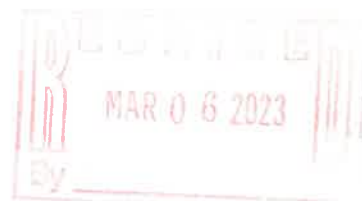


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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**SUPERIOR COURT
NO. 2284CV01392-C**

ABDER SALIM

v.

**CAROL MICI, AS COMMISSIONER OF
THE DEPARTMENT OF CORRECTION**

**MEMORANDUM OF DECISION AND ORDER ON
CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS**

Plaintiff Abder Salim ("Plaintiff" or "Salim") filed this action pursuant to G. L. c. 249, § 4, and challenges the decision of Defendant Carol Mici, the Commissioner of the Department of Correction (the "Commissioner"), denying Plaintiff's petition for medical parole. Presented for decision are the parties' Cross-Motions for Judgment on the Pleadings. After hearing and review, and for the reasons stated below, Plaintiff's Motion is **DENIED** and Defendant's Motion is **ALLOWED**.

BACKGROUND

I. The Medical Parole Statute

"The medical parole statute was enacted in 2018 to allow for the release of prisoners who are terminally ill or permanently incapacitated." Harmon v. Commissioner of Corr., 487 Mass. 470, 472 (2021). The Legislature enacted the statute in view of "the aging prison population, the rising cost of health care, and the fact that elderly and infirm prisoners are considered among the least likely to re-offend when released[.]" Buckman v. Commissioner of Corr., 484 Mass. 14, 21 (2020) (internal quotations omitted). "Although the focus was on cost savings, there was also a

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human element to the legislation.” Id. at 22. Legislators recognized that it was “the compassionate thing to do.” Id. at 22, quoting Testimony of Rep. Mary S. Keefe, Joint Committee on the Judiciary, Hearing on Sentencing and Correctional Services (June 19, 2017).

The process begins when a prisoner, or a person acting on his behalf, submits a petition for medical parole to the prison superintendent. Harmon, 487 Mass. at 472, citing G. L. c. 127, § 119A(c)(1). Within 21 days, the superintendent must review the petition and draft a recommendation as to the prisoner’s release. G. L. c. 127, § 119A(c)(1). The superintendent must then send the petition and recommendation to the Commissioner, “along with a medical parole plan, a medical diagnosis, and an assessment of the risk of violence by the prisoner if he or she were to be released to the community.” Harmon, 487 Mass. at 472, citing G. L. c. 127, § 119A(c)(1). The Commissioner then has 45 days to “issue a written decision” as to whether 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). “If these conditions are met, ‘the prisoner shall be released on medical parole,’ on terms and conditions imposed by the parole board.” Harmon, 487 Mass. at 472, quoting G. L. c. 127, § 119A(e).

II. Factual Background

A. Plaintiff’s Criminal Offense and Incarceration

Salim is a 74-year-old man currently serving a life sentence without the possibility of parole. Salim was convicted of the first degree murder of his wife (“the Victim”), who was then 24 years old and five months pregnant. (A.R. 79, 94-95.) Salim and the Victim had two other children, ages 4 and 5, at the time. (A.R. 79.) The evidence presented at trial showed that, on July 28, 1978, Salim stabbed the Victim 45 times with an ice pick, awl or similar weapon. (A.R.

79, 81.) The Victim also suffered blunt force injuries to her head and neck consistent with human blows and/or manual strangulation. (A.R. 81.) Evidence further showed that, in the months before the murder, Salim physically abused and threatened to kill his wife; attempted to purchase a firearm to kill her; persuaded a friend to purchase an ice pick for him; borrowed an awl from another party; and repeatedly offered an employee \$2,000 to kill the Victim. (See A.R. 81-82, citing Salim v. Commonwealth, 399 Mass. 227, 230-32 (1987).) At trial, Salim maintained that the Victim's brother was in fact the perpetrator; and, in more recent court filings, Salim alleged that his deceased father killed the Victim. (A.R. 82.)

Salim has been continuously incarcerated since his murder conviction on June 1, 1981. (A.R. 96.) He was committed to various correctional facilities before being transferred to Old Colony Correctional Center ("OCCC") in Bridgewater, Massachusetts in 2003, where he currently resides. (A.R. 96.) Salim received 34 disciplinary reports between 1981 and 2003, including, *inter alia*, threatening staff twice; possessing contraband on ten occasions (such contraband including a razor blade, iron in his cell, a state-owned hot plate, and cancelled checks and social security numbers of various persons); lying to staff; bribing staff; sending a letter to a former staff member; and threatening a cell-mate.

Since his transfer to OCCC, Salim has received nine additional disciplinary reports. These documented infractions were for:

- a) Violating department rules (2003);
- b) Being out of place (2004 and 2009);
- c) Violating department rules, medication outside of health services unit (2009);
- d) Use of obscene, abusive, or insolent language or gestures (2010);
- e) Possession or manufacture of an unauthorized tool, a can opener and potential handcuff key (2013);
- f) Possession or manufacture of a sharpened instrument, a 4-inch piece of mirror (2014);
- g) Lying to staff member (2015); and
- h) Failure to comply with standing count procedures (2015).

B. Plaintiff's Condition and Petition for Medical Parole

Salim petitioned for medical parole to the Superintendent of OCCC, Stephen Kennedy, on February 14, 2022.¹

On February 16, 2022, Wellpath² providers John Straus, M.D. and Nurse Practitioner Ihuoma Arikibe provided a Medical Parole Assessment of Salim's condition. In their assessment, these providers noted that Salim's medical history is significant for B-12 deficiency with mild anemia, dyslipidemia, gastroesophageal reflux disease, glaucoma, hearing impairment, hypertension, a seizure disorder, and coronary artery disease. (A.R. 107.) These conditions require Salim to use hearing aids, ambulate with a cane, and take at least nine medications. (A.R. 107.) Salim also suffered a myocardial infarction (heart attack) in 2009, and his last known seizure occurred on May 21, 2021. (A.R. 107.) Dr. Straus and Nurse Arikibe noted that Salim was alert and oriented upon examination, and is able to perform normal activities of daily living. (A.R. 107.) They thus concluded that, notwithstanding his chronic illnesses, Salim is not permanently incapacitated, and further found that "there is no concrete evidence that Salim had less than 18 months to live." (A.R. 107.)

Nicole Mushero, M.D., Ph.D., a physician in the Geriatrics Section of Internal Medicine of Boston Medical Center, examined Salim on March 26, 2022. (A.R. 69.) Dr. Mushero diagnosed Salim with dementia based on an in-person examination, a review of his medical history, and two neurocognitive evaluations. (A.R. 70.) Dr. Mushero specifically observed that Salim exhibited memory loss, including getting lost in OCCC despite residing there since 2003,

¹ Salim had previously petitioned for medical parole in January of 2021, which the Commissioner denied on March 4, 2021.

² Wellpath is the Department of Correction's contracted medical provider.

forgetting the names of prisoners who assist him every day, and being unable relay his own medical history. (A.R. 70.) Salim also exhibited “a severe difficulty understanding directions or following tasks.” (A.R. 71.) Dr. Mushero opined that Salim “likely ... has a mixed Alzheimer’s and Vascular dementia[,]” although further neuropsychiatric testing would be needed to fully elucidate the type of dementia. (A.R. 71.) Nonetheless, Dr. Mushero concluded that Salim’s neurological condition will worsen with time, and that he will become more confused, forgetful and physically weaker as the condition progresses. (A.R. 71.)

Dr. Mushero further reported that while Salim’s cardiovascular disease is appropriately managed with medication, he continues to suffer from unstable angina (chest pain) which “severely limits his ability for any type of physical activity.” (A.R. 70.) She also opined that Salim has arthritis affecting multiple joints, which limits his ability to dress and groom himself, and to grip items tightly. (A.R. 70.) Dr. Mushero noted Salim is unable to walk more than a few steps due to imbalance and pain, and uses walls and furniture, as well as a cane, to balance himself. (A.R. 70.) Lastly, Dr. Mushero recorded that Salim has open-angle glaucoma, an irreversible and progressive condition which causes him to have only light perception in his right eye and diminished vision in his left eye. (A.R. 71.) All told, Dr. Mushero found that Salim has “multiple disabling conditions” that “severely limit [his] physical functioning,” and concluded that his dementia alone “is [a] disabling, irreversible disease which renders [him] permanently incapacitated.” (A.R. 72.)

On March 7, 2022, Superintendent Kennedy recommended to the Commissioner that she deny Salim’s petition for medical parole. (A.R. 94-97.) Accompanying his recommendation, Superintendent Kennedy provided Salim’s Wellpath Medical Parole Assessment; his medical parole plan; a 2015 drug screen; a September, 2021 Classification Report; and a 2010 COMPAS

risk assessment. (A.R. 98-127.) The medical parole plan reflected that, if released, Salim planned to reside with his brother, who would arrange for any in-home care. (A.R. 94-95.) Salim also reported having three other brothers and several extended family members willing to support him. (A.R. 95.) OCCC staff members attempted to make contact with the brother with whom Salim intended to reside, but were unable to do so. (A.R. 57.)

On March 16, 2022, the Essex County District Attorney's Office registered its opposition to Salim's medical parole petition, citing the brutal facts of his underlying offense, his refusal to accept responsibility for same, his unwillingness to engage in programming to address the causative factors of his crime (*e.g.*, domestic violence counseling), his history of institutional misbehavior, and his lack of community support. (A.R. 76-85.) In addition, the District Attorney asserted that Salim's condition had not significantly declined since his first petition was rejected in 2021. (A.R. 78.)³

D. The Commissioner's Decision

On April 21, 2022, the Commissioner denied Salim's petition for medical parole, concluding that Salim is not terminally ill or permanently incapacitated, that he was unlikely to live and remain at liberty without violating the law, and that his release would be incompatible with the welfare of society. (A.R. 55-56.) As to the risk to public safety, the Commissioner noted that Salim was serving a sentence for first degree murder, a conviction for which he continued to deny responsibility and continued to challenge via federal habeas petition. (A.R. 58.) The Commissioner further reasoned that, while Salim's disciplinary history during incarceration is "relatively remote," his recent offenses disturbingly included possession of a can opener and a

³ Pursuant to G.L. c. 127, § 119A(d)(2), the Victim's brother and last surviving sibling also submitted a two-sentence letter to Plaintiff's counsel, dated March 30, 2022. (A.R. 64.) The Victim's brother only speaks Arabic and his letter, translated, stated that he did not oppose Plaintiff's release and provided no further comment or explanation. (A.R. 62, 64.)

sharpened piece of mirror. (A.R. 58.) The Commissioner acknowledged Dr. Mushero's opinion that Salim is permanently incapacitated and that several conditions impair his ability to perform various activities of daily life. Nevertheless, the Commissioner stated that she must ultimately determine whether Salim meets the statutory criteria for incapacitation, which includes balancing Dr. Mushero's opinion with the Wellpath evaluation noting that Salim is able to carry out daily activities. (A.R. 56, 59.) Based on the totality of information available, the Commissioner concluded that there was insufficient evidence that Salim is suffering from a terminal illness or permanent incapacitation so debilitating that he does not pose a risk to public safety. (A.R. 59.)

On the same day that the Commissioner issued her decision, and based on Dr. Mushero's report, Wellpath's Associate Regional Medical Director, Dr. Elana Sullivan, wrote to the Commissioner and recommended that Salim undergo further neurological evaluation. (A.R. 60.)

On July 28, 2022, Dr. Sullivan reported that, following Salim's 2021 seizure, a computed tomography (CT) scan of his brain revealed a right frontal lesion consistent with a calcified meningioma. (A.R. 32.) Additionally, although a neurological evaluation was recommended, Salim has declined to submit to such evaluation and further follow-up or imaging since 2021. (A.R. 32.)⁴ Dr. Sullivan further noted that Salim had an episode of chest pain in July, 2022, which resolved after treatment with nitroglycerin, and a contemporaneous EKG was normal. (A.R. 32.)

On July 15, 2022, Salim requested that the Commissioner reconsider her decision to deny him medical parole.⁵ On August 29, 2022, the Commissioner denied Salim's request. (A.R. 1-4.) Concerning Salim's possible dementia, the Commissioner noted that Salim himself has refused

⁴ Plaintiff argued to the Commissioner that such a neurosurgical evaluation is not the same as a neurocognitive assessment of his impairment.

⁵ On August 11, 2022, the Essex County District Attorney's Office again opposed Plaintiff's renewed request.

additional testing. (A.R. 3.) Nonetheless, the Commissioner specifically considered Salim's cognitive condition, as detailed in his most recent medical records, in relation to its impact on his functional abilities. (A.R. 3.) The Commissioner also rejected Plaintiff's argument that she had failed to obtain a proper risk assessment or medical parole plan. The Commissioner reiterated that Superintendent Kennedy's recommendation contained current information concerning Salim's risk, including the 2021 Classification Report. (A.R. 3.) Lastly, the Commissioner noted that OCCC staff had confirmed with Salim's brother that Salim could reside with him if released. (A.R. 4.) However, finding "no substantive change in [] Salim's condition", the Commissioner reaffirmed her finding that Salim did not qualify for medical parole. (A.R. 4.)

DISCUSSION

I. Standard of Review

The medical parole statute provides that a prisoner aggrieved by a decision denying medical parole may petition for certiorari relief pursuant to G. L. c. 249, § 4 and G. L. c. 127, § 119A(g). On certiorari review, the Superior Court's role is to "correct substantial errors of law apparent on the record adversely affecting material rights." Doucette v. Massachusetts Parole Bd., 86 Mass. App. Ct. 531, 540-41 (2014), quoting Firearms Records Bur. v. Simkin, 466 Mass. 168, 180 (2013). The Court may rectify only those errors "which have resulted in manifest injustice to the plaintiff or which have adversely affected the real interests of the general public." Chardin v. Police Comm'r of Boston, 465 Mass. 314, 321 n.15 (2013) (quotations omitted). The Court reviews the Commissioner's decision for abuse of discretion, applying an arbitrary or capricious standard. Carver v. Mici, No. 2177CV00105, Essex County, 2021 WL 6275026, at *2 (Mass. Super. Dec. 30, 2021) (Karp, J.), citing Doucette, 86 Mass. App. Ct. 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 Comm’r of Cambridge, 473 Mass. 716, 729 (2016), quoting Doe v. Superintendent of Schs. of Stoughton, 437 Mass. 1, 6 (2002).

II. Analysis

After hearing and review of the administrative record, the Court concludes that the Commissioner did not commit any substantial error of law apparent on the record, and her decision was neither arbitrary or capricious nor an abuse of discretion.

The medical parole statute required the Commissioner to determine whether (1) Plaintiff is “terminally ill” or “permanently incapacitated”; (2) such that if released he “will live and remain at liberty without violating the law”; and (3) that his release will be compatible with societal welfare. G. L. c. 127, § 119A(e). Plaintiff does not argue that he is “terminally ill,” which requires a condition likely to cause death in not more than 18 months. See 501 Code Mass. Regs. § 17.02. Rather, Plaintiff insists that he is permanently incapacitated. A “permanent incapacitation” is defined as a “physical or cognitive incapacitation that appears irreversible, as determined by a licensed physician, that is so debilitating that the prisoner *does not pose a public safety risk*.” 501 Code Mass. Regs. § 17.02 (emphasis added). Because “permanent incapacitation” requires the Commissioner to determine a prisoner’s “public safety risk,” the three elements of the Commissioner’s analysis – permanent incapacitation, the ability to remain at liberty without violating the law, and societal welfare – bear a “close interrelationship.” Buckman, 484 Mass. at 19 n.9. See also Mahdi v. Department of Corr., No. 1982CV01064, Norfolk County, slip op. at 11 (Mass. Super. Ct. Mar. 31, 2020) (Connors, J.) (noting the elements are “formally separate”, but “certainly conceptually intertwined[.]”).⁶ Indeed, all three

⁶ Likewise, a condition is “debilitating” within the meaning of a “permanent incapacitation” if it is:

concern the prisoner's likelihood of recidivism and dangerousness to society, and thus often rest on the same supporting evidence -- including the prisoner's criminal history and behavior while incarcerated. Mahdi, No. 1982CV01064, slip op. at 11; Carver, 2021 WL 6275026, at *6 n.11.

Here, the record indicates, and the Commissioner acknowledged, that Salim has significant medical conditions, most notably arthritis, visual and hearing impairments, and possible dementia. Nonetheless, the Commissioner reasonably concluded, based on Salim's most recent medical evaluations and criminal and disciplinary history, that his conditions were not so debilitating as to "minimize [his] ability to commit a crime" and prevent him from posing a "public safety risk." See 501 Code Mass. Regs. § 17.02. The Commissioner supportably determined that Salim remains able to commit serious criminal offenses. Notably, there was evidence that, prior to committing the savage killing of his wife, Salim sought to purchase a firearm, enlisted others to obtain the likely murder weapon, and repeatedly solicited an employee to engage in a murder for hire. There was also evidence that Salim had an extensive and troubling history of disciplinary infractions; and, while the most recent offenses were "relatively remote," they involved the possession of items that could be used as lethal weapons – viz., a can opener and sharpened piece of glass. (A.R. 58.) Lastly, there was evidence that Salim remained unrepentant and refused to attend domestic abuse treatment, factors obviously heightening the risk of danger he would pose on release.

The Commissioner was clearly entitled to consider Salim's heinous, pre-meditated crime, his refusal to accept either backward-looking responsibility or forward-focused treatment, and

"A physical or cognitive condition that appears irreversible, . . . 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 (emphasis added).

his substantial history of prison discipline, in determining that Salim remains a danger to the public. See Carver, 2021 WL 6275026, at *6 (the commissioner appropriately considered the petitioner's behavior while incarcerated and "the facts of the horrific crime for which [he] is imprisoned when determining that he is certainly still capable of committing a similar crime"). Thus, there is more than adequate support for the Commissioner's conclusion that Salim, despite his present ailments and conditions, poses a risk to public safety, is unlikely to remain at liberty without violating the law, and that his release would be incompatible with societal welfare. Such conclusion appears particularly reasonable, given Salim's history of threats and his propensity to seek out weapons and solicit others to commit acts of violence.

Plaintiff's Motion presents four substantive arguments, none of which is persuasive. First, Plaintiff argues that the Commissioner erred by disregarding Dr. Mushero's opinion, and by considering only Salim's physical condition rather than his cognitive impairment. (Pl.'s Mot. at pp. 10-12.) This argument is both factually and legally incorrect. The Commissioner plainly considered Dr. Mushero's report, and her findings of possible dementia, alongside the evaluation of Dr. Straus and Nurse Arikibe. However, the Commissioner gave greater weight to the report from the Wellpath providers, who had more regular contact with Salim and who determined that he was alert, oriented and fully able to perform his daily life activities. (A.R. 3.)⁷ The Commissioner did not act arbitrarily or capriciously in placing greater reliance upon the opinion of medical providers who had greater familiarity with Salim.⁸

⁷ Plaintiff does not make any showing that Salim's possible dementia reduces his risk of recidivism. Dr. Mushero reported that Salim exhibits "a severe difficulty understanding directions or following tasks." (A.R. 71.) This finding, however, would appear to heighten rather than allay concerns about Salim's ability to remain at liberty without violating the law.

⁸ Nor did she act arbitrarily or capriciously by noting in her reconsideration decision the absence of additional testing as to the origin, effects or prognosis of Salim's cognitive condition. This is attributable to Salim's decision to decline further evaluation. The statute does not require or even empower the Commissioner to compel Salim to undergo medical screening. See generally G.L. c. 127, § 119A.

Second, Plaintiff argues that the Commissioner disregarded substantial evidence of his physical incapacitation. This argument is equally unavailing. The Commissioner acknowledged both Salim's significant medical history and the conflicting medical evaluations regarding his ability to perform daily activities. More to the point, though, the fact that Salim has vision and hearing impairments, a difficulty ambulating, and requires assistance with certain activities, does *not* compel a conclusion that he no longer poses a risk of violence. Based on Salim's history of soliciting the means and assistance needed to commit acts of violence, his lack of remorse for the crime he committed, and his numerous disciplinary infractions displaying an undeterred danger to officers and fellow inmates, the Commissioner supportably concluded that Salim remains a public safety risk despite his present condition.

Third, Plaintiff argues that the Commissioner relied on an insufficient risk assessment because (1) the most recent COMPAS evaluation was from 2010 and was incomplete; and (2) the Commissioner relied exclusively upon Salim's conviction and remote disciplinary history. The Court disagrees. The Commissioner specifically acknowledged the 2010 COMPAS evaluation, and conceded that Salim's most recent disciplinary infraction was "relatively remote." (A.R. 58.) Nonetheless, the Commissioner found that Superintendent Kennedy's assessment and accompanying 2021 Classification Report provided up-to-date information on Salim's disciplinary history and participation in programming, and thereby addressed the deficiencies in the 2010 evaluation. (A.R. 58.) See Abercrombie v. Commissioner of Corr., No. 21-P-6822022, WL 3640325, at *3 n.7 (Mass. App. Ct. Aug. 24, 2022) (Rule 23.0) (noting that an arguably "stale" 2014 COMPAS risk assessment was not fatal, "where the commissioner's decision was supported by the more recent classification report and the superintendent's

independent assessment”).⁹ In addition, the Commissioner did not merely rely upon the fact of Salim’s conviction or disciplinary history; she assessed these particular facts in the context of Salim’s current physical condition.¹⁰ The Commissioner considered the specific facts underlying these offenses, as well as Salim’s refusal to acknowledge fault or engage in educational programming related to his crime, in evaluating his present risk. (A.R. 56-59.) As noted, the nature of Salim’s crime, his aberrant conduct while incarcerated, and his present condition (which may inhibit his ability to understand and adhere to rules and directions), collectively provide more than sufficient support for the Commissioner’s decision to deny medical parole.

Lastly, Plaintiff argues that the Commissioner failed to obtain and consider an adequate medical parole plan. As noted, OCCC staff confirmed that, if released, Plaintiff would live with his brother. The Commissioner considered this fact in denying Plaintiff’s request for reconsideration. Plaintiff has not raised any argument as to why this plan, or any other placement, warrants vacating the Commissioner’s decision. To the contrary, the Commissioner could reasonably conclude that, based on Salim’s documented danger to immediate family members, cell-mates and others, such a placement would not mitigate the risk to public safety, ensure that Salim will obey the law, or render his release compatible with societal welfare.

CONCLUSION AND ORDER

For all the reasons stated above, Plaintiff’s Motion for Judgment on the Pleadings is **DENIED**. Defendant’s Motion for Judgment on the Pleadings is **ALLOWED**. Judgment shall

⁹ The case at bar is thus distinguishable from Rodriguez v. Department of Corr., relied upon by the Plaintiff in a letter of supplemental authority, a case in which “no standardized risk assessment was presented to [the superintendent or] the commissioner.” No. 22-P-256, 2022 WL 17587566, at *2 (Mass. App. Ct. Dec. 13, 2022).

¹⁰ Contrary to Plaintiff’s argument, 501 Code Mass. Regs. § 17.04(3) does not preclude consideration of his conviction and disciplinary history. It merely lists relevant medical factors. A prisoner’s conduct, including the facts surrounding his offense, are inherently relevant to the Commissioner’s assessment of the risk he poses. See Mahdi, No. 1982CV01064, slip op. at 11; Carver, 2021 WL 6275026, at *6.

enter for the Defendant.

SO ORDERED.

A handwritten signature in black ink, reading "Robert B. Gordon", written over a horizontal line.

Robert B. Gordon
Justice of the Superior Court

Dated: February 28, 2023