

2021 WL 2561988 (Mass.Super.) (Trial Order)
Superior Court of Massachusetts.
Bristol County

Justin DENNY,

v.

Carol A. MICI¹.

No. 2073CV00627.

June 9, 2021.

Memorandum of Decision and Order on the Parties' Cross-Motions for Judgment on the Pleadings

Raffi N. Yessayan, Judge.

*1 Plaintiff Justin Denny ("Denny") filed this action in the nature of certiorari pursuant to [G. L. c. 249, § 4](#) seeking judicial review of the July 16, 2020 decision of defendant Carol A. Mici, Commissioner of the Department of Correction ("Commissioner") to deny him medical parole under [G. L. c. 127, § 119A](#). For the reasons discussed below, plaintiff's motion for judgment on the pleadings is **DENIED** and defendant's cross-motion is **ALLOWED**.

BACKGROUND

The following facts are taken from the administrative record.²

On July 18, 2019, Denny pleaded guilty to charges of armed assault with intent to commit a felony (two counts), attempted assault and battery by discharging a firearm (two counts) and carrying a firearm without a license. On August 1, 2019, he was sentenced to state prison for five to eight years. The charges stemmed from an incident that occurred on April 18, 2017. After an argument with his then-girlfriend, Denny fired a round from a handgun into the car in which his girlfriend and her father were riding as they left the scene of the argument. Denny was arrested and held at the Bristol County jail to await trial. While held, he violated a restraining order taken out by the victim by trying to contact her. He received a sentence of two years' probation (crime while incarcerated) as a result.

Denny currently is incarcerated at the Old County Correctional Center ("OCCC"). On May 11, 2020, Denny's parents submitted to Superintendent Stephen Kennedy a medical parole petition pursuant to [G. L. c. 127, § 119A](#). The petition stated that Denny would reside with his parents and receive outpatient medical care from two outpatient providers. The petition also stated that Denny is disabled and receives Social Security Disability Insurance ("SSDI") benefits.³

In support of the petition for medical parole, Denny's parents submitted a May 29, 2020 medical summary signed by Wellpath⁴ Nurse Practitioner Despina Kiely ("NP Kiely"), which was reviewed and "signed off" by Dr. John Strauss of Wellpath on July 16, 2020. NP Kiely stated that Denny is a 31-year-old male with a history of severe obstructive sleep apnea which required a tracheotomy, bronchitis, and a reported history of pneumothorax. He suffers from asthma, hypertension, diabetes, hypothyroidism, and ongoing gastrointestinal complaints including chronic diarrhea. He is allergic to three major classifications of antibiotics. He also has a history of a 2005 motor vehicle accident for which he underwent ankle reconstructive surgery. NP

Kiely noted that he has retrograde intramedullary nailing of the left femur, hardware palpable below the surface of the medial epicondyle, multiple incisions in his left ankle and leg with a significant “clunk” audible and palpable with active dorsiflexion. He experiences chronic back, leg and ankle pain as a result. NP Kiely further noted that Denny tends to lean slightly to the right, abducts his left lower extremity slightly due to a leg length discrepancy and/or limited left ankle dorsiflexion. She stated that Denny is “[a]ble to walk facility distances but reports significant discomfort and pain, moderate to severe intensity ... worsening with activity.” His medical restrictions include a half-inch heel lift for leg length discrepancy, a cane, a bottom bunk, first-floor tier, and a BPAP machine. NP Kiely concluded: “Mr. Denny is permanently incapacitated due to longstanding health issues as outlined above. His medical conditions may contribute to a shortened lifespan, but it would be difficult to state that he has less than 18 months to live.”

*2 On June 1, 2020, Superintendent Kennedy recommended against medical parole for Denny. Kennedy noted that Denny is not bedridden or receiving total care, and, per NP Kiely, can “walk facility distances....” Kennedy also noted that, since his transfer to OCCC, he has received one disciplinary report for lying to staff in connection with a phone call he made to circumvent the inmate phone system. Kennedy further noted that Denny has an open restraining order which was reissued on May 20, 2020, two closed restraining orders on his record, a history of domestic violence, an open probation case out of the Bristol Superior Court for an assault and battery on a family/household member, and five restraining order violations. A 2019 COMPAS Risk and Needs Assessment determined that Denny's risk of violence is medium, his risk of recidivism is medium, and his risk of substance abuse is low. Kennedy concluded that Denny was not eligible for medical parole because he does not “currently suffer from a terminal illness” and his medical conditions are not “so physically debilitating that he does not pose a public safety risk” as required by [G. L. c. 127, § 119A](#).

The Bristol County District Attorney's Office (“DA's Office”) filed a written statement opposing medical parole. The DA's Office stated that Denny remains dangerous based on his history of violent behavior involving multiple women. In addition to the victim in the underlying case, two other women have sought restraining orders against Denny. The DA's Office also stated: “[Denny] has shown that he intends to disregard public safety norms and engage in whatever conduct he sees fit to engage in. While in custody, Denny used his mother to violate a court order forbidding contact with the victim.” The DA's Office further noted that Denny's health issues are “longstanding” and “were known at the time of [his] plea and sentencing, as shown by the letter to Sheriff Hodgson written on Denny's behalf when he was held pending trial.”⁵

In her July 16, 2020 decision denying Denny's parents' petition, the Commissioner stated:

I am not persuaded that your son is terminally ill or permanently incapacitated as those terms are used in [G. L. c. 127, § 119A](#). Moreover, I am not persuaded that your son is so debilitated that if released, he would live and remain at liberty without violating the law, nor do I believe that your son's release would be compatible with public safety and the welfare of society. My decision is based on your son's firearms violations, the open restraining order against him which was reissued on May 20, 2020, the two closed restraining orders on his record, his history of domestic violence, his open probation case out of the Bristol Superior Court for an Assault and Battery of a Family Member and five restraining order violations, and the fact that he has been in Department custody for less than one year. I also credit District Attorney Quinn's statements in opposition to the medical parole petition that your son's health is substantially the same as his condition on April 18, 2017 when he committed the crimes for which he is now incarcerated. I also agree with District Attorney Quinn, and find it significant, that your son has a history of violent and criminal behavior involving multiple women, and that in addition to the victim described above, two other women have obtained court-ordered restraining orders against him. All of this information demonstrates to me that your son would pose a significant risk to public safety were he to be released.

*3 Denny commenced this action seeking certiorari review on September 20, 2020.

DISCUSSION

The medical parole statute provides that a prisoner aggrieved by a decision denying medical parole may petition for relief in the nature of certiorari pursuant to G. L. c. 249, § 4. See G. L. c. 127, § 119A(g). “On certiorari review, the Superior Court’s role is to examine the record ... and to ‘correct substantial errors of law apparent on the record adversely affecting material rights.’” *Doucette v. Massachusetts Parole Bd.*, 86 Mass. App. Ct. 531, 540-541 (2014), quoting *Firearms Records Bureau v. Simkin*, 466 Mass. 168, 180 (2013). The standard of review “var[ies] according to the nature of the action for which review is sought.” *Forsyth Sch. for Dental Hygienists v. Board of Registration in Dentistry*, 404 Mass. 211, 217 (1989). Where, as here, “the decision under review was not made in an adjudicatory proceeding,” but rather was an “exercise of administrative discretion,” the “arbitrary and capricious” standard applies. See *Revere v. Massachusetts Gaming Comm’n*, 476 Mass. 591, 605 (2017) (citation omitted). See also *Diatchenko v. District Attorney for Suffolk Dist.*, 471 Mass. 12, 31 (2015) (“Because the decision whether to grant parole to a particular ... offender is a discretionary determination by the board ... an abuse of discretion standard is appropriate.”); *Doucette*, 86 Mass. App. Ct. at 541 (“In cases reviewing the decisions of administrative bodies which, like the parole board, are accorded considerable deference ... the arbitrary and capricious standard of review applies.”). “A decision is arbitrary or capricious such that it constitutes an abuse of discretion where it ‘lacks any rational explanation that reasonable persons might support.’” *Frawley v. Police Com’r of Cambridge*, 473 Mass. 716, 729 (2016), quoting *Doe v. Superintendent of Schs. of Stoughton*, 437 Mass. 1, 6 (2002). “It is not the place of a reviewing court to substitute its opinion for that of the agency decision maker.” *Doe*, 437 Mass. at 6. The plaintiff bears the burden of demonstrating that the Commissioner acted arbitrarily and capriciously. *Garrity v. Conservation Comm’n of Hingham*, 462 Mass. 779, 792 (2012).

“[I]n 2018, the Legislature established a medical parole program for prisoners in State and county custody who are terminally ill or permanently incapacitated.” *Buckman v. Commissioner of Corr.*, 484 Mass. 14, 15 (2020), citing G. L. c. 127, § 119A. Under the medical parole statute, a “prisoner shall be released on medical parole” where “the [C]ommissioner 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....” G. L. c. 127, § 119A(e). The statute requires the Commissioner to answer three questions. See *Buckman*, 484 Mass. at 19. First, “is the prisoner ‘terminally ill’ or ‘permanently incapacitated?’”⁶ *Id.* Second, “if released, will the prisoner live and remain at liberty ‘without violating the law?’” *Id.* Third, “is the prisoner’s release ‘incompatible with the welfare of society?’” *Id.* “If the [C]ommissioner determines that the answer to the first two questions is ‘yes,’ and the answer to the third is ‘no,’ ‘the prisoner shall be released on medical parole.’” *Id.*

*4 As to the first question, the statute 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.” G. L. c. 127, § 119A(a) (emphasis added). Denny argues that the Commissioner erred in concluding he was not permanently incapacitated when NP Kiely stated that he was. He contends that the determination of a prisoner’s “permanent incapacitation” rests solely with a licensed physician and that once a licensed physician determines that a prisoner is “permanently incapacitated,” the Commissioner cannot conclude otherwise. Denny is incorrect. Under the statute, it is the Commissioner, not a licensed doctor, who decides whether a prisoner meets the standard of “permanent incapacitation.” In making her decision, the Commissioner receives “certain inputs”:

For one, the statute requires the input of ‘a licensed physician’ to assess whether the prisoner has (i) an ‘incurable’ condition that ‘will likely cause ... death ... in not more than 18 months’; and/or (ii) ‘a physical or cognitive incapacitation that appears irreversible.’ G. L. c. 127, § 119A(a). The Commissioner then must consider a superintendent’s ‘assessment of the risk for violence that the prisoner poses to society,’ and the ‘medical parole plan’ prepared by or at the direction of the superintendent. Based on these inputs, *the Commissioner must determine* whether the prisoner’s condition is ‘so debilitating that the prisoner does not pose a public safety risk,’ *id.*...

Adrey v. Department of Correction, 2020 WL 6435064 at *6 (Mass. Super. 2020) (Krupp, J.) (emphasis added). Accordingly, as the statutory language makes clear, even if a licensed physician determines that a prisoner is “permanently incapacitated,” the Commissioner can conclude that a prisoner is a public safety risk and deny the petition on that basis.⁷

Here, the Commissioner determined that Denny's medical conditions are not so debilitating that he poses no public safety risk. In making her determination, the Commissioner relied on Superintendent Kennedy's recommendation. Kennedy recommended against release based on the nature of Denny's charges, his criminal history, his history of domestic violence, his open restraining order, his prior restraining order violations, and a risk screen assessment which concluded that his risk for both violence and general recidivism in 2019 was medium.⁸

As to the remaining two questions, to grant medical parole, the Commissioner must determine that if 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." *G. L. c. 127, § 119A(e)*. In denying Denny medical parole, the Commissioner concluded that his release would be incompatible with the welfare of society because he poses a significant risk to public safety. The Commissioner's decision was not arbitrary and capricious, and she did not abuse her discretion in denying the Plaintiff medical parole. The Superintendent's recommendation and the record as a whole furnish a rational explanation for the Commissioner's determination that despite his medical conditions, Denny poses a public safety risk if released. Additionally, as stated previously, the Commissioner's "determination is granted considerable deference." *Greenman v. Massachusetts Parole Bd.*, 405 Mass. 384, 387 (1989).

ORDER

***5** For the foregoing reasons, it is hereby **ORDERED** that Plaintiff's Motion for Judgment on the Pleadings is **DENIED** and the Defendants' Cross-Motion is **ALLOWED**.

<<signature>>

Raffi N. Yessayan

Justice of the Superior Court

DATED: June 9, 2021

Footnotes

- 1 Commissioner of the Department of Correction
- 2 Denny contends that the Commissioner admitted to every statement of fact alleged in his complaint because she "denie[d] none of them with particularity." The defendant is incorrect. Pursuant to Superior Court Standing Order 1-96(2), "[t]he administrative agency whose proceedings are to be judicially reviewed shall, *by way of answer*, file the original or certified copy of the record of the proceeding under review (the record) within ninety (90) days after service upon it of the Complaint." No further answer was required.
- 3 Denny's parents included with their petition the necessary consents for the release of confidential information regarding a medical parole plan.
- 4 Wellpath is the Department of Correction's medical provider.
- 5 The administrative record contains a letter submitted by Prisoners' Legal Services on Denny's behalf to the Bristol County Sheriff's Office ("BCSO"). The letter is dated September 5, 2017, and states: "Denny reportedly suffers from sleep apnea, diabetes, a mood disorder, has bolts, plates, and a rod in his left ankle and leg.... Mr. Denny reports that prior to his incarceration he depended on a cane due to the significant damage in his left leg and ankle. He reports having metal hardware in this leg and ankle, and that a bolt in his ankle now appears to be out of place and causes great pain and swelling. Mr. Denny also reports he has been denied his cane at BCSO,... Please x-ray, evaluate and treat Mr. Denny's ankle as medically indicated and issue him a cane and a double mattress."
- 6 Denny does not claim that he is terminally ill.
- 7 Denny also argues that the Commissioner abused her discretion in determining that he posed a risk to public safety because it was based, in part, on her crediting the statements in the District Attorney's opposition that Denny's health is substantially the same as his condition when he committed the underlying crimes. The defendant does not dispute that his health issues are longstanding; however, he contends that, since his incarceration, his health has significantly declined. There is no information in the administrative record

to substantiate his claim in this regard, however. See *Mello Const., Inc. v. Division of Capital Asset Mgmt.*, 84 Mass. App. Ct. 625, 631 n. 12(2013)(“[i]n a certiorari proceeding” under G. L. c. 249, § 4, “judicial review is confined to the record of the administrative proceedings below”).

- 8 DOC regulations require the risk for violence assessment to consider the prisoner's terminal illness/permanent incapacitation, clinical management, and prognosis; his current housing situation; an assessment of his mobility, gait, and balance; the medically prescribed and required durable equipment or other assistive devices; and his ability to manage activities of daily living. See 501 Code Mass. Regs. § 17.05.

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