motion for Judgment on the Pleadings. The Court held a hearing on the motions on August 21st 2024, and took the matter under advisement.

After consideration given to the case history, pleadings, and relevant law, the Court hereby **DENIES** Brousseau motion, **ALLOWS** the Department's cross motion and **ORDERS** the matter **DISMISSED**.

BACKGROUND

After being convicted of 1st Degree Murder in 1992, Brousseau was sentenced to life imprisonment without the possibility of parole. Her conviction arose out of the 1990 ambush and execution of the estranged husband of one of Brousseau's associates. Although she did not wield the gun, Brousseau took part in the planning, was present at the scene (where she assisted

by repairing the weapon for the shooter), and then cleaned and disposed of the gun in the immediate aftermath of the murder. After being tried in the Bristol Superior Court, Brousseau's conviction was reviewed and upheld by the Supreme Judicial Court. *Commonwealth v. Brousseau*, 421 Mass. 647, 658 (1996).

In June of 2023, Brousseau filed a petition for medical parole pursuant to G.L. c. 127, § 119A. After finding that Brousseau was neither permanently incapacitated nor suffering from a terminal illness as defined in § 119A, the Department's former commissioner (Carole Mici) denied the petition in September of 2023. In February of 2024, Brousseau moved for reconsideration, initially relying only on a claim of permanent incapacity; however, in March of 2024, she expanded her rationale to include a claim of terminal illness. Approximately two months later, on the 19th of April 2024, Interim Commissioner Jenkins denied Brousseau's request. Shortly thereafter, the petitioner sought relief in the Superior Court.

In evaluating Brousseau's petition, Jenkins had at his disposal a recommendation (negative) from the Acting Superintendent of MCI Framingham, three medical evaluations and supporting records, internal Department records, risk assessments for violence and drug use, a classification report, the petitioner's medical parole plan, an opposition letter from the Bristol County District Attorney's Office, objections from the victim's family, and letters in support of Brousseau from various individuals and organizations. The primary issues presented in Brousseau's certiorari petition are Jenkins' interpretation and application of the medical evaluations and his determination that she presented a risk of re-offense if released.

In assessing Brousseau's medical condition, Jenkins had access to evaluations conducted by Dr. Mark Eisenberg and Dr. Joyce Rosenfeld.¹

¹ Only Dr. Rosenfeld is listed as a "Qualified Medical Provider" in Brousseau's February 15, 2024 petition for medical parole.

Dr. Eisenberg, an outside consultant acting on Brousseau's behalf, authored a report dated December 20th 2023, in which he opined that the petitioner suffered from musculoskeletal, kidney and cardiac disease, as well as diminished sight and hearing. As result of these irreversible conditions, Dr. Eisenberg averred that Brousseau was permanently incapacitated and presented a minimal risk of recidivism if released on medical parole. Dr. Eisenberg did not offer any opinion as to Brousseau's life expectancy nor did he indicate that she was suffering from a terminal illness. See A.R. pp. 11-14.

Dr. Rosenfeld, a Wellpath employee, submitted an initial report dated August 8th 2023, and an update prepared on February 29th 2024.² Both of Dr. Rosenfeld's reports indicated that Brousseau suffered from a wide variety of physical ailments, including but not limited to congestive heart failure, hypercholesterolemia, atrial fibrillation, hypertension, chronic renal insufficiency (stage III), hyperparathyroidism, osteoporosis, prolapsed uterus causing occasional urine retention, lower leg edema, and epicondylitis, as well as post-traumatic stress disorder (PTSD). Dr. Rosenfeld also noted that both of Brousseau's hips and knees had been replaced. Dr. Rosenfeld opined that, as a consequence of Brousseau's myriad of ailments and afflictions, she was "moderately to severely limited." She did not find that Brousseau was permanently incapacitated and specifically noted that Brousseau declined to undergo the cardiac catheterization recommended by her treatment providers.³ Like Dr. Eisenberg, Dr. Rosenfeld did not opine that Brousseau is suffering from a terminal illness, but did state that some of the available literature suggests a six-month life expectancy. See A.R. pp. 52-53.

Jenkins was also aware that Brousseau presented a low risk of violence. Her

² Wellpath has a contract to supply medical services to inmates in the custody the Department.

³ Other records suggest that Brousseau also failed to comply with recommendations for physical therapy.

administrative record indicates that her incarceration has been largely trouble free. Despite being in state custody for well over 30 years, she has only seven disciplinary reports, the most recent of which was issued in 2015. None of the reports were for violence or intimidation. The Department's internal evaluations of Brousseau are consistent with her lack of disciplinary reports. Both the "Pathways to Change" and standardized risk assessment prepared by the Department found Brousseau presents as a low risk for recidivism and violence. Likewise, the Department's substance abuse profile placed Brousseau in the low risk category.

DISCUSSION

The medical parole statute allows for the release of prisoners who are terminally ill or permanently incapacitated. G. L. c. 127, § 119A.⁴ It is not discretionary. *Id.* Under the statute, a prisoner "shall be released on medical parole" "[i]f the commissioner determines" that the prisoner is "terminally ill or permanently incapacitated such that if the prisoner is released the prisoner will live and remain at liberty without violating the law and that the release will not be incompatible with the welfare of society." *Id.*

Upon receiving a written petition for medical parole from an inmate, the superintendent of the facility where the prisoner is incarcerated must review the petition and develop a recommendation regarding release on medical parole within 21 days of receiving the petition. See G. L. c. 127, § 119A(c)(1). The superintendent then sends the petition, and the recommendation, to the commissioner, accompanied by a medical parole plan, a written diagnosis by a licensed physician, and an assessment of the risk of violence that the prisoner would pose to society. *Id.*

If the commissioner determines that the petitioner suffers from either a terminal illness or

⁴ The administration of petitions for medical parole pursuant to G. L. c. 127, § 119A is further defined and clarified by 501 Code of Massachusetts 17.00.

permanent incapacitation, the commissioner must then determine whether the petitioner “will live and remain at liberty without violating the law and that the release will not be incompatible with the welfare of society.” G. L. c. 127, § 119A. Guidance on the factors to be considered by the commissioner in determining if the petitioner will “remain at liberty without violating the law” are set forth in 501 Code Mass. Regs. §§ 17.04(2), (3).

In reviewing Jenkins’ denial, the Court applies the arbitrary and capricious standard. *McCauley v. Superintendent, Mass. Corr. Inst., Norfolk*, 491 Mass. 573, 593 (2023). A decision is not arbitrary and capricious unless there is no ground upon which a reasonable person might deem proper to support it. *Garrity v. Conservation Comm’n of Hingham*, 462 Mass. 779, 792, (2012). Such deferential standard requires this Court to leave undisturbed Jenkins’ determination so long as there was any rational basis to support it. *Mederi, Inc. v. Salem*, 488 Mass. 60, 68 (2021).

In the instant matter, the first issue to be addressed is whether Jenkins had any rational basis to decide that Brousseau was neither terminally ill nor permanently incapacitated.

Terminal illness is defined in G. L. c. 127, § 119A “as a condition that appears incurable, as determined by a licensed physician, that will likely cause the death of the prisoner in not more than 18 months and that is so debilitating that the prisoner does not pose a public safety risk.” Neither Dr. Eisenberg nor Dr. Rosenfeld opined that Brousseau was terminally ill. At most, Dr. Rosenfeld made a passing reference to literature which suggests to a six-month life expectancy. Referencing, but not endorsing, a suggested life expectancy falls considerably short of the mark set out in the medical parole statute. As such, Jenkins’ rejection of so much of Brousseau’s petition as based upon terminal illness in no way approaches arbitrary and capricious.

Permanent incapacity presents a more difficult question. Section 119A defines permanent

incapacitation as “a physical or cognitive incapacitation that appears irreversible, as determined by a licensed physician, and that is so debilitating that the prisoner does not pose a public safety risk.” In reviewing Brousseau’s petition, Jenkins was presented with evidence for and against a finding of permanent incapacity.

After examining Brousseau in November of 2023, Dr. Eisenberg concluded that she was permanently incapacitated. He did so based upon her uncontested medical conditions and their impact upon her ability to navigate her active daily functions. Dr. Eisenberg specifically opined that Brousseau’s limitations would minimize her likelihood to re-offend if released.

Conversely, Dr. Rosenfeld found only that Brousseau was “moderately to severely limited.” While this description acknowledges that the petitioner suffers from a number of very serious ailments, Dr. Rosenfeld made clear that Brousseau’s limitations do not rise to the level of permanent incapacitation. Further, Dr. Rosenfeld did not reach the conclusion that Brousseau’s impairments would render her unable or even unlikely to re-offend if released. Toward that end, Dr. Rosenfeld noted that Brousseau’s special housing status is more function of room configuration than medical need. Finally, Dr. Rosenfeld’s reference to Brousseau’s refusal to undergo cardiac catheterization or other tests which might improve her circulatory function speaks directly to the issue of “permanent” incapacity.

Faced with this conflicting data, Jenkins chose to rely on the opinion of the Department’s in-house medical provider. Arguably, he could have reasonably concluded that Dr. Rosenfeld had greater contact with Brousseau by virtue of her employment and the fact that she conducted two evaluations as opposed to one by Dr. Eisenberg. Nor is it irrational for Jenkins to conclude that the more recent evaluation (February 2024 vs. November 2023) of a 72 year-old woman in declining health was a better reflection of her condition at the time of the reconsideration. In

addition, the fact that Brousseau declined medical interventions and failed to complete physical therapy, might reasonably cause Jenkins to question Dr. Eisenberg's determination of permanent incapacity.⁵

In light of the above, Jenkins undoubtedly had a rational basis to conclude that Brousseau was not terminally ill or permanently incapacitated. Accordingly, this Court cannot find his actions to be arbitrary and capricious.

As Jenkins had a rational basis to conclude that Brousseau was not terminally ill or permanently incapacitated, there is no need for the Court to address the finding that the petitioner still represents a risk to public safety. That said, G. L. c. 127, § 119A(e) requires a determination as to whether the petitioner "will live and remain at liberty without violating the law" and that the prisoner's release is not "incompatible with the welfare of society." Both prongs require a comprehensive look, done on a case-by-case basis. *McCauley*, 491 Mass. at 592. While the petitioner's claim fails on the medical basis, had the Court decided otherwise, it would have been hard pressed to find that Jenkins' explanation as to why Brousseau still represents a threat to public safety satisfies the "comprehensive look" standard set forth in *McCauley*.

ORDER

For the foregoing reasons, Brousseau's motion for judgment on the pleadings is **DENIED**, the Departments cross motion is **ALLOWED**, and the matter is **ORDERED DISMISSED**.

Dated: September 20, 2024


Christopher P. Belezos
Justice of the Superior Court

⁵ The fact that Jenkins did not reference Dr. Eisenberg's opinion in his decision has no impact on this Court's determination. The question before this Court is whether Dr. Rosenfeld's opinion amounted to a rational basis to support Jenkins' denial.