

2021 WL 4571114 (Mass.Super.) (Trial Order)
Superior Court of Massachusetts.
Suffolk County

Martin MCCAULEY, Plaintiff,

v.

Nelson ALVES, Superintendent, MCI-Norfolk and Carol Mici,
Commissioner of the Massachusetts Department of Correction, Defendants.

No. 2184CV00615.

August 13, 2021.

**Memorandum of Decision and Order on Plaintiff's Expedited Motion for Judgment
on the Pleadings and Defendants' Cross Motion for Judgment on the Pleadings**

Maureen Mulligan, Judge.

*1 Martin McCauley filed this certiorari petition under [G.L. c. 249, § 4](#), for review of a decision by the Commissioner of the Department of Correction (“the Commissioner”) denying his petition for medical parole under G.L. c. 127, § 19A. This matter is before me on the parties' cross motions for judgment on the pleadings. For the reasons set out below, Plaintiff's Motion for Judgment on the Pleadings is **DENIED**, and Defendants' Motion for Judgment on the Pleadings is **ALLOWED**.

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. See [G.L. c. 127, § 119A](#); [Buckman v. Commissioner of Correction](#), 484 Mass. 14, 17 (2020). “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).

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. p. 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 is currently incarcerated. [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 is in favor of medical parole,” the superintendent shall send to the Commissioner the petition and a recommendation as to whether medical parole should be granted, along with a medical parole plan, a written diagnosis by a physician licensed to practice medicine, and an assessment of the risk for violence that the prisoner poses to society. *Id.*, citing G.L. c. 127, § 119A(c)(1). “The superintendent's assessment of the risk for violence that the prisoner poses to society ... shall utilize standard assessment tools that measure clinical prognosis, such as the LS/CMI assessment tool and/or COMPAS, as well as risk level for classification evaluation purposes.” 501 Code Mass. Regs. § 17.03(7)(d).

*2 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). Based upon the information provided: 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).

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).

FACTS IN RECORD¹

Mr. McCauley is serving a mandatory life sentence at a Massachusetts Correction Institution. He is serving his first incarceration. Following a jury trial, he was convicted of first-degree murder, two counts of armed robbery while masked and disguised, and unlawfully carrying a firearm. He was committed on March 23, 1982.

The record shows that Mr. McCauley first submitted a petition for Medical Parole on his own behalf on April 2, 2020. This was followed by a petition filed by his attorney on April 17, 2020. The Petition was denied. A June 10, 2020 request for reconsideration was also denied by the Commissioner. A second request for reconsideration was submitted on December 18, 2020. In connection with this second request for reconsideration, the Commissioner reviewed an updated medical assessment by Dr. Michael Moore, Wellpath Medical Director at MCI-Norfolk dated January 2, 2021 and a further updated assessment by Dr. Steven Descoteaux, Wellpath Medical Director dated February 1, 2021. On February 2, 2021, the Commissioner denied Mr. McCauley's December 18, 2020 motion for reconsideration and a petition for relief was filed with this court.

In the Commissioner's latest denial of Mr. McCauley's medical parole petition, she acknowledged that Dr. Moore and Dr. Descoteaux (both licensed physicians with the Department of Correction's medical vendor) determined Mr. McCauley to be permanently incapacitated.² She states on page two of her February 2021 decision that:

Dr. Moore opined that Mr. McCauley is considered permanently incapacitated from his lumbar stenosis for which neurological consultation offered no significant improvement considering his prior four lumbar surgeries. Progression of Mr. McCauley's neuropathy is anticipated to worsen with advancing age. Dr. Descoteaux further described that Mr. McCauley's incapacitation is characterized by permanent limitation and his inability to walk unassisted.³ Dr. Descoteaux states that Mr. McCauley has frequent episodes where his leg gives out without warning, resulting in a fall to the floor. Dr. Descoteaux notes that though Mr. McCauley's neuropathic pain has progressed he has been incapacitated for months to years.

*3 The medical records and reports submitted as part of the Administrative Record confirm the Commissioner's summary.⁴ In her denial letters, however, the Commissioner concluded that Mr. McCauley would pose a risk to public safety based on his history of institutional violence and extensive disciplinary issues, especially those involving drug transactions within the facility. The Commissioner summarizes Mr. McCauley's disciplinary history, which “consists of multiple infractions,” including

failure to provide urine, possession of controlled substances, insolence, being in possession of six packets of marijuana and a syringe while he was at the time involved in a drug transaction with another inmate who had eighteen glassine packets of heroin, testing positive for controlled substances, weapons, disruptive behavior, attempt to introduce controlled substance into the institution via a staff member, acting as a peek man while other inmates injected themselves with controlled substances, assault on staff, being out of place, being in possession of contraband and destruction to state property. His adjustment included returns to higher custody and disciplinary placements for multiple infractions during his initial years of incarceration.

(Commissioner's June 5, 2020 denial of Medical Parole Letter). Each of these infractions are described in more detail in the record and are stated to have occurred between 1987 to 2016. The record does not show any disciplinary infractions after 2016 and the Commissioner's multiple decisions do not address the absence of discipline between 2016 and her final decision issued on February 2, 2021. Some of the disciplinary actions highlighted by the Commissioner include:

- December 1987, received 1 ½ year placement in DSU for being in possession of marijuana, a syringe and being involved in a drug transaction with another inmate possessing heroin;
- August 10, 1990, received one-year DSU placement after found to be in possession of a weapon concealed inside his mattress;
- July 1992 transfer to another prison because of disruptive behavior;
- December 1992 found to have transferred funds to be utilized to introduce heroin into the facility and in June 1993 received a 13-month DDU placement for those events;
- September 2008 tested positive for alcohol and for buying alcohol from another inmate;
- October 2013 took 1/8 piece of Suboxone for which he received a disciplinary report;
- February 2016 damage to state property and possession of another inmates property;
- November 2016 taking a shower at an unauthorized time.

The record does not appear to include a risk assessment for routine violence using the tools proscribed in [501 Code Mass. Regs. § 17.03\(7\)\(d\)](#). The Commissioner acknowledged that the Suffolk County District Attorney's office submitted comments stating that it did not oppose Mr. McCauley's medical parole release.

[B]ased on their review of the materials filed in support of the petition and supplied to the Suffolk County District Attorney's Office 'and in particular based on the determination of Wellpath's Medical Parole Assessment that Mr. McCauley is significantly and permanently incapacitated, the Suffolk County District Attorney's Office does not oppose the granting of the defendant's medical parole petition under [G.L. c. 127, § 119A](#).' [The] non-opposition of the Suffolk County District Attorney is expressly based on the existence of a sufficiently detailed release plan that provides for the reintegration of the defendant and, most importantly the safety of the public.

*4 On February 2, 2021, the Commissioner denied Mr. McCauley's Request for Reconsideration of Denial of Medical Parole Petition on two grounds. First, relying on [501 Code Mass. Regs. § 17.14\(4\)](#), she found that there was not a "significant and material change in Mr. McCauley's medical condition which warrants reconsideration" of her earlier decisions.⁵ Second, the Commissioner found that despite the medical opinions that Mr. McCauley is permanently incapacitated, medical restrictions have been put in place that allow him to maintain daily living activities among the general inmate population. Further, Mr.

McCauley's history of institutional violence and disciplinary infractions make him unlikely to "live and remain at liberty without violating the law." The Commissioner concluded that his release would be "incompatible with the welfare of society."

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. 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.

There is ample evidence that Mr. McCauley is permanently incapacitated, and the Commissioner does not challenge this diagnosis. Two "licensed physicians" opined that Mr. McCauley is permanently incapacitated. There is no evidence that he is terminally ill. The regulations require a physician to determine terminal illness or permanent incapacitation, see 501 Code Mass. Regs. § 17.02 – Definition of Medical Parole, but the Commissioner determines whether 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, § 119(A)(e).

Here, the Commissioner determined that Mr. McCauley will not be able to live at "liberty without violating the law" and that his release will not be "compatible with the welfare of society" because of his prison disciplinary history, including numerous controlled substance violations, his ability to take care of his own daily needs in the general prison population, and his ability to ambulate with the accommodation of a rolling walker. This decision is reasonable in light of the facts and circumstances shown in the record and does not allow me to disturb the Commissioner's decision.

ORDER

For the reasons stated above, Mr. McCauley's Motion for Judgment on the Pleadings is **DENIED**. The Defendants' Motion for Judgment on the Pleadings is **ALLOWED**.

*5 <<signature>>

Maureen Mulligan

Justice of the Superior Court

Date: August 13, 2021

Footnotes

- 1 At the time of the hearing on this matter, Plaintiff raised the issue that the full Administrative Record had not been provided to the court. Defendants offered to submit the complete record and did so in two parts on Friday June 25 and Monday June 28. The court considers this record to be part of paper #5 on the docket and the submissions shall be docketed as #5.1 and 5.2.

- 2 In the Commissioner's two prior denials of Mr. McCauley's petitions for medical parole, the record shows and the Commissioner
acknowledged in her denials the physicians' finding that Mr. McCauley is permanently incapacitated.
- 3 The record shows that Mr. McCauley walks aided by a rolling walker.
- 4 The medical records also show that in addition to chronic pain syndrome from multiple failed back surgeries, spinal stenosis and
severe neuropathy, Mr. McCauley suffers from migraine headaches, benign prostatic hypertrophy, abdominal wall incisional hernias
and peripheral leg swelling. However, these additional medical issues are not part of the “permanently incapacitated” diagnosis.
- 5 I do not consider this reason for denial of Mr. McCauley's petition as the Supreme Judicial Court rejected this argument in [Harmon
v. Commissioner of Correction](#), 487 Mass. 470, 477 (2021) (the medical parole statute “does not permit the DOC to impose a rule
precluding consideration of most subsequent petitions and, in particular those submitted for any reason other than a serious health
decline”).

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