

2019 WL 11276385 (Mass.Super.) (Trial Order)
Superior Court of Massachusetts.
Worcester County

Benjamin LAGUER,
v.
Thomas A. TURCO, III, Commissioner of the
Massachusetts Department of Corrections & others¹.

No. 18-1431D.
January 7, 2019.

Memorandum of Decision and Order on Motions for Judgment on the Pleadings

J. Gavin Reardon, Jr., Judge.

*1 Petitioner, Benjamin LaGuer (LaGuer), seeks relief from this court pursuant to G. L. c. 127, § 119A(g) and G. L. c. 249, § 4, after the commissioner of the Massachusetts Department of Corrections (DOC), Thomas A. Turco, III (commissioner), denied LaGuer's petition for medical parole. In his motion for judgment on the pleadings, LaGuer requests, among other things, that he be granted medical parole. The respondents, which include the commissioner, Collette Goguen, Superintendent of North Central Correctional Institute (superintendent), and Daniel Bennett, Secretary of the Executive Office of Public Safety and Security (secretary), filed an Opposition and cross motion for judgment on the pleadings. For the reasons discussed below, this matter is **REMANDED** for reconsideration of LaGuer's petition for medical parole, in light of his recently improved medical condition.

BACKGROUND

LaGuer has been diagnosed with liver cancer. Based on the record available to the commissioner when he made his decision denying medical parole, one doctor estimated that LaGuer had a six month life expectancy as of April 2018.

LaGuer was convicted of the aggravated oral, anal, and vaginal rape of a fifty-nine year old woman, an offense for which he is serving a second-degree life sentence. The offense occurred over an eight-hour period, during which the victim was beaten, bound, and threatened

with death, LaGuer also received concurrent twelve to fifteen year sentences for breaking and entering and unarmed robbery, which have expired.

On April 27, 2018, LaGuer submitted a written petition for medical parole to the superintendent. He submitted the petition shortly after a new law came into effect on April 13, 2018, making medical parole available to prisoners under certain circumstances. LaGuer identified in his petition "an appropriate plan for his release," but noted that he could not, and could not be expected to, provide a medical parole plan at that time.

Pursuant to a letter dated June 25, 2018, the superintendent transmitted to the commissioner LaGuer's petition, as well as the superintendent's recommendation that the commissioner deny LaGuer's request for medical parole. In the letter, the

superintendent noted that LaGuer's petition included "documentation from multiple physicians regarding Mr. LaGuer's current medical diagnosis, letters of recommendation from various constituents in support of Mr. LaGuer's medical parole and a proposed housing plan." The superintendent also provided the commissioner with a 2017 prognosis note from LaGuer's DOC medical record; LaGuer's personalized program plan; a recent classification report; and a copy of a 2015 decision in which the Massachusetts Parole Board denied LaGuer parole.

On June 11, 2018, the commissioner sent a letter to the Worcester County district attorney (DA), informing him of LaGuer's petition for medical parole. The DA responded with a June 18, 2018, letter "strongly oppos[ing]" LaGuer's request.

On June 26, 2018, the commissioner issued his decision denying LaGuer's request for medical parole.² LaGuer then sought relief from the superior court pursuant to [G. L. c. 127, § 119A\(g\)](#). On October 1, 2018, this court held a status conference and made certain findings of fact as set forth in an order dated October 4, 2018. A further status conference was held on October 11, 2018 and the court allowed a motion for reconsideration on October 19, 2018. After a hearing was held on November 20, 2018, on the motions for judgment on the pleadings, the matter was taken under advisement.

*2 In his motion for judgment on the pleadings, LaGuer seeks relief based on three alleged errors. First, he asserts that the commissioner abused his discretion when he denied LaGuer medical parole. Second, LaGuer contends that the superintendent and commissioner "violated the letter and the spirit" of the medical parole statute by failing to provide a medical parole plan for LaGuer. Third, LaGuer asserts that the secretary violated [§ 119A\(h\)](#) by failing to promulgate regulations.

In their opposition and cross motion, the respondents contend that the commissioner's decision was not arbitrary or capricious and was supported by the record. They posit that they were not responsible for developing a medical parole plan for LaGuer and that the commissioner properly exercised his discretion in assessing LaGuer's risk of violence. The respondents assert that the court does not have the authority to grant LaGuer medical parole or to order the commissioner to do so. Finally, they contend that it would be inappropriate for the court to order the secretary to promulgate regulations under [§ 119A\(h\)](#).

One week, after the court held a hearing on the motion for judgment on the pleadings, LaGuer's counsel informed the court that it had just received an updated prognosis as to LaGuer's cancer. Although LaGuer's cancer appears to be in temporary remission, it is likely to reoccur. His predicted life expectancy is now estimated to be one year. I commend petitioner's counsel for bringing this matter to my attention in accordance with Rule of Professional Conduct 3.3(a) (Candor Toward the Tribunal). I find, however, that this change in circumstances warrants remand for consideration of this new information.³

DISCUSSION

I. Standard of Review

[General Laws c. 127, § 119A\(g\)](#) states that a "prisoner... aggrieved by a decision denying... medical parole made under this section may petition for relief pursuant to [section 4 of chapter 249](#),"⁴ Under certiorari review, the court examines the record and reviews the commissioner's decision to determine whether there was an abuse of discretion. See *Diatchenko v. District Attorney for the Suffolk Dist.*, 471 Mass. 12, 31 (2015) (applying an abuse of discretion standard in an action under [G. L. c. 249, § 4](#), as "the decision whether to grant parole to a particular... offender is a discretionary determination by the board"); *Doucette v. Massachusetts Parole Bd.*, 86 Mass. App. Ct. 531, 534 (2014) (stating that "[c]ertiorari review of the merits of the board's decision pursuant to [G. L. c. 249, § 4](#), is based on general principles of certiorari review and the administrative record"): "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 Comm'r of Cambridge*, 473 Mass. 716, 729 (2016) (internal quotation marks omitted). Because "the power to grant parole, being fundamentally related to the execution of a prisoner's sentence, lies exclusively within the province of the executive branch," the court's role is limited to ensuring that the commissioner

“constitutionally exercised” such power, *Diatchenko*, 471 Mass. at 28, 33. The court may not substitute its own opinion for that of the commissioner. See *Frawky*, 471 Mass. at 729; *Diatchenko*, 471 Mass. at 30.

II. Medical Parole Statute

*3 General Laws c. 127, § 119A established a “compassionate release program available to all prisoners.” *Sharris v. Commonwealth*, 480 Mass. 586, 601 n.10 (2018). It “allows a prisoner who suffers from a terminal illness or permanent incapacitation that is so debilitating that the prisoner does not pose a public safety risk to be released on medical parole.” *Id.* (internal quotation marks omitted). The process begins when a prisoner submits a written petition to the superintendent,⁵ See § 119A(c)(1). The superintendent must review the petition and “develop a recommendation” as to whether the prisoner should be released. *Id.* Within twenty-one days of receiving the petition, the superintendent is required to transmit the following items to the commissioner: (1) the petition; (2) the superintendent’s recommendation; (3) a medical parole plan;⁶ (4) a written diagnosis by a licensed physician; and (5) “an assessment of the risk for violence that the prisoner poses to society.” *Id.* Such items must be transmitted “[w]hether or not the superintendent recommends in favor of medical parole.” *Id.*

Once the commissioner receives the petition and recommendation, the commissioner must provide written notification to various individuals that the prisoner is being considered for medical parole.⁷ § 119A(c)(2). Those individuals may provide written statements or, if applicable, may request a hearing. *Id.*

Within forty-five days of receiving the petition, the commissioner “shall issue a written decision... accompanied by a statement of reasons for the ... decision.” § 119A(e). The prisoner “shall be released on medical parole” only if “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.* A “terminal illness” is defined in the statute 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.” § 119A(a). Any prisoner released is subject to terms and conditions imposed by the parole board. § 119A(e).⁸

*4 Finally, the medical parole statute states that “[t]he secretary [of the executive office of public safety and security] shall promulgate rules and regulations necessary for the enforcement and administration of this section.” § 119A(h).

III. Commissioner's Denial of Medical Parole

Section 119A(e) required the commissioner to grant LaGuer medical parole only if he determined that LaGuer was “terminally ill ... such that if [LaGuer were] released [he would] live and remain at liberty without violating the law and that the release [would] not be incompatible with the welfare of society.” The commissioner found this not to be the case, for various reasons. First, the commissioner noted LaGuer’s limited life expectancy, but concluded that LaGuer did not meet the statutory definition for being terminally ill, because LaGuer lived in the general inmate population, did not require a walker or other assistive device to walk short distances, received cancer treatment on an outpatient basis, and had “rebounded from treatments and procedures for his medical conditions.” Under these circumstances as supported by the record, it was not arbitrary or capricious for the commissioner to determine that LaGuer was not terminally ill, because LaGuer’s condition was not “so debilitating that [LaGuer did] not pose a public safety risk.” § 119A(a).

Second, the commissioner was “not convinced that Mr. LaGuer would live and remain at liberty without violating the law, or that his release would be compatible with the welfare of society,” because LaGuer continued to maintain his innocence as to the aggravated rape for which he was convicted, even though DNA evidence, obtained at his request, showed that his DNA profile, which occurs in less than one in 100 million people, matched DNA found in pooled sperm taken from the victim. The commissioner emphasized that LaGuer refused to engage in recommended sex offender treatment and received a number of

disciplinary reports while incarcerated, including violating an order not to contact a former prosecutor who is now a judge. The commissioner also questioned LaGuer's trustworthiness, because he falsified evidence by tampering with his saliva sample before trial and filed a false letter in support of a new trial motion.

The issue of whether the factors set forth above⁹ constitute sufficient reason to deny medical parole is now moot, as LaGuer's medical condition has improved. Accordingly, this matter must be remanded for revaluation in light of LaGuer's present medical condition.

IV. DOC's Failure to Provide Medical Parole Plan

I already determined in my findings and order dated October 4, 2018, that the superintendent violated the clear mandate found in § 119A(c)(1) that the superintendent “transmit... a medical parole plan.” The medical parole statute is intended to provide a terminally ill or permanently incapacitated prisoner with an expedited process for seeking medical parole. Sec § 119A(c)(1) (superintendent to transmit materials within twenty-one days of receiving petition); § 119A(e) (commissioner to issue written decision within forty-five days of receiving petition). As a result, for the reasons more fully set forth in the court's findings and order dated October 4, 2018, the court concludes that the DOC through the superintendent's actions and the commissioner's decision, made a substantial error of law adversely affecting LaGuer's material rights by failing to work with LaGuer to develop a medical parole plan. See *FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone*, 41 Mass. App. Ct. 681, 684 (1996) (under certiorari review, court may correct “substantial errors of law apparent on the record adversely affecting material rights”).

*5 The respondents argue, pursuant to the holding in *Diatchenko*, that the superintendent has no obligation to participate in the creation of the medical parole plan, particularly in circumstances such as this where she has recommended against parole.¹⁰ Respondents base this argument on what they assert is the inviolate and immutable legal principle that no court, under any circumstance, can order a prisoner paroled. See *Diatchenko*, 471 Mass. at 33. This argument goes too far, for several reasons.

First, as I have previously found, the use of the word shall throughout the statute clearly imposes a mandatory, non-delegatable duty on the superintendent and commissioner. *Commonwealth v. Cook*, 426 Mass. 174, 180-182 (1997)(general rule of construction is that the use of the word “shall” in a statute indicates a mandatory requirement.)

Second, statutes must be interpreted in a common sense way so as to effectuate their purpose. *Federal Nat'l Mtge. Assoc. v. Rego*, 474 Mass. 329, 333-334 (2016) (statutes are to be interpreted so as to render the legislation effective, in accordance with sound reason and common sense). The medical parole statute, by its express language, applies only to prisoners who have less than eighteen months to live and are significantly incapacitated. To craft a medical parole plan as set forth, in the statute, significant documentation regarding the prisoner's physical and mental condition will need to be obtained and assembled. Common sense dictates that a significantly incapacitated, incarcerated individual may have limited access to necessary materials and would have difficulty completing the task without input from and the assistance of the superintendent and/or the DOC. To give effect to the expedited nature of the medical parole statute's strict timelines, the superintendent and/or the DOC should work cooperatively with the prisoner to prepare a transmittal package for the commissioner that includes a complete and competent medical parole plan.

Third, the respondents' argument that the superintendent need not participate in the drafting of a medical parole plan would interfere with the court's ability to provide a complete and timely administrative review of the commissioner's decision to grant or deny medical parole, as required by G. L. c. 249, § 4. Such avoidance of the dictates and intent of the law is not permissible. This logic, in addition to the creation of the separate medical parole statute independent of existing parole practice, takes this matter outside the scope of the *Diatchenko* decision.

V. Secretary's Failure to Promulgate Regulations

The court will not order the secretary to promulgate rules and regulations as required by § 119A(h). The statute does not set any deadline by which the secretary must take such action and, in any event, less than a year has passed since the statute was enacted. These circumstances do not warrant the use of an extraordinary remedy like the mandamus relief LaGuer requests under G. L. c. 249, § 5. See *Montefusco v. Commonwealth*, 452 Mass. 1015, 1015 (2008) (“Relief in the nature of mandamus is extraordinary, and is granted in the discretion of the court where no other relief is available.”)

ORDER

For the foregoing reasons, it is hereby **ORDERED** that matter is **REMANDED** for reconsideration of LaGuer's petition for medical parole, in light of his recently improved medical condition and that:

- *6 1. Within twenty-one days of the date of this order, LaGuer, if he chooses, may submit a renewed petition for a medical parole plan (renewed petition), which reflects his current medical condition; and
- 2. Within twenty-one days of receipt of LaGuer's renewed petition, the superintendent shall comply with the requirements of § 119A(c)(1), including reviewing the renewed petition and developing a recommendation based on such petition. Among the items to be transmitted to the commissioner shall be a medical parole plan to be drafted through the participation and cooperation of LaGuer and the superintendent regardless of whether or not the superintendent recommends medical parole.

<<signature>>

J. Gavin Reardon, Jr.

Justice of the Superior Court

DATE: January 7, 2019

Footnotes

- 1 Collette Goguen, Superintendent of North Central Correctional Institute, and Daniel Bennett, Secretary of the Executive Office of Public Safety and Security
- 2 There appears to be some inconsistency as to the timeline here, as the commissioner appears to have received Laguer's petition from the superintendent on or after June 25, 2018, but was aware of the petition before that date, as he notified the DA of the petition approximately two weeks earlier in his June 11, 2018 letter to the DA. In addition, the court notes that the commissioner issued his decision on June 26, 2018, one day after the superintendent transmitted the petition and other materials to the commissioner.
- 3 The information regarding LaGuer's improved medical condition is contained in a November 27, 2018 letter to the court from LaGuer's counsel and accompanying medical records. I expressly include this letter and documentation as a basis of this decision, should either party seek appellate review.
- 4 *General Laws C. 249, § 4* provides that: “A civil action in the nature of certiorari to correct errors in proceedings which are not according to the course of the common law, which proceedings are not otherwise reviewable by motion or by appeal, may be brought in the supreme judicial or superior court.... Such action shall be commenced within sixty days next after the proceeding complained of. Where such an action is brought against a body or officer exercising judicial or quasi-judicial functions to prevent the body or officer from proceeding in favor of another party, or is brought with relation to proceedings already taken, such other party may be joined as a party defendant by the plaintiff or on motion of the defendant body or officer or by application to intervene. Such Other party may file a separate answer or adopt the pleadings of the body or officer. The court may at any time after the commencement of the action issue an injunction and order the record of the proceedings complained of brought before it. The court may enter judgment quashing or affirming such proceedings or such other judgment as justice may require.”

- 5 More specifically, a petition can be submitted by “the prisoner, the prisoner's attorney, the prisoner's next of kin, a medical provider
of the correctional facility or a member of the department's staff.” § 19A(c)(1).
- 6 A “medical parole plan” is defined as “a comprehensive written medical and psychosocial care plan specific to a prisoner and
including, but not limited to: (i) the proposed course of treatment; (ii) the proposed site for treatment and post-treatment care; (iii)
documentation that medical providers qualified to provide the medical services identified in the medical parole plan are prepared to
provide such services; and (iv) the financial program in place to cover the cost of the plan for the duration of the medical parole,
which shall include eligibility for enrollment in commercial insurance, Medicare or Medicaid or access to other adequate financial
resources for the duration of the medical parole.” § 119A(a).
- 7 Such individuals include “the district attorney for the jurisdiction where the offense resulting in the prisoner being committed to the
correctional facility occurred, the prisoner, the person who petitioned for medical parole, if not the prisoner and, if applicable under
chapter 258B, the victim or the victim's family.” § 119A(C)(2).
- 8 § 119A(f) provides, in relevant part, “A prisoner granted release under this section shall be under the jurisdiction, supervision and
control of the parole board, as if the prisoner had been paroled pursuant to section 130 of chapter 127. The parole board may revise,
alter or amend the terms and conditions of a medical parole at any time. If a parole officer receives credible information that a
prisoner has failed to comply with a condition of the prisoner's medical parole or upon discovery that the terminal illness or permanent
incapacitation has improved to the extent that the prisoner would no longer be eligible for medical parole under this section, the parole
officer shall immediately arrest the prisoner and bring the prisoner before the board for a hearing.”
- 9 The commissioner offered other reasons why LaGuer should not be released on medical parole, including because LaGuer had not
provided a suitable medical parole plan and because no one had addressed any safety or security issues arising from LaGuer residing
in a private home upon release.
- 10 I note, however, that the respondents have expressly stated orally and in writing that they did not deny the petition for any failure
or lack in the “so-called” medical parole plan.

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