

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT No. _____

████████████████████
Plaintiff

v.

CAROL MICI
Commissioner of the Massachusetts Department of Correction
Defendant

COMPLAINT

1. Plaintiff ██████████ is a 78-year-old woman in the custody of the Massachusetts Department of Correction (“DOC”) who is cognitively incapacitated and has physical impairments, making her eligible for medical parole under G.L. c. 127 § 119A. Commissioner of Correction Carol Mici denied her petition of December 2, 2022 (“December 2022 petition”) and request for reconsideration of March 2, 2023 (“March 2023 request for reconsideration”), despite clear evidence of eligibility. Ms. ██████████ files this complaint to remedy Commissioner Mici’s arbitrary and capricious denial.

2. Ms. ██████████ is permanently cognitively incapacitated. DOC and its medical provider, Wellpath, have indefinitely housed her in the MCI-Framingham Health Services Unit (“HSU”). She is frail, malnourished, and requires a walker or wheelchair for most distances. Further, Wellpath has diagnosed her with Alzheimer’s disease and found that she is not eligible for medication to slow its progression because, due her old age and frailty, she is prone to experiencing the serious side effects of medication for treating Alzheimer's disease.

3. Ms. ██████████’s December 2022 petition and March 2023 request for reconsideration described the qualifying conditions and provided the evidentiary support

required by statute for a grant of medical parole. Ms. [REDACTED]'s March 2023 request for reconsideration provided the commissioner with additional evidence of incapacitation and lack of safety risk. The commissioner held a hearing at which DOC and Wellpath staff provided evidence further establishing Ms. [REDACTED]'s eligibility.

4. Contrary to the clear evidence of Ms. [REDACTED]'s permanent incapacitation, and evidence that she does not present a risk to public safety, Commissioner Mici denied Ms. [REDACTED]'s December 2022 petition and March 2023 request for reconsideration, declaring that she is not permanently incapacitated as defined by the statute and presents a risk to public safety.

5. In denying Ms. [REDACTED]'s petition and request for reconsideration, Commissioner Mici disregarded determinations by multiple licensed physicians that Ms. [REDACTED] is permanently incapacitated due to Alzheimer's disease, additional evidence submitted supporting that finding, and the fact that no licensed physician opined that she is not permanently incapacitated. Commissioner Mici also failed to obtain and consider an assessment of Ms. [REDACTED]'s risk for violence based on *current* abilities or a medical parole release plan, as are required by the medical parole statute and regulations. In so doing, Commissioner Mici came to conclusions entirely unsupported by the record. Her decision was arbitrary and capricious, an abuse of discretion, and contrary to the medical parole statute. Ms. [REDACTED] now appeals that decision through this Complaint for certiorari review.

Jurisdiction

6. Jurisdiction to review the decision of Commissioner Mici is conferred by G.L. c. 249, § 4, and is specifically authorized by G.L. c. 127 § 119A(g).

Parties

7. [REDACTED] is a 78-year-old woman who has been incarcerated in the DOC since 2006. She is currently confined in MCI-Framingham (“Framingham”) in Framingham, Massachusetts, 01702. She is serving her first incarceration of any kind, a life with parole sentence for Murder in the Second Degree, for which she has served 17 years in prison.

8. Carol Mici is the Commissioner of the Massachusetts Department of Correction, an agency of the Commonwealth of Massachusetts, with its principal office at 50 Maple Street in Milford, Massachusetts, 01757. Commissioner Mici is responsible for deciding petitions for medical parole pursuant to G.L. c. 127 § 119A.

The Medical Parole Statute and Regulations

9. The medical parole statute was enacted as a provision of the Criminal Justice Reform Act in 2018. The statute requires the release of any incarcerated person in the Department of Correction, a county jail, or house of correction who is terminally ill or permanently incapacitated such that if they are released, they will remain at liberty without violating the law, and whose release will not be incompatible with the welfare of society.

10. Permanent incapacitation is defined in 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 § 119A(a).

11. Debilitating condition is not defined in the statute, but is defined in the relevant Executive Office of Public Safety and Security (“EOPSS”) regulations as “[a] physical or cognitive condition that appears irreversible and 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 palliative or medical care." 501 CMR 17.02.

12. Medical parole is not discretionary. Rather, it must be granted upon a finding that the subject of a petition meets the statutory standard. The statute provides that, "[n]otwithstanding any general or special laws to the contrary, a prisoner may be eligible for medical parole due to a terminal illness or permanent incapacitation pursuant to subsections (c) and (d)." G.L. c. 127 § 119A(b).

13. A petition for medical parole must be filed with the Superintendent of the facility where the prisoner is confined. The Superintendent must, within 21 days of filing, develop a medical parole plan for the prisoner, obtain a written diagnosis of the prisoner from a licensed physician, perform an assessment of the prisoner's risk of violence, obtain an updated clinical review of the prisoner by the DOC's health services provider, convene a multidisciplinary review team, and transmit a recommendation as to the release of the prisoner to the Commissioner. 501 CMR 17.04; *Buckman v. Commissioner of Correction*, 484 Mass. 14, 32 (2020).

14. A medical parole plan is defined in the relevant regulations as "[a] comprehensive written medical and psychosocial care plan specific to a prisoner and including, but not limited to:

- a. the proposed course of treatment;
- b. the proposed site for treatment and post-treatment care (home plan);
- c. documentation that medical providers qualified to provide the medical services identified in the medical parole plan are prepared to provide such services; and
- d. 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 other government benefits, or access to other adequate financial resources for the duration of the medical parole."

15. The Superintendent's risk for violence assessment "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.” 501 CMR 17.04(2)(d). The risk of violence assessment “shall” also consider, pursuant to 501 CMR 17.04(3):

- the prisoner’s diagnosis and prognosis;
- the prisoner’s current housing situation (*e.g.*, placement in general population, institutional infirmary, Lemuel Shattuck Hospital, or outside hospital);
- the necessary clinical management of the prisoner’s terminal illness/permanent incapacitation;
- an assessment for mobility, gait and balance, specifically, whether the prisoner is bedridden, wheelchair-bound, uses a walker, or can walk with assistance;
- the medically prescribed and required durable medical equipment or other assistive devices for the prisoner including, but not limited to, wheelchairs (manual or electric), hospital beds, traction equipment, canes, crutches, walkers, kidney machines, ventilators, oxygen, monitors, pressure mattresses, and/or lifts;
- the prisoner’s ability to manage Activities of Daily Living;
- a mental health assessment; and
- the prisoner’s age, height, weight, ability to eat independently, and if the prisoner is fed intravenously.

Procedural and Factual Background

16. On December 2, 2022, Plaintiff submitted a medical parole petition (“December 2022 petition”) to Commissioner Mici and the Superintendent of Framingham, Kristie Marchand, identifying Ms. [REDACTED] as a person who qualifies for medical parole due to cognitive incapacitation and serious physical impairments. This included a declaration from Dr. William Weber, a licensed physician practicing at the Beth Israel Deaconess Medical Center, affirming Ms. [REDACTED]’s cognitive incapacitation.

17. On December 22, 2022, Superintendent Marchand submitted to Commissioner Mici her recommendation against granting Ms. [REDACTED] medical parole. Her recommendation included the following addenda:

- December 12, 2022 medical assessment signed by Wellpath physician Dr. Joyce Rosenfeld, medical director at Framingham
- June 2, 2022 Classification Report

- June 4, 2021 Classification report

18. Superintendent Marchand submitted a second medical assessment signed by Dr. Rosenfeld, dated December 30, 2022 with a January 3, 2023 addendum describing a visit to MetroWest Medical Center.

19. On January 30, 2022, Plaintiff supplemented her December 2022 petition with medical records regarding her cognitive incapacitation and serious physical impairments as well as three stays at MetroWest Medical Center: (1) on December 7, 2022 for unresponsiveness; (2) on December 30, 2022 for dehydration; and (3) on January 3, 2023 for abdominal pain.

20. On February 2, 2022, Plaintiff further supplemented her medical parole petition with documentation regarding Framingham's decision to permanently house her in the HSU and examples of confusion and need for assistance with activities of daily living (“ADLs”) resulting from her cognitive incapacitation.

21. On February 6, 2023, Commissioner Mici denied Ms. [REDACTED]’s December 2022 petition.

22. On March 2, 2023, Plaintiff submitted a request for reconsideration of the denial of medical parole (“March 2023 request for reconsideration”), providing additional documentation of eligibility. This included a declaration from Dr. Nicole Mushero, a licensed physician with board certifications in internal medicine and geriatric medicine, affirming Ms. [REDACTED]'s Alzheimer’s disease.

23. On March 8, 2023, Framingham Superintendent Kristie Marchand submitted a medical assessment signed by Dr. Joyce Rosenfeld, and a June 2, 2022 classification report, but no recommendation as to whether Ms. [REDACTED] should be released and no risk assessment.

24. On April 12, 2023, Commissioner Mici held a hearing (“April 2023 hearing”) on the March 2023 request for reconsideration, at which Plaintiff’s undersigned counsel; Framingham Deputy Superintendent Lynn Lizotte; Wellpath physician Dr. Johvonne Claybourne; three registered victims; and Hampden County Assistant District Attorney Jennifer Fitzgerald testified.

25. On April 14, 2023, Commissioner Mici denied Ms. [REDACTED]’s March 2023 request for reconsideration of her medical parole petition.

Documentation of the Petitioner’s Permanent Incapacitation

26. The documentation Ms. [REDACTED] provided established that she is permanently incapacitated due to her serious cognitive and physical impairments. She provided the following illustration of her level of cognitive debilitation:

- DOC’s own Medical records regularly refer to Ms. [REDACTED]’s dementia, Alzheimer’s disease, cognitive debilitation, chronic confusion, and altered thought process.
- Ms. [REDACTED]’s medical records indicate that she seems to be experiencing delusions about her family living in the Laurel Unit, a housing unit at Framingham, stating that “her Aunts and relatives were at Laurel,” that she “[h]opes to get back to Laurel tonight before Mom and Dad show up,” and that she “put a deposit on a room in Laurel and that her son would be moving in with her.”
- Medical records regularly state that Ms. [REDACTED] presents a nutrition risk for consuming less than her bodily requirement, that she often needs prompting to remember to eat, and that the reason medical staff are concerned about her

nutrition intake is because she has difficulty remembering to eat. She was hospitalized on December 30, 2022, for dehydration.

- Other incarcerated people reported that, since being housed in the HSU, Ms. [REDACTED] gets up in the middle of the night and asks to go to the bathroom even though there is a bathroom accessible to her in her cell, and that she gets up in the middle of the night, puts on her makeup, and tells staff she is ready to go back to her unit.
- Counsel has met with and interviewed Ms. [REDACTED] several times since 2020, and each time counsel meets with her, she does not remember who counsel is or how she knows counsel.

27. Both the original petition and request for reconsideration included declarations by qualified physicians confirming Ms. [REDACTED]'s cognitive incapacitation.

- The December 2022 petition included a declaration by Dr. Weber, who examined Ms. [REDACTED] on November 10, 2022 and evaluated her using a Montreal Cognitive Assessment (MoCA). The assessment is scored out of 30 points, and any score below 23 indicates cognitive impairment. Ms. [REDACTED] scored 17 points on this assessment, strongly corroborating that she has dementia. Dr. Weber opined, based on his examination, that Ms. [REDACTED]'s memory issues are incapacitating and affect her basic judgment skills.
- The March 2023 request for reconsideration included a declaration by Dr. Mushero, who conducted a thorough review of Ms. [REDACTED]'s medical records. Based on this review, Dr. Mushero opined that Ms. [REDACTED] has a diagnosis of Alzheimer Dementia, which alone is a disabling, irreversible,

progressive disease that renders her permanently incapacitated at this stage, and that patients with a moderate level of dementia, like Ms. [REDACTED], require significant assistance or oversight of activities of daily life given challenges remembering to perform or how to perform basic tasks such as bathing, dressing, and eating, and often lack personal safety awareness.

28. Multiple physicians from Wellpath, DOC's own medical contractor, have stated facts on the record that support the allegation that Ms. [REDACTED] is permanently cognitively incapacitated:

- On January 13, 2023, Wellpath psychologist Dr. Susan Mascoop evaluated Ms. [REDACTED] using a MoCA on which she scored 9/30 points, indicating "severe cognitive impairment." Based on this, Dr. Mascoop gave Ms. [REDACTED] a diagnosis of "probable Major Neurocognitive Disorder due to Alzheimer's Disease." Dr. Mascoop further stated that Ms. [REDACTED] "has difficulty figuring out how to put on her clothes and requires prompts to do so correctly."
- On February 9, 2023, Wellpath psychiatrist, Dr. Susan Richardson, examined Ms. [REDACTED] and determined that: (1) she has a neurocognitive disorder due to Alzheimer's disease; (2) no current medication for Alzheimer's disease can improve cognition; and (3) given her advanced age and frailty, she is medically contraindicated from taking medication for treating Alzheimer's disease. Given these findings, Dr. Richardson ultimately opined that "there is no dementia or ADL [activities of daily life] unit for women in the DOC in Massachusetts. Patient [Ms. [REDACTED]] would be much better served in a nursing home

setting on a dementia unit where the facility is designed to manage patients with dementia and the staff are specially trained to care for these very challenging patients.”

- In both the December 30, 2022 and March 8, 2023 medical assessments by Dr. Rosenfeld, she stated that “there seems to have been a decline in [Ms. ██████████ ██████████'s] abilities to perform activities of daily living in terms of needing to be heavily prompted.”
- During the April 2023 hearing, Wellpath representative Dr. Johvonne Claybourne testified that she met with and evaluated Ms. ██████████ on Tuesday April 11, 2023, and found her to be very anxious and confused. Dr. Claybourne stated that Ms. ██████████ was very focused on being late for church because she goes every Sunday, and that she was unable to report the proper year or the proper day of the week. She knew her birth date but did not know her age. Dr. Claybourne further testified that, given Ms. ██████████'s anxiety and distraction, she was unable to meet with her for very long and, therefore, the doctor also spoke with staff on the unit. Staff explained that they frequently find rotting food in Ms. ██████████'s cell because she hoards food and forgets to eat it; that she needs prompting to shower, brush her teeth, and do her laundry; and that staff now utilize a chart to try to keep track of when she showers because she forgets to do so. Further, when she is in the shower, she needs prompting use soap or to wash her hair, and it is not uncommon for her to put on her soiled underwear after she has cleaned herself. Dr. Claybourne also testified that, according to the nursing staff, DOC rules prevent staff from going into Ms. ██████████'s cell to

remove her clothes and help her sort through dirty and clean clothes, even though the nursing staff feel that she needs more care. Staff also explained Ms. [REDACTED] needs to be escorted at all times because she gets lost when she is moving out of the unit. When Commissioner Mici asked Dr. Claybourne what level of care in the community Ms. [REDACTED] would need if she were to be medically paroled, Dr. Claybourne testified that she would need to live in a nursing home with a memory unit.

29. Despite documents from the DOC and Wellpath relating to assessments and observations that support a finding of incapacitation, none directly state an opinion as to whether or not Ms. [REDACTED] is permanently cognitively incapacitated. Notably, Commissioner Mici did not seek an opinion on the statutory standard from any of them.

30. Ms. [REDACTED] also has serious physical impairments. She has severe mobility issues, is extremely frail, and has a number of medical restrictions in place.

Commissioner's decision to deny medical parole is contrary to evidence of medical incapacitation

31. On April 14, 2023, Commissioner Mici denied Ms. [REDACTED]'s March 2023 request for reconsideration, finding that “she is still able to function independently with prompting [and] does not suffer from a serious medical condition.”

32. Commissioner Mici states in her decision that Ms. [REDACTED] can independently perform her ADLs with prompting and, therefore, is not permanently incapacitated; however, the fact that Ms. [REDACTED] needs heavy prompting to complete her ADLs necessarily means that she cannot perform her ADLs independently, which is evidence of her permanent incapacitation.

33. Commissioner Mici also ignored the following evidence of Ms. [REDACTED]'s permanent incapacitation:

- Ms. [REDACTED]'s delusions regarding her family living in the Laural Unit;
- Ms. [REDACTED] presents a nutrition risk for consuming less than her bodily requirement and often needs prompting to remember to eat because her Alzheimer's disease causes her to forget to eat.
- On November 10, 2022 Dr. Weber evaluated Ms. [REDACTED] using a MoCA test and she scored 17 points out of 30 points, strongly corroborating her dementia. Dr. Weber opined, based on his examination, that Ms. [REDACTED]'s memory issues are incapacitating and affect her basic judgment skills.
- Dr. Mushero reviewed Ms. [REDACTED]'s medical records and opined that she has a diagnosis of Alzheimer dementia which renders her permanently incapacitated at this stage, and that patients like Ms. [REDACTED] require significant assistance or oversight of activities of daily life.
- On January 13, 2023, Wellpath psychologist Dr. Susan Mascoop evaluated Ms. [REDACTED] using a MoCA test on which she scored 9/30 points, indicating "severe cognitive impairment."
- On February 9, 2023, Wellpath psychiatrist, Dr. Richardson, examined Ms. [REDACTED] and opined that she would be much better served in a nursing home setting on a dementia unit given the lack of ADLs unit for women in the DOC.
- In both the December 30, 2022 and March 8, 2023 medical assessments by Framingham medical director, Dr. Joyce Rosenfeld, she noted a decline in Ms.

██████████'s abilities to perform ADLs because she needed to be heavily prompted.

- During the April 2023 hearing for the request for reconsideration, Wellpath representative Dr. Johvonne Claybourne testified that she met with Ms. ██████████ and HSU staff on April 11, 2023, and learned that Ms. ██████████ is having memory issues, staff have to heavily prompt her to perform her ADLs, and staff do not feel that they are able to provide her the care she needs.

Commissioner failed to obtain superintendent's recommendation and adequate medical parole plan, as required by law.

34. Commissioner Mici failed to obtain an updated recommendation from the Superintendent for the request for reconsideration, as is required by the medical parole statute and regulations; in response to the March 2023 request for reconsideration, the Superintendent provided only a medical assessment and classification records, with no recommendation, and Deputy Superintendent Lynn Lizotte did not include a recommendation in her April 2023 hearing testimony, nor did the commissioner ask her to provide a recommendation.

35. Commissioner Mici also failed to obtain and consider an adequate medical parole plan for Ms. ██████████ that included investigation into a “proposed course of [medical] treatment,” or her eligibility for health insurance or government benefits, as is required by the regulations. 501 CMR 17.02. Such a plan would allow for consideration of whether the treatment and housing proposed would reduce any risk of violence the commissioner feels is posed.

Commissioner failed to obtain a proper risk assessment based on current abilities, as required by law.

36. Commissioner Mici denied Ms. [REDACTED]'s March 2023 request for reconsideration, finding that she “has a history of manipulative and violent behavior with no indication that she is not capable of the same,” if released, Ms. [REDACTED] would not “live and remain at liberty without violating the law,” and her release would not “be compatible with the welfare of society.”

37. Commissioner Mici failed to obtain an updated recommendation from the Superintendent for the March 2023 request for reconsideration and, in so doing, also failed to obtain a proper assessment of Ms. [REDACTED]'s risk of violence based on *current* abilities, which should have been included in such a recommendation.

38. Commissioner Mici relied on static historical factors that predate Ms. [REDACTED]'s current incapacitated state, such as the details of her conviction 17 years ago, and the registered victims’ and Hampden County District Attorney’s Office’s (“District Attorney’s Office”) unsupported assertions that Ms. [REDACTED] is manipulative.

39. The Commissioner relied on the same pre-incapacitation factors and District Attorney’s Office’s characterization of Ms. [REDACTED], while also ignoring reliable evidence that Ms. [REDACTED] presents a negligible risk of violence based on her current behavior and serious physical impairments:

- Ms. [REDACTED]'s conviction was her first of any kind and occurred before she became permanently incapacitated.

- Ms. [REDACTED] has a classification score of only 2, meaning that she would qualify for minimum security but for the overrides in place for her conviction and her health status.
- Ms. [REDACTED] has not been disciplined in the last five years.
- Ms. [REDACTED] has never been disciplined for violence during her 17 years of incarceration.
- Ms. [REDACTED] has severe mobility issues, illustrated by the fact that Wellpath has prescribed her a walker for short distances and a wheelchair with an assistant who pushes her wheelchair for her for long distances. She also presents a fall risk due to her physical instability.
- Ms. [REDACTED] is extremely frail, so much so that Wellpath denied Ms. [REDACTED] medication to slow the progression of her Alzheimer's disease because her frailty and small stature put her at risk of side effects so severe that they would outweigh any benefit of the medication.
- Ms. [REDACTED]'s frailty is worsened by her failure to eat, which is a result of her Alzheimer's disease.
- Both Dr. Rosenfeld's December 20, 2022 and March 8, 2023 medical evaluations listed the following medical restrictions for Ms. [REDACTED]: she is prescribed a rolling walker with a seat; a wheelchair with an assistant to push it; she is not permitted to use the stairs and has an elevator pass; she uses bilateral wrist splints; she must use a medical mattress; she must be housed on the bottom tier; she must take her meals in her cell; and she must go to the front of the line during medication distribution.

Cost-Benefit Analysis

40. In *Harmon v. Commissioner of Correction*, the Supreme Judicial Court opined that “[t]he purpose of the [medical parole] 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.” 487 Mass. 470, 477 (2021). Granting Ms. [REDACTED] release on medical parole would comport with these purposes.

Claims for Relief

Certiorari Review of Medical Parole Petition (G.L. c. 249 §4 and G.L. 127, § 119A)

41. Plaintiff repeats and realleges each and every allegation contained in the previous paragraphs of this complaint as if fully alleged herein.

42. Defendant’s decision denying Plaintiff’s medical parole petition filed pursuant to G.L. c. 127 § 119A was arbitrary and capricious. The decision lacks any rational explanation that reasonable people might support and was made without consideration and in disregard of facts and circumstances presented in the record. The decision denying Plaintiff medical parole contains substantial and material errors, including the following:

- Commissioner Mici arbitrarily and capriciously ignored evidence from multiple licensed physicians regarding Ms. [REDACTED]’s permanent incapacitation.
- Commissioner Mici abused her discretion in finding that Ms. [REDACTED] could independently perform her ADLs even though the record shows, and Commissioner Mici acknowledged, that she needs significant assistance by way of prompting to complete her ADLs.
- Commissioner Mici failed to obtain and consider a recommendation from the Superintendent in connection with the March 2023 request for reconsideration.

- Commissioner Mici failed to obtain and consider an assessment of Ms. [REDACTED] [REDACTED]'s risk for violence based on *current* abilities that comports with the requirements of the medical parole statute and regulations, including use of a standardized assessment tool, consideration of ability to engage independently in activities of daily living, and other required factors.
- Commissioner Mici failed to obtain and consider a medical parole plan that complies with the requirements of the medical parole statute and regulations, including a proposed course of treatment, site for treatment, and eligibility for insurance or other benefits.

43. Certiorari relief is necessary because the errors resulting in the Commissioner's decision resulted in manifest injustice to Plaintiff for which she is without another available remedy.

Prayer for Relief

44. Wherefore, Plaintiff respectfully requests that the Court grant the following relief:

- Set aside the Commissioner's decision and remand the matter for an entry of an order consistent with the evidence establishing cognitive incapacitation under G.L. c. 127 § 119A;
- Order such other and further relief as this Court deems just and proper.

Dated: June 13, 2023

Respectfully submitted,
Plaintiff,

[REDACTED]

By her attorney,



Sarah Nawab, BBO #707546
Prisoners' Legal Services of Massachusetts
50 Federal Street, 4th Floor
Boston, MA 02110
617-482-2773
snawab@plsma.org