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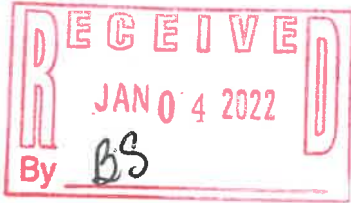
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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2184CV01623



VICTOR FIGUEROA

vs.

CAROL MICI, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF CORRECTION

DECISION AND ORDER ON THE PARTIES' CROSS MOTIONS
FOR JUDGMENT ON THE PLEADINGS

NOTICE SENT
12/29/21
P.L.S.
R.S.
MASS. D.O.C.
S.D.M.
WMA

Victor Figueroa petitioned the Commissioner of Correction for Medical Parole Release. That Petition was denied, Figueroa appealed the decision to the Superior Court. This matter is before the court on the parties' cross motions for judgment on the pleadings.

LEGAL FRAMEWORK

As part of the comprehensive criminal justice reform legislation enacted in 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 Correction, 484 Mass. 14, 17 (2020); G.L. c. 127, § 119A. "The purpose of the statute ... [is] both to reduce significant health care expenditures for aging and ill prisoners who are unlikely to reoffend and to show compassion to sick and disabled prisoners." Harmon v. Commissioner of Correction, 487 Mass. 470, 477 (2021). Summarily,

If the commissioner determines that a 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, the prisoner *shall* be released on medical parole. The parole board *shall* impose terms and conditions for medical parole that shall apply through the date upon which the prisoner's sentence would have expired.

G.L. c. 127, § 119A(e) (emphasis added).

The Statute. Under the statute, “terminally ill” means “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 the prisoner does not pose a public safety risk.” G.L. c. 127, § 119A(a). “Permanent Incapacitation” means 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). A debilitating condition (as referenced above) is defined by the Department of Correction’s medical parole regulations as:

A physical or cognitive condition that appears irreversible, resulting from illness, trauma, and/or age, which causes a prisoner significant and serious impairment of strength or ability to perform daily life functions such as eating, breathing, toileting, walking or bathing so as to minimize the prisoner’s ability to commit a crime if released on medical parole, and requires the prisoner’s placement in a facility or a home with access to specialized medical care.

501 Code Mass. Regs. § 17.02.

The Process for Requesting Relief Under the Statute. To request release under the Medical Parole Statute, a prisoner or his or her designee submits a written petition to the superintendent of the correctional facility where the prisoner resides. G.L. c. 127, § 119A(c)(1). Upon submission of the petition for medical parole, the superintendent must promptly consider the petition and develop a recommendation as to the release of the prisoner. Buckman, 484 Mass. at 18, citing G.L. c. 127, § 119A(a). “‘Whether or not the superintendent recommends in favor of medical parole,’ the superintendent must transmit four documents to the commissioner with his or her recommendation: (1) the petition itself; (2) ‘a medical parole plan;’ (3) ‘a written diagnosis by a physician licensed to practice medicine’; and (4) ‘an assessment of the risk for violence that the prisoner poses to society.’” Id., quoting G.L. c. 127, § 119A(c)(1). The Commissioner reviews the superintendent’s recommendation and supporting materials, provides

notice to interested parties and reviews any written statements from those parties. G.L. c. 127, § 119A(c)(2).

A prisoner who has been denied medical parole may petition for relief under G.L. c. 249, § 4. See G.L. c. 127, § 119A(g).

BACKGROUND

Victor Figueroa is 74 years old and suffers from dementia, cognitive decline, progressive memory loss, altered mental status, cerebral and cerebellar hemorrhages, heart disease, chronic kidney disease, and requires assistance with all activities of daily living. He can only comprehend simple commands. On March 12, 2021, counsel for Figueroa submitted a medical parole petition to the Department of Correction. On March 17, 2021 one of Figueroa's doctors, Paul Nye, M.D., also submitted a medical parole petition on behalf of Figueroa.

Figueroa's medical records show that he has lived in the Health Services Unit ("HSU") at the Souza Baranowski Correctional Center ("SBCC") since March 2021. In January 2021, numerous cerebral and cerebellar hemorrhages were detected by MRI in Figueroa's brain. Dr. James Petros, Medical Director at SBCC, and Dr. Paul Nye, Mr. Figueroa's treating psychiatrist, opined that these are the likely cause of Figueroa's dementia and elements of his physical debilitation. In addition to his dementia issues, he has a chronic kidney disease, benign prostatic hypertrophy, obstructive uropathy, atrial fibrillation, renal and pancreatic cysts, bilateral cataracts and coronary artery disease. However, Dr. Petros reported in April 2021 that Figueroa's most significant co-morbidity is his dementia, progressive memory loss, cognitive decline and mental status.

In terms of daily living, Figueroa is unable to complete activities of daily living without assistance. He is unable to walk and uses a wheelchair. He requires assistants, a gait trainer and

a walker to stand. He is at high risk for falls and requires constant observation by staff. He wears diapers for urinary incontinence and requires assistance from staff in order to shower or use the bathroom. He is able to follow simple commands and cues from HSU staff but "cannot process most conversations." Figueroa does show some agitation. Figueroa states that his physicians have determined the agitation is related to the dementia. This may well be the case, but I do not see that determination in the record.

Dr. Petros submitted a medical assessment in March 2021 that stated Figueroa's dementia "appears progressive and will eventually require total care." Dr. Petros also opined that Figueroa's health might deteriorate suddenly and there is a significant possibility that he will expire within 18 months. Petros concluded that Figueroa is totally incapacitated. Nye also concluded that Figueroa is permanently bed bound and wheelchair bound due to strokes and has vascular dementia. Figueroa appears to be receiving constant medical care. Petros noted that Figueroa had been seen by medical providers 8 times between January 8, 2021 and March 21, 2021 and he has been hospitalized since March 22, 2021.

The Commissioner declined medical parole release finding: (1) "no evidence that he is currently so debilitated that he does not pose a public safety risk;" (2) although Figueroa is not mobile, he has retained upper body strength and considering his past crimes and disciplinary infractions while incarcerated, if released Figueroa would not be able to live and remain at liberty without violating the law; and (3) that he would be highly likely to re-offend if released.

The Commissioner acknowledged the medical diagnosis that Figueroa is "totally incapacitated." Her determination that he is not "permanently incapacitated," such that if he is released he will live and remain at liberty without violating the law and his release will not be

incompatible with the welfare of society, is based on her observation that Figueroa retains upper body strength, is easily angered and his disciplinary history puts him at risk for reoffending.

Although the Commissioner's decision states she reviewed a medical parole plan, there is no medical parole plan in the administrative record. Nor is there a current risk assessment.

DISCUSSION

Certiorari review under G.L. c. 249, § 4 is available to correct substantial errors of law apparent on the record that adversely affects material rights. Doucette v. Massachusetts Parole Bd., 86 Mass. App. Ct. 531, 540-541 (2014). The court reviews parole decisions to ensure that they are not arbitrary and capricious or based on an error of law. Id. at 541. "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 Commissioner of Cambridge, 473 Mass. 716, 729 (2016), quoting Doe v. Superintendent of Schools of Stoughton, 437 Mass. 1, 6 (2002). The court reviews the Commissioner's decision solely to ensure that it is reasonable in light of the facts and circumstances shown in the record. This court may not substitute its own opinion for that of the Commissioner. Frawley, 473 Mass. at 729. Certiorari relief is warranted, however, where Plaintiff shows substantial material errors that if allowed to stand will result in manifest injustice to a petitioner who is without another available remedy. Johnson Products, Inc. v. City Council of Medford, 353 Mass. 540, 541 n.2 (1968).

Here there are substantial material errors in the Commissioner's analysis. Two physicians determined Figueroa is totally incapacitated. Figueroa's doctors report that he is unable to follow most conversations or complete activities of daily living without assistance. Dr. Petros also reports that Figueroa's dementia "appears progressive and will eventually require total care." He opines that Figueroa may die in 18 months. Dr. Nye, one of Figueroa's

physicians, has joined in the petition seeking medical parole. The Commissioner concedes that Figueroa is totally incapacitated, but finds he is not “permanently incapacitated” and fails to meet the definition in G.L. c. 127, § 119A(e) because he will not live and remain at liberty without violating the law. The Commissioner bases her decision that Figueroa is at risk to reoffend on the reports that he maintains good upper body strength and that he shows anger and impulsive behavior. But she fails to evaluate at all the level of incapacity caused by Figueroa’s diagnosis of dementia, and whether, despite retaining some upper body strength, he has the mental capacity to make decisions that would result in him not being able to remain at liberty without violating the law. She also fails to analyze whether the agitation and anger referenced by Dr. Petros is related to Figueroa’s dementia. This is a critical oversight. Figueroa has been hospitalized since March and nothing in the medical record indicates he will be released from hospital care. There is however ample evidence that Figueroa’s dementia will only get worse and not improve. For example, Dr. Petros reports that the dementia is getting worse, not better and will continue on this downward trend. The Commissioner never comments on or appears to take this evidence into consideration in connection with her conclusion. Ignoring this evidence in her analysis is an error.

Compounding the failure to truly address Figueroa’s progression of dementia is the lack of a current risk assessment. The Commissioner’s conclusion that Figueroa is at risk of re-offending is based on a stale risk assessment from 2012 (and indicates a low risk of violence or recidivism). No new risk assessment was performed in connection with this determination.

In addition, the lack of a medical parole plan is significant not only because one is required by statute to be created, but because the type of necessary care (i.e., whether Figueroa

would be in an assisted living situation or hospital care) is relevant to the analysis of whether he is likely to offend.

The failure to conduct a risk assessment or provide a medical parole plan contradicts the dictates of the statute and constitute a material error. In addition, the fact that Figueroa remains hospitalized, is diagnosed with dementia that requires hospital treatment, and a doctor has opined this dementia will only get worse not better, are the central issues in evaluation of his medical status. The impact of Figueroa's declining mental health status was not addressed. The diagnosis provided by Dr. Petros, a prison medical provider, satisfies the 501 Code Mass. Regs. § 17.02 requirement of "a physical or cognitive condition that appears irreversible." Despite the fact that Mr. Figueroa has an irreversible cognitive condition, the Commissioner did not take the next step to evaluate whether or how this cognitive condition would "minimize the prisoner's ability to commit a crime" pursuant to 501 Code Mass. Regs. § 17.02. Instead, she based her decision, in part, on Figueroa's alleged physical strength capabilities. The Commissioner's failure to consider Mr. Figueroa's dementia in the analysis of whether Figueroa is likely to offend is a material error. Accordingly, her decision to deny medical parole was arbitrary and capricious such that it constitutes an abuse of discretion.

ORDER

This matter is **REMANDED** to the Commissioner for **RECONSIDERATION** of her decision. Such reconsideration will include the preparation and review of an updated risk assessment and a properly prepared medical parole plan that includes care for Figueroa's dementia; and address the issues of Figueroa's cognitive decline related to his dementia and any additional information from Figueroa's doctors on whether his "agitation and anger" is

connected to or a symptom of his dementia. The Reconsideration Decision shall be issued within 15 days from the date of this Order.


Maureen Mulligan
Associate Justice of the Superior Court

DATE: December 27, 2021