

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
C. A. No. 2184cv1004 E

Edward Lykus

vs.

Department of Correction, Carol Mici, Commissioner of Correction and Nelson
Alves, Superintendent, MCI Norfolk

**DECISION AND ORDER ON PLAINTIFF'S EMERGENCY MOTION FOR ORDER
REQUIRING DEPARTMENT OF CORRECTION TO IMMEDIATELY RELEASE
MR. LYKUS ON MEDICAL PAROLE AND/OR TO MODIFY THE CONDITIONS
OF HIS RELEASE**

On October 28, 2021, the parties appeared for a hearing on Cross Motions for Judgment on the Pleadings regarding Defendants' denial of Edward Lykus's ("Lykus") Petition for Medical Parole. On November 6, 2021, before a decision by the court was issued, Plaintiff filed a motion for reconsideration with the Commissioner based on new medical evidence, and on November 9, 2021, filed an emergency motion with this court seeking a remand of the matter to the Commissioner and an order for expedited review (Paper #6.2) ("First Emergency Motion"). On November 10, 2021, the motion to remand was allowed, an expedited time frame set, and this matter was stayed pending the outcome of the Commissioner's reconsideration (Paper #7). On November 22, 2021 the Commissioner granted the petition for medical parole.

When Plaintiff had not been released as of November 29, 2021, Plaintiff filed the emergency motion at issue here (Paper #16) ("Fifth Emergency Motion") titled Plaintiff Edward Lykus's Emergency Motion For Order Requiring DOC To Immediately Release Mr. Lykus On Medical Parole And/Or To Modify The Conditions Of Release With Attached Affidavits. Defendants filed an Opposition (Paper #18). The parties appeared for hearing on December 2, 2021. Lykus has been represented by counsel at all stages of the medical parole petition.

BACKGROUND

Plaintiff Edward Lykus is serving a life sentence without the possibility of parole for a first-degree murder conviction. Mr. Lykus is also serving a concurrent life sentence with the possibility of parole for attempted extortion and has a from and after sentence of 10-15 years for attempted extortion.

Medical Status. Plaintiff suffers from many health issues, but the driving force behind his initial request for medical parole related to longstanding non-healing open sacrum wounds, which rendered him unable to walk independently and require specialized care. The Commissioner denied Lykus's original Petition based on her reading of evidence in the record that the sacrum wounds were healing and would not render Lykus permanently incapacitated if healed.

On October 17, 2021, Lykus was admitted to Leominster Hospital due to lower right extremity cellulitis and while under the care of doctors in the hospital was diagnosed with Acute Myeloid Leukemia (AML). On October 31, 2021, as a result of the AML, Lykus was transferred to Massachusetts General Hospital ("MGH") for further care, where he remains today. While at MGH, Plaintiff's sister received a call from a social worker or treating physician (the record is not clear) that she should be prepared to make end of life decisions for Lykus. This prompted the petition for reconsideration of Lykus's request for medical parole.

In evaluating the Petition for reconsideration, the Commissioner reviewed updated medical reports from Dr. Maria Angles, Medical Director for Wellpath, and reports from Dr. Phillip Ameron, an oncologist at MGH who is treating Lykus. On November 18, 2021, she conducted a hearing where testimony was provided by Lykus's counsel, John Dean, Superintendent of MCI-Shirley, Dr. Angles, the Bristol County DA's Office and the victim's family.

Dr. Maria Angles, Wellpath medical director at MCI-Shirley informed the Commissioner that in older adults, due to co-morbidities, the average survival for AML

is two months (Lykus was diagnosed on or about October 31, 2021). She reported that the only possibility for remission with AML is a stem cell transplant. Lykus is not eligible for the transplant because of his other medical conditions. Dr. Angles also reported that the sacrum wound remained open and was approximately 20 centimeters. She opined that Lykus's condition makes him highly susceptible to infection and symptomatic for pneumonia. Although Lykus is able to eat on his own, he is catharized for urine and stool and is bed bound. Dr. Angles also stated that Lykus is in a fragile state, could have a fatal event any day and any treatment would be for palliative care. She recommends that due to the acute conditions, a hospital setting would be appropriate for release.

Dr. Phillip Amerin, an oncologist at MGH who is treating Lykus, indicated Lykus is able to feed himself but is dependent on nursing staff for other activities of daily living. Lykus continues to have severe pain and high-grade fevers with very low white blood cell count. Dr. Amerin stated that "prognosis is grim" and a "future treatment plan would include transfer of Mr. Lykus to Lemuel Shattuck for continuation of care."

MCI-Shirley Superintendent John Dean noted that Lykus has sepsis and is not able to ambulate. Dean reported that the staff on Lykus's security detail said that Lykus can hold a conversation and feed himself but is unable to walk on his own. Dean concluded that Lykus's medical condition has so deteriorated that he does not pose a risk to public safety. He also reported that Lykus has not had any disciplinary actions since 2007.

Opposition to release came from the Bristol County DA's office and the victim's brothers.

Commissioner's Decision on Petition for Reconsideration of Medical Parole.

After hearing evidence from Plaintiff's counsel, his doctors, the superintendent, the Bristol County District Attorney's office and the brothers of the deceased victim, the

Commissioner found that Lykus is terminally ill as defined in G. L. c. 127, §119A(a) and in her professional judgment “is so debilitated as to no longer pose a public safety risk, is likely to live in accordance with the law upon release and his release is not incompatible with the welfare of society.” Accordingly, she concluded:

I am granting Mr. Lykus’s medical parole to a secure hospital/secure nursing facility. DOC Re-Entry staff are working to determine if Mr. Lykus’s placement at an iCare nursing facility would be an appropriate secure placement for him. Any such final placement would be subject to approval by the Parole Board.

See Commissioner’s Letter dated November 22, 2021 attached as Exhibit A to Paper #16.

Relief Requested. Plaintiff’s Fifth Emergency Motion seeks an order requiring the DOC “to immediately release Lykus on medical parole and/or to order the DOC to modify the conditions of release and allow Lykus to be medically paroled to MGH.” As grounds for this motion, Plaintiff states: (1) the Commissioner’s request that Lykus be placed in a “secure hospital/nursing facility” is arbitrary and capricious and impeding his prompt release; and (2) the Commissioner has violated the medical parole statute by not developing a medical parole plan for Mr. Lykus within twenty-one days of his second petition. In connection with this motion, Plaintiff submitted an affidavit from counsel and one from his sister Roberta Lovejoy. As both affidavits are dated November 29, 2021, they could not have been part of the administrative record which closed as of November 22, 2021 (the date of the Commissioner’s decision) and I have not considered them in the discussion below.

Defendant opposes the motion on the grounds that: (1) certiorari is not the appropriate avenue for plaintiff’s requested relief; and (2) the medical parole statute does not contemplate instantaneous release. For the reasons set out below, the motion is **ALLOWED IN PART** and **DENIED IN PART**.

DISCUSSION

A. Is This Certiorari Proceeding the Proper Forum for Deciding the Pending Motion

In ruling on Plaintiff's First Emergency Motion seeking an order expediting the review of his petition for reconsideration of medical parole, the court stayed this action pending the outcome of the Commissioner's decision. The court instructed the Commissioner to file any denial of Lykus's petition for reconsideration, along with any additional materials that were reviewed in making that decision as a supplement to the Administrative Record before this court. I further ordered that the stay would be automatically lifted if the Commissioner denied the reconsideration petition for medical parole and the court would consider the supplemental record in issuing its decision on the certiorari appeal currently before this court. See Court Order at Paper #7.

I did not consider that a dispute would arise if Lykus was granted medical parole and as a result did not order the administrative record to be supplemented as a matter of course. However, Plaintiff filed the Commissioner's November 22, 2021 letter granting medical parole with the court, which contains the basis for the Commissioner's decision. I treat Motion (Paper #16) and Opposition (Paper #18) as supplemental briefing on the Motions for Judgment on the Pleadings and review them in connection with the certiorari petition.

Defendants contend that certiorari review is improper here because Plaintiff is not challenging the "granting" of medical parole. But the statute is not to be read so narrowly as to only allow a petitioner to challenge the "granting" or "denial" of the petition. The medical parole statute provides that "a prisoner, sheriff or superintendent aggrieved by a decision denying or granting medical parole made under this section may petition for relief pursuant to section 4 of chapter 249." G.L. c. 127, §119A(g). The language in G.L. c. 127, §119A(g) allows the listed persons who are "aggrieved by a decision granting or denying" medical parole to petition for relief. Aggrieved means

“suffering from an infringement or denial of legal rights” (Merriam-Webster Dictionary). Here, Plaintiff does not challenge the fact that his petition was granted, but that the condition of the release to a secure facility is arbitrary and capricious, in contravention of the statute, and as a result has delayed his release on medical parole. The issues raised by Plaintiff are appropriately before the court.¹

B. Is the Commissioner’s Decision to Require Lykus to be Released to a “Secure Hospital/Nursing Facility” Arbitrary and Capricious

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. 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). This court may not substitute its own opinion for that of the Commissioner. Frawley, 473 Mass. at 729.

¹ The DOC argued at the hearing that Petitioner is required to file a new action in the nature of mandamus to challenge the timing of the release similar to the procedure followed in Malloy v. Dept. of Corrections, 487 Mass. 482 (2021). Information on the procedural posture of Malloy was not provided. But here, in this matter before the superior court, no judgment has entered, the matter remains open, and the statute allows review.

All of the medical reports indicate that Lykus is confined to bed and cannot walk. Two doctors report that Lykus is in a fragile state and could have a fatal event any day, his “future is grim” and the only continued care would be palliative care. The security personnel guarding Lykus at MGH report that he cannot ambulate on his own. He is dying. Although there may be times that a “secure” facility may be necessary for medical reasons (Alzheimer’s and dementia patients were examples provided by the DOC’s counsel at oral argument), there is no medically necessary reason for Lykus to be in a “secure” facility. And indeed, the Commissioner found that Lykus is so debilitated as to no longer pose a public safety risk, is likely to live in accordance with the law upon release and his release is not incompatible with the welfare of society. Considering his inability to get out of bed, the prognosis that his likelihood of death is imminent, and the Commissioner’s own finding that he is so debilitated that he poses no public safety risk, the Commissioner’s decision to send Lykus to a secure facility lacks any rational explanation that reasonable persons might support. Thus, the Commissioner’s decision to parole Lykus to a “secure hospital/secure nursing facility” is arbitrary and capricious.

As represented by the parties at oral argument, the requirement of a secure facility is one of the causes of delay in Mr. Lykus’s release. “Once a final favorable decision by the Commissioner has been issued allowing release on medical parole, the DOC must be proactive in working to release the prisoner expeditiously. . . reasonable short- term delays are acceptable where they are outside the control of the DOC and necessary to ensure appropriate care in an appropriate setting and compliance with the terms and conditions of parole.” Malloy v. Dept. of Correction, 487 Mass. 482, 500 (2021). But here, the arbitrary and capricious requirement of a secure facility is impeding Lykus’s release. This requirement is within the control of the DOC to change.

Although Lykus is currently being treated at MGH, the DOC has refused to allow his sisters to visit since the granting of medical parole and he remains physically restrained.² Release on medical parole is multifaceted. It allows prisoners to spend their final days receiving appropriate medical care in a compassionate setting. But also allows the dying prisoner to receive the support of his family and friends.

For terminally ill prisoners entitled to spend their final days in freedom, each day is critical. Delaying release deprives prisoners granted medical parole the opportunity to spend their remaining time with family and friends. *Id.* at 492.

Here, Lykus's sisters have been present and asked to spend time with him.

While the DOC correctly notes that certiorari review does not generally authorize judges to substitute their judgment about parole release decisions as that is a matter for the Parole Board, the medical parole statute is different in kind from regular parole. See *Adrey v. Department of Corr.*, 2020 Mass. Super. LEXIS 86, at *9 (Mass. Super. 2020) (Krupp, J.) (recognizing that medical parole "is not about remorse or the type of rehabilitation that might animate traditional parole" nor is it "limited to prisoners who have committed only certain types of offenses"); see also G. L. c. 127, § 130. If a prisoner satisfies the medical parole statute, the legislature has mandated that prisoner's release.

Neither the statute, nor the SJC decisions define "expeditious release" or "short term delay" by a number of days. Consequently, I infer that the court must look to the totality of the circumstances. Here, considering the medical evaluation that a fatal event could occur any day, time is of the essence. The certiorari statute provides that the court may "enter judgment quashing or affirming such proceedings *or such other judgment as justice may require.*" G. L. c. 249, § 4 (emphasis added). Lykus has a terminal illness and runs a risk of dying before the administrative niceties of a second remand

² Before the grant of medical parole by the Commissioner, Plaintiff filed a motion seeking an order allowing visitation (paper #8). The motion was denied (Paper #9). Plaintiff has appealed that order to the single justice.

can be effectuated. This matter has already been remanded once. Justice requires that medical parole release, which has been delayed by the arbitrary and capricious requirement of a secure facility, be expedited so that Lykus may spend his final days not only with appropriate medical care but with his sisters by his side.³

ORDER

For the reasons stated above, Lykus's Motion and Supplemental Motion for Judgment on the Pleadings seeking immediate release is **ALLOWED**. Lykus's Motion (As Amended by Paper #16) seeking an Order that the Lykus be released to MGH is **DENIED**. The DOC's Motion for Judgment on the Pleadings is **DENIED**. The matter is remanded to the Commissioner to transmit an amended recommendation to the Parole Board within 24 hours, deleting the requirement for a "secure" facility, and the Parole Board is hereby **ORDERED** to make arrangements for Lykus's immediate release.


Maureen Mulligan
Justice of the Superior Court

DATE: December 7, 2021

³ This court does not have the authority to Order the DOC or the Parole Board to release Lykus to a particular facility as sought by Petitioner.