

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2384CV01352

JOANN SLIECH-BRODEUR,
Plaintiff

Vs.

CAROL MICI as Commissioner of the Massachusetts Department of Correction,
Defendant

MEMORANDUM OF DECISION AND ORDER OF PLAINTIFF'S MOTION FOR
JUDGMENT ON THE PLEADINGS AND OF DEFENDANT'S MOTION FOR CROSS-
MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff Joanne Sliech-Brodeur ("Plaintiff" or "JSB") is an inmate in the custody of the Massachusetts Department of Correction ("DOC") who is housed at the Massachusetts Correctional Institution ("MCI") at Framingham. Defendant Carol Mici ("Commissioner") denied Plaintiff's December 2, 2022, petition requesting medical parole. Plaintiff then sought reconsideration on March 2, 2023, to which Commissioner denied. Pursuant to Superior Court Standing Order 1-96 seeking judicial review and certiorari action under G.L.c.249, §4, Plaintiff brings this motion for judgment on the pleadings under Mass.R.Civ.P.12(c). For the following reasons, the Court **DENIES** Plaintiff's Motion for Judgment on the Pleadings and **ALLOWS** Defendant's Cross-Motion for Judgment on the Pleadings.

Procedural and Factual Background

JSB is a 78-year-old woman serving a life sentence, with the possibility of parole for second degree murder. On July 28, 2004, Springfield police arrived at the Brodeur home where they found the victim, Mr. Brodeur, killed with 34 stab wounds. JSB, who was at the scene, was taken to the hospital after she had ingested 25 Klonopin pills. The police found a handwritten

letter written by JSB stating, "God forgive me" and "now Joe can't hurt me anymore." When asked how and what the victim threatened her with, JSB stated that he threatened to divorce her. Of the 34 stab wounds, there were three significant wounds to his chest area through his lung and heart and one wound to his neck which cut multiple vital blood vessels. The victim did not have any defensive wounds and the medical examiner opined that he was likely stabbed to death while he was asleep. JSB has been in custody since 2004.

On December 2, 2022, JSB submitted a medical parole petition, with Dr. William Weber's declaration that JSB had cognitive incapacitation. Dr. Weber, a license physician practicing at the Beth Israel Deaconess Medical Center, interviewed JSB on November 10, 2022, and opined that structured cognitive testing, qualitative interview and medical records revealed that she likely has dementia with significant memory issues which impact her daily life. The Superintendent of MCI Framingham Kristie Marchand ("Superintendent") submitted an opposition for granting medical parole to JSB, supplementing the opposition with a licensed physician Dr. Joyce Rosenfeld dated on December 12, 2022. Dr. Rosenfeld wrote that JSB has a history of dementia with increasing concerns for her memory. "It was reported that the patient is unable to dress herself and has increasing difficulties with activities of daily living... In those same five months, there seems to have been a decline in her abilities to perform activities of daily living in terms of needing to be heavily prompted, as well as memory issues." (Administrative Record Page 320, "AR" 320). Superintendent also submitted JSB's classification report and "Pathway to Change" Risk assessment. Dr. Rosenfeld also submitted an addendum dated December 30, 2022, where she stated that her "mental status declined and she was too weak to independently rise from the commode[.]" (AR 285) and that she was currently

in the emergency department undergoing an evaluation for possible congestive heart failure or another cardiopulmonary malady.

Plaintiff supplemented her original petition with medical records from December 20, 2022, and January 2023 referring to JSB's diagnosis by Dr. Susan Mascoop with "[p]robable Major Neurocognitive Disorder due to Alzheimer's Disease [...] that has progressed since 2021 and that is occurring in the context of pre-existing anxiety disorder and PTSD." (AR 283). It was unclear whether or to what extent her recent Covid diagnosis may have exacerbated her significant, preexisting cognitive impairments. There was no evidence of a confusional disorder or thought disorder. Dr. Mascoop's suggestions included the following: "Staff should be aware that she has difficulty with memory and expressive language... she did best when spoken to at a slightly slowed rate, using short sentences and when information was presented in a simplified, organized manner... Structure, routine and consistency are recommended to reduce her need to cope with change and reduce her need to rely on memory and executive functions..." (AR 283). JSB was permanently housed in the Health Services Unit ("HSU") to assist her with daily living activities.

On February 6, 2023, Commissioner denied JSB's medical parole petition from December 2022. Commissioner did not find that JSB is either "permanently incapacitate" or "terminally ill" and did not find that "if released, [JSB] would live and remain at liberty without violating the law or that her release would be compatible with the welfare of society." (AR 257-258). Commissioner found that prior to her assignment to HSU, she was able to perform her activities of daily living with the assistance of her walker in the Laurel Unit. Commissioner also took into consideration the opposition from Hampden County District Attorney's Office as well as one of the victims. The First Assistant Jennifer Fitzgerald argued that JSB's crimes were so

heinous and violent in nature that despite her current medical condition, she still poses a significant public safety risk. Commissioner did not credit Dr. Weber's assessment that JSB is unable to function without significant support with her activities of daily living, as he did not speak with anyone who assisted her. She did not credit Dr. Weber as he did not have qualification or certification in diagnosis or treatment of cognitive impairments. Commissioner did not believe JSB would remain at liberty without violating the law and did not believe that her release would be compatible with the welfare of society. Commissioner did find it appropriate to revisit this case several weeks from this decision, once JSB has recovered from COVID and began any suggested medication trial to improve her cognitive functioning.

On March 2, 2023, about a month after the denial of medical parole, JSB requested a reconsideration. She provided a declaration from Dr. Nicole Mushero who opined that JSB carries a diagnosis of Alzheimer's Dementia since March 2021 and that JSB's need for close monitoring of weight and meal intake from her dementia further demonstrates at least a moderate level of disease. Dr. Mushero also found that JSB requires significant assistance or oversight of daily tasks like bathing, dressing, and eating and that she must be supervised 24 hours. Dr. Mushero also agreed with other physicians who believed that none of the current medication improve cognition in treatment for Alzheimer's disease and would not improve her current mental state.

On March 8, 2023, Superintendent opposed a reconsideration by submitting a medical assessment by Dr. Joyce Rosenfeld and a classification report from June 2022. No new risk assessment was submitted. On April 12, 2023, Commissioner held a hearing for JSB's request for reconsideration where JSB's counsel, MCI Framingham Deputy Lynn Lizotte, Dr. Johvonne Claybourne, three registered victims, and ADA Jennifer Fitzgerald testified. Deputy Lizotte

testified that JSB has been housed in HSU since December 7, 2022, and that JSB expresses her interest in going back to the general population. As recently as March 2023, DOC implemented a new program schedule for her with a structured activity in HSU or in the Laurel day room. Mental health reports stated that she engages in the activities and expresses her appreciation for initiating these activities. She is observed socializing with others and moving about the Laurel day room. Deputy Lizotte stated that JSB “does have some confusion, and she does have bouts of clarity also.” (AR 18). “Officers in HSU will prompt her on occasion to have her laundry cleaned to get things laundered. She moves about in her walker between units, sometimes not waiting for her peer supporter or her pusher, and she does socialize with the inmates in Laurel and does want to get out of her cell often...” (AR 18).

Dr. Claybourne found JSB as very anxious and confused. Correction officers frequently found rotting food in her cell as she hoards food and forgets to eat it. She needs prompting to shower, brush her teeth and laundry, although staff are using a chart to help her keep track of her tasks. The staff does have to use a lot of verbal cues and they escort her all the time because she could get lost. She found that there is “dementia and [] worsening cognitive impairment.” (AR 21). Commissioner asked Dr. Claybourne if there was any medication which JSB could benefit her cognitive functioning, to which she stated that there were none.

Two days after the hearing, on April 14, 2023, Commissioner denied JSB’s request for reconsideration of her medical parole petition denial. Commissioner did not find that JSB suffered from a permanent incapacitation that is “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.” She found that JSB is still able to function independently at times and with prompting, and that there is no evidence or indication that she is

incapable of committing another crime or similar crime involving harming another person or living lawfully if released on medical parole.

DISCUSSION

A. The Legal Standard

An action in the nature of certiorari is a means “to correct errors in proceedings ... not otherwise reviewable by motion or by appeal.” G. L. c. 249, § 4. “Certiorari review of an administrative decision requires ‘(1) a judicial or quasi-judicial proceeding, (2) from which there is no other reasonably adequate remedy, and (3) a substantial injury or injustice arising from the proceeding under review.’” Seales v. Boston Hous. Auth., 88 Mass. App. Ct. 643, 648-649 (2015), quoting Figgs v. Boston Hous. Auth., 469 Mass. 354, 361 (2014). Both parties agree that the sole remedy for an inmate aggrieved by the Commissioner’s decision on a petition for medical parole, is a review by an action in the nature of certiorari review to correct substantial error of law apparent on the record adversely affecting material rights. See Sheriff of Plymouth County v. Plymouth County Personnel Board, 440 Mass. 708, 710 (2004). The plaintiff “bears the burden to allege and demonstrate the absence of inadequacy of other remedies.” Kifor v. Commonwealth, 490 Mass. 1003, 1004 (2022). Plaintiff has met this burden of demonstrating the absence of other remedies.

The Court shall examine the administrative record and correct any substantial errors of law apparent on the record which would adversely affect the material rights of the plaintiff. See Doucette v. Massachusetts Parole Bd., 86 Mass. App. Ct. 531, 540-541, and Carney v. City of Springfield, 403 Mass. 604, 605 (1998). A certiorari review also examines whether the decision was arbitrary or capricious or if it constituted an abuse of discretion. See City of Revere v. Massachusetts Gaming Comm’n, 476 Mass. 591, 605 (2017). A decision is arbitrary or

capricious where the decision “lacks any rational explanation that reasonable persons might support.” Perullo v. Advisory Comm on Personnel Standards, 476 Mass. 829, 836 (2017).

“As the granting of parole is a discretionary function of the executive branch, generally the judiciary's role is limited to reviewing the constitutionality of the [B]oard's decision and proceedings.” Deal v. Massachusetts Parole Board, 484 Mass. 457, 142 N.E.3d 77, 81 (2020). In a certiorari action, the Board's decision is “afforded significant deference,” and the arbitrary and capricious standard applies. Doucette at 541. The standard of review for a certiorari action depends on the nature of the action for which review is sought. Where the decision being reviewed implicates the exercise of administrative discretion, a court applies the arbitrary or capricious standard, which is more deferential to the party defending the administrative action it took. That standard is generous to the decision-making party, and only requires that there be a rational basis for the decision. See McCauley v. Superintendent, Massachusetts Correctional Institution, Norfolk, 491 Mass. 571, 572, 205 N.E.3d 295 (2023). “As is a decision by a parole board to grant parole, the decision to grant medical parole is a discretionary one for the Massachusetts Commissioner of Correction with which, if otherwise constitutionally exercised, the judiciary may not interfere. On review of a decision of medical parole eligibility under M.G.L. ch. 249, §4 of a decision regarding medical parole, a judge does not have the power to substitute its judgment for that of the Commissioner regarding whether a prisoner merits release on medical parole.” Id. at HN24

The court must apply “substantial deference to the expertise and statutory ‘interpretation of the agency charged with primary responsibility for administering a statute it is charged with enforcing,’ unless a statute unambiguously vars the agency’s approach.” Zoning Bd. Of Appeals

of Amesbury v. Housing Appeals Comm., 457 Mass. 748, 759-760, 933 N.E.2d 74 (2010), quoting Goldberg v. Board of Health of Granby, 444 Mass. 627, 633, 830 N.E.2d 207 (2005).

B. Legislative purpose and medical parole statute

M.G.L.c.127, §119A(e) provides for a prisoner's ability to apply for, and be granted, medical parole "[i]f 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." Plaintiff does not allege that she is terminally ill but argues that she is permanently incapacitated. "Permanent incapacitation" is defined by the statute as "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, §119(e). Upon the petition by the prisoner, the superintendent shall transmit to the commissioner, along with a recommendation, three different items: a medical parole plan, a written diagnosis by a physician licensed to practice medicine and "an assessment of risk for violence that the prisoner poses to society." G.L.c.127, §119A(d)(1).

ANALYSIS

1. Commissioner's determination of permanent incapacitation

JSB argues that Commissioner violated her obligation to obtain a determination from a licensed physician as to whether she suffered from a debilitating condition and that Commissioner's finding of permanent incapacitation was arbitrary and capricious. JSB's own petition contained an opinion of a licensed physician Dr. William Weber who declared that JSB had a cognitive incapacitation. Dr. Weber opined that she had dementia with significant memory

issues which impacted her daily life. JSB also supplemented Dr. Mascoop's medical opinion that she suffers from probable major neurocognitive disorder due to Alzheimer's Disease since 2021. In the superintendent's opposition to the medical parole, a licensed physician's report of Dr. Joyce Rosenfeld was submitted. Dr. Rosenfeld found that JSB has a history of dementia with memory issues, with difficulty dressing herself and with a decline in performing activities of daily living without heavy prompts.

In denying the petition, Commissioner was within her discretion to find that JSB did not suffer from a "permanent incapacitation." The Court finds that all three doctors described a "debilitating condition" where her cognitive condition affected her daily living. JSB argues that Dr. Rosenfeld did not specifically make a determination as to whether JSB suffered from a "debilitating condition." For the benefit of JSB, it is clear that Dr. Rosenfeld described that JSB had a debilitating condition, in that JSB has a history of dementia with increasing concerns with her memory. JSB is incapable of performing her daily living activities and there has been a decline to perform daily activities without heavy prompt and assistance. Although Dr. Rosenfeld did not specifically write the words "debilitating condition," she certainly described and diagnosed one. 501CM, §17.04(2)(b) states the superintendent must submit "a determination by a licensed physician as to whether the prisoner suffers from a debilitating condition."

"Debilitating condition is 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 CMR, §17.02. There is no requirement that the licensed physician must use the

words “debilitating condition” in her determination but must describe JSB’s condition to which she suffers. And for the benefit of JSB, the Court finds that Dr. Rosenfeld found that there was a debilitating condition according to the administrative record.

The plain reading of the regulation is consistent with the legislative purpose of the statute to show compassion to those individuals who are least likely to offend, considering the poor health and age of the prisoner, while also considering savings in costs of health care for those who need serious care. McCauley at 586. JSB is incapable of performing most of her daily life functions independently and all doctors opine that she has a debilitating condition. The determination of whether JSB’s debilitating condition is so debilitating that she does not pose a public safety risk, *not minimize, but does not pose a safety risk*, is not a determination or diagnosis a licensed physician can make, but a determination by the commissioner. “It is difficult to neatly describe the nexus between physical incapacitation and the inability to commit a crime.” Id. at 590. Our statute is not so limiting that it requires a determination that a prisoner is physically incapable of violating the law but that she “will live and remain at liberty without violating the law,” and that the prisoner’s release is not “incompatible with the welfare of society.” G.L.c.127, §119A (e). These prongs require a more comprehensive look on a case-by-case basis at various considerations.

At the time of the denial of the petition, JSB could not perform many of her daily functions. However, Commissioner also heard evidence that she was able to perform her activities on her own, with assistance of her walker. Although confused at times, she did not require assistance and prompting with every life activity. The Commissioner did not find that her current debilitating condition was so debilitating to pose no safety risk to the public. The

Commissioner also found that her release, given the severity and gravity of her crime, was not compatible with the welfare of society.

After the denial of the petition, JSB provided a declaration from Dr. Nicole Mushero that JSB needed close monitoring of weight and meal intake and that she suffers from at least a moderate level of Alzheimer's Dementia. Dr. Mushero opined that JSB needed significant assistance of daily tasks like bathing, dressing, and eating. There was no medication that could improve her condition. Superintendent opposed the reconsideration and submitted Dr. Joyce Rosenfeld's report and Dr. Johvonne Claybourne and the Deputy of MCI Framingham testified. The Deputy observed JSB socializing with others and moving about the room by herself with a walker. Although she has some confusion, she also has bouts of clarity. (AR18). Dr. Claybourne found that she needs a chart to help her keep track of her tasks, and requires prompting to shower, brush her teeth and to do laundry. She requires verbal cues and needs an escort so that she does not get lost.

Dr. Mushero and Dr. Claybourne, like the three previous doctors, found that JSB suffers from a debilitating condition where her dementia and her cognitive impairment causes her significant and serious impairment of strength or ability to perform daily life functions. But where Commissioner heard evidence that JSB is able to move around by herself with bouts of clarity, Commissioner used her discretion to find that JSB's debilitating condition was not a permanent incapacitation where she would no longer pose a risk to the community.

Whether the prisoner will live and remain at liberty without violating the law and whether the prisoner's release will be incompatible with the welfare of society are comprehensive fact-intensive questions that leave room for difference in opinion among those analyzing the same record. "The commissioner's discretion is not a small component of the criteria to be applied; to

the contrary, prisoners are released under the statute in her discretion alone, on her consideration of the factors mentioned by the statute or the regulations.” Id. at 594. In light of the discretionary nature of these determinations, an arbitrary or capricious standard is appropriate. Where this discretion explicitly is conferred on the commissioner by the Legislature, this Court must give the commissioner’s decision regarding the release of a prisoner under the statute deference. See Ciampi v. Commissioner of Correction, 452 Mass. 162, 168, 892 N.E.2d 270 (2008).

2. Risk for violence assessment

In response to JSB’s petition for medical parole, Superintendent submitted a risk assessment, which place her in a low risk of violence and low risk of recidivism. JSB argues that the superintendent did not submit nor did the Commissioner require another risk violence assessment for the motion for reconsideration. The original risk assessment was written in December 2022. The hearing for the reconsideration of the denial was three months later, in March 2023. No updated assessment was provided. The statute commands that the superintendent shall transmit to the Commissioner a medical parole plan, a written diagnosis by a licensed physician and an assessment of the risk for violence that the prisoner poses to society. Superintendent did provide all three requirements for Commissioner to consider the eligibility of medical parole for JSB.

Upon Commissioner’s denial, a motion for reconsideration of her denial does not necessarily promulgate a new assessment of the risk of violence, especially, if there have been no changes from three months prior. This hearing was a hearing for reconsideration, not a new medical parole hearing, thus did not require the strict three requirements of a medical parole plan, a written diagnosis by a doctor and an assessment of the risk. In addition, JSB’s risk

assessment had not changed and still remained low. Commissioner's decision in again denying the reconsideration was reasonable given the entire administrative record.

JSB also argued that the Pathway to Change risk assessment from 2015 was outdated and did not account for her increased age and her diagnosis of Alzheimer's disease diagnosed in 2021. The 2015 Pathway assessed at a low risk of violence and low risk of recidivism. In preparation for the medical parole petition, Superintendent's risk assessment pursuant to G.L.c.127, §119A (c) takes into account her current age, her crime, her sentence, her disciplinary reports (most recent as 2019), her programs involved during her incarceration, and her job at Med-line area (where she was discharged in January 2021 due to her being at risk with the spread of COVID). In her assessment, she still "scored a low risk of violence and recidivism and scored low for risk of substance abuse. She has no active conflicts or history of escapes and is parole eligible on February 22, 2024." (AR 295). Superintendent properly submitted a risk for violence assessment, which must be based upon the results of a standardized assessment tool that measures clinical prognosis, such as the LS/CMI assessment tool and/or COMPAS, and a recent classification report, according to 501CMR § 17.04 (2)(d) and (e). The risk assessment considered the prisoner's diagnosis and prognosis, her current situation, her necessary clinical management of her illness, her assessment of her mobility, her ability or inability to manage activities of daily living, her mental health assessment and her age, weight, her ability to eat independently, according to 501 CMR §17.04(3) (a) through (h). In McCauley, the hearing was remanded because the superintendent did not provide an assessment citing that "due to his sentence of life without parole, he does not receive a risk of needs assessment." McCauley at 596. Such is not the case here. The risk assessment was properly submitted and thus, Commissioner's reliance on the risk assessment was proper.

3. Commissioner's reliance on JSB's conviction

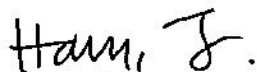
It was not an abuse of discretion to consider the severity and the facts of the plaintiff's crime for which she is incarcerated as a factor in determining whether she would be a risk to the safety of the public. The facts of the crime are relevant to the determination, whether the person will be a risk to the safety of the public on release. The facts of JSB's conviction, notwithstanding her current age of 78 and the crime occurring twenty years ago, are a particularly important factor to consider where she killed and stabbed her husband 34 times with a knife. Despite her medical condition and cognitive deterioration, her condition is not yet permanently incapacitated. Commissioner's determination that her current condition does not assure that she will live and remain at liberty without violating the law is within her discretion. Given the victims' impact statement opposing her release, Commissioner also used her discretion to find that JSB's release would be incompatible with the welfare of society.

CONCLUSION

For the above reasons:

1. The Plaintiff's Motion for Judgement on the Pleadings is DENIED.
2. The Defendant's Cross-Motion for Judgment on the Pleadings is ALLOWED.
3. The Court affirms Commissioner's decision to deny JSB's medical parole and Commissioner's decision to deny JSB's motion for reconsideration.

Dated: December 8, 2023¹


Catherine H. Ham
Justice of the Superior Court

¹ A hearing on these motions was heard on 11/14/2023. Another hearing with the parties to clarify the administrative record was held on 12/6/2023.