

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT 2484CV01599

[REDACTED],
Plaintiff,

v.

SHAWN JENKINS,
Interim Commissioner of the Massachusetts Department of Correction,
Defendant.

PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff [REDACTED], pursuant to Super. Ct. Standing Order 1-96 and Mass. R. Civ. P. 12(c), hereby brings this motion for judgment on the pleadings. In support, as more fully detailed in the accompanying memorandum, Plaintiff states that Defendant's denial of her request for reconsideration of her petition for medical parole was arbitrary and capricious and an abuse of discretion. In his denial, the Defendant disregarded uncontradicted medical evidence, substituted his own judgment for that of a licensed physician contrary to the statutory scheme, and ignored the impact of Ms. [REDACTED]'s debility and the Department of Correction's own assessments that Ms. [REDACTED] presents a low risk of recidivism and violence when assessing her risk to public safety, whether she would live and remain at liberty without violating the law, and whether her release would be compatible with the welfare of society. The decision lacks a rational basis that a reasonable person would support.

WHEREFORE, the Plaintiff respectfully request that this Court grant her the Motion for Judgment on the Pleadings and order the following relief:

- a. Set aside the Defendant's decision as arbitrary and capricious;
- b. Remand the matter to the Defendant with instructions that he reconsider Ms. [REDACTED] for medical parole in accordance with the requirements of the statute and regulations, and render a new decision within seven days;

- c. Issue a declaratory judgment against the Defendant declaring that where a licensed physician has determined that a medical parole petitioner has an incapacitation that appears irreversible, and there is no determination by a licensed physician to the contrary, it is a violation of G.L. c. 127, §119A for the commissioner to substitute his opinion to the contrary;
- d. Issue a declaratory judgment that Plaintiff is permanently incapacitated, as defined in G.L. c. 127, §119A;
- e. Order such other and further relief as this Court deems just and proper; and
- f. Enter judgment in favor of the Plaintiff.

Request for a Hearing

Plaintiff requests a hearing pursuant to Super. Ct. R. 9A(c)(3), which presumptively allows for a hearing on a motion for judgment on the pleadings. Plaintiff further requests that the Court issue a writ of habeas corpus to MCI-Framingham for her to appear at the hearing by video conference, as she is presently incarcerated and travel is extremely onerous given her medical condition. If the Court is not inclined to allow her appearance by video, Plaintiff requests that the hearing be held without her present.

Dated: June 27, 2024

Respectfully submitted,

Plaintiff,


By her attorney,

/s/ Michael J. Horrell

Michael J. Horrell, BBO #690685
Prisoners' Legal Services of Massachusetts
50 Federal Street, 4th Floor
Boston, MA 02110
Tel: 617-482-2773
mhorrell@plsma.org

Certificate of Service

I hereby certify that on June 27, 2024, a true copy of the above document was served by email upon:

Richard E. Gordon
Department of Correction – Legal Division
70 Franklin Street, Suite 600
Boston, MA 02110
Richard.Gordon@DOC.State.MA.US
Attorney for Defendant

Dated: June 27, 2024

/s/ Michael J. Horrell
Michael J. Horrell, BBO #690685

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SHAWN JENKINS,
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**PLAINTIFF'S MEMORANDUM IN SUPPORT OF HER
MOTION FOR JUDGMENT ON THE PLEADINGS**

INTRODUCTION

Plaintiff [REDACTED] is a 72-year-old woman in the custody of the Massachusetts Department of Correction (“DOC”) who has been in DOC custody for over 32 years serving her first and only state prison sentence. She suffers from a host of debilitating, progressive, and permanent medical conditions that render her unable to independently perform basic activities of daily living. She currently resides in the Health Services Unit of MCI-Framingham.

Despite her medical frailty and declining health, the commissioner of the Department of Correction denied her petition for medical parole in September 2023, as well as her request for reconsideration in April 2024. Because the most recent denial was arbitrary and capricious, the Court should vacate it and remand it to the commissioner for reconsideration on an expedited schedule in light of Ms. [REDACTED]’s precarious and worsening condition.

FACTS AND PROCEDURAL HISTORY

I. THE MEDICAL PAROLE STATUTE

The medical parole statute was enacted as a provision of the Criminal Justice Reform Act in 2018. The statute requires the release of any prisoner in the Department 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. 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). Similarly, terminal illness is defined in the statute as “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 that the prisoner does not pose a public safety risk.” *Id.*

II. MS. [REDACTED]'S MEDICAL PAROLE PETITION

Ms. [REDACTED] petitioned for medical parole in June of 2023 on the grounds that she suffered from a host of chronic medical conditions that were debilitating, not likely to improve, and that in aggregate rendered her permanently incapacitated. Administrative Record (“A.R.”) 70-182. Specifically, medical records from the DOC’s healthcare vendor, Wellpath, indicated that Ms. [REDACTED] suffered from congestive heart failure, atrial fibrillation, obesity, chronic kidney disease, hypertension, hyperlipidemia, hyperparathyroidism, anemia, restless leg syndrome, arthritis, uterine prolapse, vaginal atrophy, urinary incontinence, bilateral lower extremity edema, recurrent dislocations of her right hip, moderately severe hearing loss, cataracts, chronic dental decay, and chronic back and leg pain. A.R. 70-71, 75-139. She also had both her hips and knees surgically replaced, which resulted in chronic pain, leg length disparity, and gait disturbances. *Id.* In early March 2023, Ms. [REDACTED]’s medical condition deteriorated to the point that she was transported by ambulance to MetroWest hospital where she was admitted for several days due to hypoxic respiratory failure and congestive heart failure. A.R. 71, 135-39. Ms. [REDACTED] had also suffered multiple falls since the beginning of 2022. A.R. 71, 79 (“Patient sustained a fall in cell and states ‘I blacked out and fell on the floor with my head close to underneath my bed’”), 86 (“Call to patient’s room after Pt. sustained a fall while transferring to commode.”). Additionally, Ms. [REDACTED] had medical restrictions forbidding her from using stairs or a top bunk, was reliant on a wheelchair, walker, and assistance from others to move or leave the Health Services Unit, and had to sleep on a recliner with pillows for support to avoid severe muscle spasms that resulted from lying flat on a bed. A.R. 71, 87, 100 (“Stayed inside today due to her pusher being unavailable”), 108.

The petition cited Ms. [REDACTED]'s inability to complete activities of daily living independently, as demonstrated by her medical records documenting that staff helped her wrap her legs, assisted her with getting dressed, and helped her shower. A.R. 71. The records were submitted as Exhibit A to the petition and were highlighted to show instances where medical staff helped Ms. [REDACTED] with her daily tasks. A.R. 74-139.

The petition asserted that Ms. [REDACTED]'s release would not pose a risk to public safety because she suffered from extensive physical debilitation. A.R. 71. Additionally, her institutional history—including disciplinary history, program plan, and classification report, which were submitted as Exhibit B to her medical parole petition—suggested that her release would not pose a risk to public safety and would be compatible with the welfare of society. A.R. 71, 140-82. Despite entering DOC custody in the early 1990s, Ms. [REDACTED] had received just seven disciplinary reports, the most recent of which was in 2015. A.R. 71, 155, 167-82. The few reports she had received were all for alleged minor, non-violent rule infractions—lending property to other prisoners, possession of non-weapon contraband, refusing an order to clean, and smoking a cigarette inside at a time when smoking was only allowed in the yard. *Id.* Most of the tickets were closed administratively, dismissed, or continued without a finding. *Id.* According to Ms. [REDACTED]'s August 2020 personalized program plan compiled by the DOC, her Pathways to Change standardized risk assessment indicated that she presented a low risk of violence and a low risk of recidivism. A.R. 72, 159. Both the Pathways to Change assessment and TCU Drug Screen also found her to be a low risk for substance abuse. *Id.*

At the time of her medical parole petition, Ms. [REDACTED]'s most recent classification report indicated the only factor weighing in favor of higher security was the nature of her index crime. A.R. 72, 141. All other factors—recent convictions, history of escapes, history of

institutional violence, disciplinary history, age, and program participation—weighed in favor of lower security. *Id.* The report’s preliminary custody level recommendation was that Ms.

██████ be housed in a minimum or lower security facility, but she remains at MCI-Framingham, a medium security facility, only because of classification override codes due to her life sentence and the fact that she requires 24-hour healthcare coverage. A.R. 72, 142. The classification report indicated that Ms. ██████ maintained a positive adjustment to prison life, and that while she had participated in a number of programs and jobs over the years, her program participation had been put on hold since 2016 due to her medical issues. A.R. 72, 155. The report also noted that she “resides in HSU due to medical needs with limited mobility.” *Id.*

Lastly, the petition cited research indicating that aging is correlated with a sharp decline in recidivism risk. A Massachusetts DOC 2020 research report found that formerly incarcerated people “55 and older, both male and female, recidivated at the lowest rates, consistent with research on age and recidivism.” A.R. 72.¹ Similarly, a 2017 Vera Institute of Justice report found that “early-release policies are also supported by recidivism research, which demonstrates that age is significant predictor of re-offending: arrest rates drop to just more than 2 percent in people ages 50 to 65 years old and to almost zero percent for those older than 65.” *Id.*² At age 71, Ms. ██████ was part of this latter category, which supported the conclusion that her release would not pose a risk to public safety and would be compatible with the welfare of society. *Id.*

¹ Citing MA Executive Office of Public Safety and Security DOC, MA DOC THREE-YEAR RECIDIVISM RATES: 2015 RELEASE COHORT 9 (2020), available at <https://www.mass.gov/doc/three-year-recidivism-rates-2015-release-cohort/download>.

² Citing Aging Out: Using Compassionate Release to Address the Growth of Aging and Infirm Prison Populations 3, VERA INSTITUTE OF JUSTICE (2017), available at <https://www.vera.org/downloads/publications/Using-Compassionate-Release-to-Address-the-Growth-of-Aging-and-Infirm-Prison-Populations%E2%80%94Full-Report.pdf>

III. DR. ROSENFELD'S ASSESSMENTS

In response to the petition, on June 30, 2023, Dr. Joyce Rosenfeld, a physician at MCI-Framingham employed by DOC's medical provider, wrote a medical parole assessment of Ms. [REDACTED]. A.R. 183. In that assessment, she summarized Ms. [REDACTED]'s medical history, including congestive heart failure, hypercholesterolemia, atrial fibrillation, hypertension, chronic renal insufficiency – stage III, hyperparathyroidism, osteoporosis, prolapsed uterus, occasional urinary retention, PTSD from past physical and emotional abuse, and surgical replacement of both hips and knees. *Id.* Dr. Rosenfeld also listed a multitude of medical orders by her and her staff, including that Ms. [REDACTED] be provided with a reclining chair, rolling walker with seat cushion, transport by wheelchair van, bottom bunk, compression stockings and ace wrappings for her legs, elbow wrap, orthopedic pillow, exercise peddler, and hearing aids. *Id.*

In her summary, Dr. Rosenfeld wrote that Ms. [REDACTED] “resides in our HSU largely because of moderate to severe physical limitations” and had a “significant exacerbation of congestive heart failure in March 2023” that required hospitalization. *Id.* After a consultation with the cardiology team at Lemuel Shattuck Hospital, “it was decided that maximizing her medications to treat [congestive heart failure] was the only avenue she could tolerate. She declines going out for cardiac catheterization or other tests as she would have to allow for CPR and other resuscitative efforts. She expressed overwhelming dread over the possibility of rib fractures if resuscitated as she’s had many inflicted upon her with past abuse. There remains uncertainty for prognosis, as she remains at risk of sudden death with her advanced heart disease while not pursuing further interventions.” *Id.*

In light of Dr. Rosenfeld's June 30, 2023 assessment, Ms. [REDACTED] submitted a written statement pursuant to G.L. c. 127 § 119A(c)(2) to the commissioner requesting to be granted

medical parole on the additional basis of terminal illness because, as Dr. Rosenfeld determined, she was “at risk of sudden death” despite pursuing “the only avenue [of treatment] she could tolerate.” A.R. 54.

Dr. Rosenfeld completed additional assessments of Ms. [REDACTED] on August 10 and 30, 2023, where she wrote that she did “not have data that can predict life expectancy for [Ms. [REDACTED]], however, given that she has dyspnea with mild exertion, peripheral edema, and transient chest pain, a 6 month period has been cited in some literature.” A.R. 52-53.

IV. COMMISSIONER’S FIRST DENIAL

Former DOC Commissioner Carol Mici denied Ms. [REDACTED]’s petition for medical parole on September 1, 2023. A.R. 49-51. As grounds for the denial, Commissioner Mici cited the fact that Ms. [REDACTED] was able to complete “all activities of daily living on her own” (A.R. 51), despite the 65 pages of highlighted medical records to the contrary submitted with the petition (A.R. 74-139). She also found Ms. [REDACTED] could “ameliorate” her “risk for possible sudden death” by “following the medical provider’s recommendation that she receive cardiac catheterization” (A.R. 51), despite the conclusion of Dr. Rosenfeld and the cardiology team that Ms. [REDACTED]’s current course of treatment was “the only avenue she could tolerate” (A.R. 183).

V. REQUEST FOR RECONSIDERATION AND DR. EISENBERG ASSESSMENT

On February 15, 2024, Ms. [REDACTED] submitted a request for reconsideration, asking that the commissioner reconsider her denial. A.R. 38-44. The request asserted Ms. [REDACTED] was physically incapacitated by her long list of ailments, which were confirmed by the assessments of Dr. Rosenfeld, as well as an additional independent medical assessment from Dr. Mark Eisenberg. A.R. 38-39.

Dr. Eisenberg is a licensed and board-certified internal medicine physician on the faculty at Harvard Medical School and the Massachusetts General Hospital. A.R. 11. He sought and was granted permission from the DOC to bring medical equipment into MCI-Framingham to perform an independent assessment of Ms. [REDACTED] for medical parole. *See* Decl. of Michael J. Horrell, Esq. Based on that in-person assessment on November 30, 2023, and his review of approximately 200 pages of medical records, Dr. Eisenberg concluded that Ms. [REDACTED] “is permanently incapacitated due to [multiple] irreversible, chronic and debilitating medical conditions, which seriously impair her strength and ability to perform activities of daily living (‘ADLs’), minimizing her ability to commit a crime if released on medical parole.” A.R. 11-12. Specifically, he cited her musculoskeletal disease that impaired her ability to independently walk, use the toilet, dress herself, shower, or lift her arms past 60 degrees; kidney disease that had resulted in two hospital admissions over the past year and which would inexorably lead to debilitating dialysis in the next several years; cardiac disease that leaves her short of breath and requiring a wheelchair; and failing vision and hearing that limit her mobility and put her at increased risk for falls, multiple of which she had suffered over past several years that required emergency transport to a hospital. A.R. 12-13. In his summary, he emphasized that she “will not be able to live independently and will need to live in a nursing home or assisted living facility” and that he “consider[s] her permanently incapacitated without hope of any meaningful improvement[.]” A.R. 13.

In addition to Dr. Eisenberg’s assessment, the request for reconsideration again referenced the multiple instances of Ms. [REDACTED] requiring assistance with ADLs included in the previously submitted medical records, as well as 100 additional instances in updated medical records from the previous year where medical staff at the DOC documented Ms. [REDACTED]

requiring assistance with basic activities of daily living, including putting on her clothes, bandages, and compression socks; showering; cleaning; and using the commode. A.R. 39-42, 241-600.

Lastly, the request again emphasized DOC's own standardized assessments of Ms. [REDACTED], her classification score, her minimal disciplinary history, and the effect of age on recidivism to ask the commissioner to reconsider her conclusion that Ms. [REDACTED] would not live at liberty without violating the law and her release would be incompatible with the welfare of society. A.R. 42-43.

VI. DR. ROSENFELD'S UPDATED ASSESSMENT

Dr. Rosenfeld completed an additional medical parole assessment on February 29, 2024, which was consistent with Dr. Eisenberg's and indicated that Ms. [REDACTED]'s overall condition was declining. A.R. 601-02. Specifically, the assessment noted that Ms. [REDACTED] had been hospitalized twice for kidney failure since her previous assessment in August 2023 and was suffering from "worsening [shortness of breath] on exertion and is no longer able to walk in the yard as was her routine. She also developed left knee pain that limited her further. She was not able to ambulate to the commode or tolerate showering." A.R. 602. The assessment also noted a left ankle sprain, for which Ms. [REDACTED] declined "formal PT" but was given exercises to do. *Id.* The summary continued that Ms. [REDACTED]'s "mobility has declined" and she was limited "to wheelchair now rather than rolling walker. She requires help to dress, bathe. She had been a full assist to the commode but now is a bit improved, furniture in the room was adjusted for a shorter transfer." *Id.* Dr. Rosenfeld also noted that Ms. [REDACTED]'s kidney and heart disease were "chronic and progressive with risks of end stage organ failure and may be terminal illnesses" and that she "remain[s] at risk for a sudden cardiopulmonary event." *Id.*

VII. COMISSIONER’S SECOND DENIAL

On April 19, 2024, Interim Commissioner Shawn Jenkins denied the request for reconsideration. A.R. 1-4. As a justification for the denial, Defendant Jenkins repeated verbatim a sentence from Commissioner Mici’s original denial—“While Ms. [REDACTED] remains at risk for possible death due to her various medical problems, this risk is something that Ms. [REDACTED] can ameliorate by following the medical provider’s recommendation that she receive cardiac catheterization”—despite the fact that the request for reconsideration was based upon permanent incapacitation and not terminal illness. A.R. 3. The denial also asserted that Ms. [REDACTED] can “ameliorate her mobility issues by participating in formal PT” (*id.*), even though the mention of physical therapy in Dr. Rosenfeld’s assessment concerned only Ms. [REDACTED]’s ankle sprain and not her large constellation of severe mobility issues (A.R. 602), and no physician had suggested physical therapy could lead to meaningful improvement in Ms. [REDACTED]’s mobility. To the contrary, Dr. Eisenberg concluded categorically that Ms. [REDACTED] suffers from irreversible physical incapacitation without any meaningful hope of improvement, but his declaration was not discussed or even mentioned in the denial. A.R. 13.

The denial asserted that Ms. [REDACTED]’s release would present a public safety risk because her “ability to conduct some activities of daily living, such as using the commode, has recently improved” and she “is able to leave the Health Services Unit with the help of an incarcerated individual who is hired to push her wheelchair” (A.R. 3), despite the fact that there is no rational connection between public safety and Ms. [REDACTED]’s slightly improved ability to transfer to the toilet after staff rearranged the furniture or her ability to be pushed in a wheelchair. Lastly, the denial stated that Defendant Jenkins was “not confident” that Ms. [REDACTED] if released, “will leave and remain at liberty without violating the law and that release will not be

incompatible with the welfare of society,” without giving any additional reason for this conclusion. A.R. 4.

ARGUMENT

A person must be granted medical parole if the commissioner determines (1) she is terminally ill or permanently incapacitated such that (2) she will live and remain at liberty without violating the law and (3) release will not be incompatible with the welfare of society. *McCauley v. Superintendent, Mass. Corr. Inst., Norfolk*, 491 Mass. 571, 593–94 (2023) (citation omitted); G.L. c. 127, § 119A(e); *Adrey v. Dep’t of Corr.*, No. 193786H, 2020 WL 4347617, at *5 (Mass. Super. June 19, 2020) (“The medical parole statute requires that a prisoner ‘*shall*’ be released on medical parole”) (emphasis in original).

Denial of a medical parole petition is subject to judicial review through an action for certiorari. G.L. c. 127, § 119A(g) (authorizing action pursuant to G.L. c. 249, § 4). Courts apply the arbitrary and capricious standard to the commissioner’s decision, which requires the decision to have a rational basis. *McCauley v. Superintendent, Mass. Corr. Inst., Norfolk*, 491 Mass. 571, 593 (2023). A rational basis requires that the agency “examine the relevant data and articulate a satisfactory explanation for its action,” including a “connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). An agency decision is arbitrary and capricious if it relies on factors the legislature did not intend for it to consider, fails to consider an important aspect of the situation, provides an explanation counter to the evidence, or is so implausible that it cannot be explained as a difference in view or the product of agency experience. *Id.*; see also *City of Revere v. Massachusetts Gaming Comm’n*, 476 Mass. 591, 605–06, (2017) (agency decision is arbitrary and capricious if it “violated . . . requirements of the act” or “ignored specific statutory criteria”).

I. DEFENDANT’S DENIAL OF MS. [REDACTED]’S REQUEST FOR RECONSIDERATION WAS ARBITRARY AND CAPRICIOUS

The denial of Ms. [REDACTED]’s request for reconsideration was arbitrary and capricious for three reasons: (1) the commissioner failed to consider the medical opinion of Dr. Mark Eisenberg regarding Ms. [REDACTED]’s irreversible physical incapacitation; (2) the commissioner impermissibly substituted his medical judgment regarding physical incapacitation for that of a licensed physician contrary to the language of the statute, and (3) the conclusions that Ms. [REDACTED] poses a public safety risk and would not live and remain at liberty without violating the law and that her release would be incompatible with the welfare of society lack a rational basis.

A. The Commissioner Failed to Consider the Medical Assessment from a Licensed Physician Regarding Ms. [REDACTED]’s Permanent Physical Incapacitation

Under the medical parole statute, the “decision must be based on certain inputs. For one, the statute requires the input of a ‘licensed physician’ to assess whether the prisoner has . . . ‘a physical or cognitive incapacitation that appears irreversible.’” *Adrey v. Dep’t of Correction*, No. 193786H, 2020 WL 4347617, at *6 (Mass. Super. June 19, 2020) (quoting G.L. c. 127, § 119A(a)); see *Buckman v. Comm’r of Corr.*, 484 Mass. 14, 29 (2020) (“[B]y enacting § 119A, the Legislature intended to trigger a collaborative process whereby the health care provider for the institution, reentry staff, and the prisoner (or his or her attorney or next of kin) work together to . . . obtain a written diagnosis by a licensed physician.”).

Despite this requirement, the commissioner’s denial of the request for reconsideration entirely fails to mention—much less to appropriately consider—the declaration of Dr. Mark Eisenberg, which was submitted with and cited throughout Ms. [REDACTED]’s request for reconsideration. A.R. 11-14, 38-43. Dr. Eisenberg is a licensed and board-certified internal

medicine physician on the faculty of Harvard Medical School and the Massachusetts General Hospital. A.R. 11. He requested permission from DOC to enter MCI-Framingham with his medical equipment to perform an independent evaluation of Ms. [REDACTED]'s suitability for medical parole, and DOC approved the request. *See* Decl. of Michael J. Horrell, Esq. The conclusions from his evaluation speak directly to Ms. [REDACTED]'s suitability for medical parole under the statute; specifically, he found that Ms. [REDACTED] has “multiple severe, irreversible, debilitating medical conditions which restrict her ability to ambulate and perform her [activities of daily living]” and that she is “permanently incapacitated without hope of any meaningful improvement and I believe the extent of her debilitation and impairment minimizes her ability to commit a crime.” A.R. 13.

Because the commissioner’s decision does not address Dr. Eisenberg’s directly relevant and statutorily mandated assessment, it was arbitrary and capricious. *See McCauley v. Superintendent, Massachusetts Corr. Inst.*, Norfolk, 491 Mass. 571, 598 (2023) (failure to consider factor required by medical parole statute cannot be excused).³

B. The Commissioner Impermissible Substituted His Judgment Regarding Physical Incapacitation for that of a Licensed Physician Contrary to Statute and Agency Competence

A person is eligible for medical parole if, among other requirements, she suffers from “a physical or cognitive incapacitation that appears irreversible, *as determined by a licensed physician*, and that is so debilitating that [she] does not pose a public safety risk.” G.L. c. 127, §

³ The fact that the commissioner’s decision relied upon and credited a clinical assessment from Dr. Rosenfeld does not justify ignoring Dr. Eisenberg’s assessment. *See Adrey v. Dep’t of Correction*, No. 193786H, 2020 WL 4347617, at *6 (Mass. Super. June 19, 2020) (ordering medical parole when commissioner “failed to reconcile or explain” changes in medical evaluations, including a preference for one over another).

119A(a) (emphasis added). That criterion is plainly satisfied by Dr. Eisenberg’s declaration, and the commissioner cannot substitute his opinion to the contrary.

Regarding Ms. [REDACTED]’s condition, Dr. Eisenberg attested that she “suffers from physical incapacitation” due to several “*irreversible*, chronic, and debilitating medical conditions[.]” A.R. 12 (emphasis added). With respect to her musculoskeletal disease, he found that given her “age and the severity of the disease in her shoulders, hips and knees, her joint disease is *irreversible* and will continue to decline. I do not foresee a scenario in which she can perform her ADLs and achieve independence.” *Id.* In his conclusion, he again emphasized that Ms. [REDACTED] suffers from “multiple severe, *irreversible*, debilitating medical conditions which restrict her ability to ambulate and perform her [activities of daily living],” that she “will not be able to live independently,” and that he considers her “*permanently incapacitated* without hope of meaningful improvement[.]” A.R. 13.

Despite Dr. Eisenberg’s unequivocal assessment, the commissioner concluded that Ms. [REDACTED] is not physically incapacitated because she can “ameliorate her mobility issues by participating in formal PT.” A.R. 3. This determination, which is directly contrary to the findings of Dr. Eisenberg, arrogates the medical judgment to the commissioner, contrary to the language of the statute and the commissioner’s competence.

The commissioner’s decision also finds no support in the medical assessment of Dr. Rosenfeld, or in common sense. Dr. Rosenfeld’s assessment is consistent with Dr. Eisenberg’s, and it nowhere states that Ms. [REDACTED]’s ailments are reversible. To the contrary, it describes Ms. [REDACTED] as a woman with severe and worsening medical conditions: it cites multiple recent hospitalizations, “worsening” shortness of breath, the recent total loss of the ability to walk, new left knee pain, the loss of the ability to use the restroom or shower independently,

congestive heart failure and chronic kidney disease that are “progressive with risks of end stage organ failure and may be terminal illnesses,” a persistent risk “for a sudden cardiopulmonary event,” and surgical replacement of both her knees and hips. A.R. 601-02. Out of that summary, the commissioner cherry picks only that Ms. [REDACTED] declined formal physical therapy for a left ankle sprain to conclude that she is not permanently incapacitated because her mobility may improve. A.R. 3. Dr. Rosenfeld does not say—and the administrative record does not support—that physical therapy on Ms. [REDACTED]’s left ankle has the potential to improve her myriad, longstanding, and worsening mobility and musculoskeletal issues. *See Mahdi v. Dep’t of Corr., et al*, Mass. Super. Ct., No. 1982CV01064, Dkt. 11, Mem. of Decision on Cross-Mots. for J. on the Pleadings, 10 n.2 (Norfolk Cnty. Mar. 31, 2020) (“refusal to follow medical advice” inadequate justification for denial of medical parole when “there is no suggestion in [physicians’] reports or elsewhere in the record” that following the advice “would remedy or correct [plaintiff’s] several medical issues which led to the medical conclusion of incapacitation”).

Because the commissioner impermissibly substitutes his own, non-competent medical opinion for that of a licensed physician in contravention of the medical parole statute’s requirements, the denial of request for reconsideration was arbitrary and capricious.⁴

⁴ Both denials also improperly substitute the commissioners’ judgment for those of a licensed physician when they claim that Ms. [REDACTED] could “ameliorate” her “risk for possible death” by undergoing cardiac catheterization to treat her congestive heart failure. A.R. 3, 51. To the contrary, Dr. Rosenfeld and the cardiology team at Lemuel Shattuck Hospital determined that “maximizing her medications” was “the only avenue she could tolerate.” A.R. 183. However, because no licensed physician has categorically stated that Ms. [REDACTED] has a condition that will likely cause her death in not more than 18 months, *see* G.L. c. 127, s 119A(a), Ms. [REDACTED] does not claim in this suit that failure to grant her medical parole on the basis of terminal illness was arbitrary and capricious.

C. The Commissioner's Conclusions that Ms. [REDACTED] Poses a Public Safety Risk, Would Not Live and Remain at Liberty Without Violating the Law, and That Her Release Would Be Incompatible with the Welfare of Society Lack a Rational Basis

Under the medical parole statute, the question of a person's public safety risk is tied to the extent of her debilitation. G.L. c. 127, § 119A(a) (defining "permanent incapacitation" 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") (emphasis added). The medical parole regulations define "debilitating condition" as one that "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. The regulations also require the superintendent to perform a risk of violence assessment based upon, at least, the following factors:

- (a) The prisoner's diagnosis and prognosis;
- (b) The prisoner's current housing situation;
- (c) The necessary clinical management of the prisoner's terminal illness/permanent incapacitation;
- (d) As assessment for mobility, gait and balance, specifically, whether the prisoner is bedridden, wheelchair-bound, uses a walker, or can walk with assistance;
- (e) The medical prescribed and required durable medical equipment or other assistive devices for the prisoner;
- (f) The prisoner's ability to manage activities of daily living;
- (g) A mental health assessment; and
- (h) The prisoner's age, height, weight, ability to eat independently, and if the prisoner is fed intravenously.

501 CMR 17.04(3). The commissioner's determination "as to whether a prisoner is so debilitated that he or she does not pose a public safety risk should result from a comprehensive approach,

considering all the factors implicated by the particular case.” *McCauley v. Superintendent, Massachusetts Corr. Inst., Norfolk*, 491 Mass. 571, 592 (2023).

Based upon these factors and the evidence in the administrative record, no reasonable person could conclude that Ms. [REDACTED]’s release would pose a public safety risk. She is over 70 years old and unable to walk, bathe, dress, or use the toilet by herself. A.R. 11-14, 601-02. She cannot raise her hands above her shoulders and becomes winded after moving short distances. *Id.* She requires access to 24-hour medical care (A.R. 142) and must sleep in a recliner in the Health Services Unit of MCI-Framingham because she suffers severe back pain and spasms if she lies down (A.R. 108). She has required multiple hospitalizations over the past year due to rapid decompensation, and her heart failure and kidney disease put her at risk of rapid organ failure and death. A.R. 601-02. She has had both knees and hips replaced. A.R. 11-14, 601-02. She has both vision and hearing loss, and she has suffered from recent falls resulting in emergency transports. *Id.*; A.R. 71, 79, 86. An independent, licensed physician has determined, in no uncertain language, that she is not likely to get better and will need to live in a nursing home or assisted living facility for the rest of her life. A.R. 14.

In addition to Ms. [REDACTED]’s extensive debilitation, DOC’s own internal documents support that she is unlikely to pose a public safety risk if released. DOC’s standardized risk assessment indicates that she presents a low risk of violence, substance abuse, and recidivism, A.R. 72, 159, which is comports with DOC’s published research that found formerly incarcerated people aged 55 and older “recidivated at the lowest rates.” A.R. 72.⁵ With the exception of the nature of her crime, all the factors in Ms. [REDACTED]’s classification report—recent convictions,

⁵ Citing MA Executive Office of Public Safety and Security DOC, MA DOC THREE-YEAR RECIDIVISM RATES: 2015 RELEASE COHORT 9 (2020), available at <https://www.mass.gov/doc/three-year-recidivism-rates-2015-release-cohort/download>.

history of escapes, history of institutional violence, disciplinary history, age, and program participation—weigh in favor of minimum or lower security. A.R. 72, 141. The administrative record indicates that she has received just seven disciplinary reports during her incarceration, most recently in 2015, all of which were for minor, non-violent rule infractions, such as lending property to others, possession of non-weapon contraband, refusing an order to clean, and smoking a cigarette inside at a time when smoking was only allowed in the yard. A.R. 71, 155, 167-82. Most of the tickets were closed administratively, dismissed, or continued without a finding. *Id.*

Despite this compelling evidence that Ms. [REDACTED]'s release would not present a risk to public safety, the commissioner's decision cited three bases for his contrary conclusion: (1) "Ms. [REDACTED]'s ability to conduct some activities of daily living, such as using the commode, has recently improved"; (2) people are able to push Ms. [REDACTED] to other units while she is in her wheelchair; and (3) the commissioner believes that Ms. [REDACTED] could "pursue interventions" to "potentially improve her overall health." A.R. 3. None of these justifies the decision.

Ms. [REDACTED]'s ability to use the commode with somewhat less assistance than before because DOC staff repositioned her recliner closer to the toilet in her cell (A.R. 602) bears no rational connection to public safety. *See McCauley v. Superintendent, Massachusetts Corr. Inst., Norfolk*, 491 Mass. 571, 586 (2023) ("The plain language of the regulation does not require that a prisoner be incapable of performing all daily life functions, but some daily life functions."). Nor does the fact that she can be pushed in a wheelchair. To the contrary, the medical parole regulations specifically list a lack of strength or ability to walk as a feature of a debilitating condition (501 CMR 17.02) and being "wheelchair-bound" as a factor that must be considered in a risk assessment (501 CMR 17.04(3)). As such, the commissioner's claim that Ms. [REDACTED]'s

confinement to a wheelchair is evidence that she is *not* debilitated and *poses* a public safety risk cannot be squared with the regulation or case law. *See, e.g., Mahdi v. Dep't of Corr., et al*, Mass. Super. Ct., No. 1982CV01064, Dkt. 11, Mem. of Decision on Cross-Mots. for J. on the Pleadings, 11 n.3 (Norfolk Cnty. Mar. 31, 2020) (decision concluding a petitioner posed a public safety risk because he could “be pushed in a wheelchair” was not supportable); *Emma v. Mici*, Mass Super. Ct., No. 2184CV01061, Dkt. 12, Mem. of Decision and Order on Cross Mots. for J. on the Pleadings, 9 (Suffolk Cnty. May 26, 2021) (commissioner erred in concluding that petitioner was not sufficiently debilitated when his “condition continue[d] to weaken” and he was “unable to walk on his own and require[d] a wheelchair”). Further, as discussed above, the commissioner’s conjecture that Ms. [REDACTED]’s medical condition may improve is beyond his competence, contrary to the medical evidence in the record, and cannot supersede a contrary opinion from a licensed physician under the medical parole statute.

Lastly, regarding whether Ms. [REDACTED] would live and remain at liberty without violating the law or her release would be compatible with society’s welfare, the commissioner provides no further explanation of his determination. He simply says that he is “not confident.” A.R. 4. Such a bald statement, the likes of which have already drawn rebuke from the Supreme Judicial Court, cannot provide a rational basis for a denial of medical parole. *See McCauley v. Superintendent, Mass. Corr. Inst., Norfolk*, 491 Mass. 571, 602 (2023) (noting an “explanation” of “why the [commissioner] concluded that the plaintiff did not meet the requirements of the statute” was “imperative not only so the prisoner may prepare a relevant response, but also so the court may properly analyze whether the determination is arbitrary or capricious. We urge the commissioner to prepare a more detailed explanation of her decision going forward.”). Because

the commissioner provides no rational basis for his conclusion, his decision is arbitrary and capricious and must be vacated.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully request that this Court grant her the Motion for Judgment on the Pleadings and order the following relief:

- a. Set aside the Defendant's decision as arbitrary and capricious;
- b. Remand the matter to the Defendant with instructions that he reconsider Ms. [REDACTED] for medical parole in accordance with the requirements of the statute and regulations, and render a new decision within seven days;
- c. Issue a declaratory judgment against the Defendant declaring that where a licensed physician has determined that a medical parole petitioner has an incapacitation that appears irreversible, and there is no determination by a licensed physician to the contrary, it is a violation of G.L. c. 127, §119A for the commissioner to substitute his opinion to the contrary;
- d. Issue a declaratory judgment that Plaintiff is permanently incapacitated, as defined in G.L. c. 127, §119A;
- e. Order such other and further relief as this Court deems just and proper; and
- f. Enter judgment in favor of the Plaintiff.

Dated: June 27, 2024

Respectfully submitted,

Plaintiff,
[REDACTED]

By her attorney,

/s/ Michael J. Horrell

Michael J. Horrell, BBO #690685

Prisoners' Legal Services of Massachusetts

50 Federal Street, 4th Floor

Boston, MA 02110

Tel: 617-482-2773

mhorrell@plsma.org

Certificate of Service

I hereby certify that on June 27, 2024, a true copy of the above document and appendix thereto was served by email upon:

Richard E. Gordon
Department of Correction – Legal Division
70 Franklin Street, Suite 600
Boston, MA 02110
Richard.Gordon@DOC.State.MA.US
Attorney for Defendant

Dated: June 27, 2024

/s/ Michael J. Horrell
Michael J. Horrell, BBO #690685

APPENDIX OF UNREPORTED CASES

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<i>Mahdi v. Dep't of Correction, et al.</i> , Mass. Super. Ct., No. 1982CV01064, Dkt. 11, Memorandum of Decision on Cross-Motions for Judgment on the Pleadings (Norfolk Cnty. Mar. 31, 2020)	App. 1
<i>Adrey v. Dep't of Correction</i> , No. 193786H, 2020 WL 4347617 (Mass. Super. June 19, 2020)	App. 18
<i>Emma v. Mici</i> , Mass. Super. Ct., No. 2184CV01061, Dkt. 12, Memorandum of Decision and Order on Cross Motions for Judgment on the Pleadings (Suffolk Cnty. May 26, 2021)	App. 26

Docket
NORFOLK, ss

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT

CIVIL ACTION NO. NOCV-2019-1064

11/10
3/31/2020
RECEIVED & FILED
CLERK OF THE COURTS
NORFOLK COUNTY
4/1/2020

ABDUL JALEEL MAHDI,
Plaintiff

v.

DEPARTMENT OF CORRECTION,
CAROL MICI, Commissioner of
Correction, and STEVEN SILVA,
Superintendent, MCI-Norfolk,
Defendants

MEMORANDUM OF DECISION ON CROSS-MOTIONS
FOR JUDGEMENT ON THE PLEADINGS

The plaintiff in this action is Abdul Jaleel Mahdi who is an inmate at the Massachusetts Correctional Institution-Norfolk where he is in the fifty-second year of a committed sentence of life imprisonment for the crime of second degree murder. Now eighty-nine years old, application has been made on his behalf under the provisions of G. L. c. 127 § 119A seeking medical parole contending that he qualifies under the statute as both permanently incapacitated and terminally ill. His petition was initially rejected by the defendant Commissioner of Correction, Carol Mici, as incomplete. Subsequently counsel supplemented the petition filing.

Mahdi's petition included medical documentation in the form of signed reports from two licensed physicians, Arnold Blank, M.D. of Wellpath and Steven Descoteaux, M.D., Wellpath's Medical Director, both of whom are familiar with Mahdi's medical condition. The petition also included a medical parole plan, which, *inter alia*, stated his daughter's willingness to have Mahdi reside with her if released and included plans for medical services through the Veteran's

Administration.

Pursuant to the statute, Commissioner Mici solicited a recommendation as to the merits of the application from defendant Steven Silva, Superintendent of MCI-Norfolk. Superintendent Silva's letter after reviewing matters that appeared in Mahdi's Department of Correction (DOC) records along with medical and other materials submitted, concluded with a recommendation that he not be granted medical parole. It predicated this on the opinion that Mahdi failed to meet "the definition of having a medical condition so debilitating that he does not pose a public risk" and cited the severity of Mahdi's past crimes, charged and uncharged, medical, mental health and disciplinary history, classification, and staff observation. A hearing was convened on June 3, 2019 before Commissioner Mici at which counsel for Mahdi appeared and was heard. Mici heard also from Superintendent Silva and from the family of the victim of the homicide for which Mahdi had been convicted in 1968 and a prosecutor from the Hampden County District Attorney's Office. Evidence was also presented by Medical Director Descoteaux concerning Mahdi's medical condition.

On June 7, Mici rendered her written decision. Her letter recounted incidents that had taken place during Mahdi's fifty-two year prison history and went on to review concerns that had been voiced by the victim's family and the prosecutor. It stated that she concurred with Superintendent Silva's recommendation and was denying the application. Mahdi through counsel filed a petition in the Supreme Judicial Court seeking review of that decision in the nature of *certiorari*. SJ-2019-0313. A Single Justice ordered the case transferred to this Court by Order dated August 14 2019. The Administrative Record was filed with this Court, and on January 6, 2020, the parties' cross-motions for judgement on the pleadings pursuant to Superior

Court Rule 9A. Hearing was conducted on February 18, 2020.

Legal Standard

The plaintiff's claim is one in the nature of certiorari which seeks to review the action undertaken by an official within a governmental agency, the Department of Correction. The purpose of such a lawsuit is to seek the correction of errors of law not otherwise subject to review, where such errors are apparent on the record and adversely affect material rights. *Carney v. City of Springfield*, 403 Mass. 604,605 (1988); *MacHenry v. Civil Service Commission*, 40 Mass. App. Ct. 632,634 (1996). Relief in the nature of certiorari is warranted where the plaintiff demonstrates errors that are so substantial and material that, if allowed to stand, they will result in manifest injustice to a petitioner who is without any other available remedy. *Johnson Products, Inc. v. City Council of Medford* 353 Mass. 540, 541 n.2 (1968); *Tracht v. County Comm'rs of Worcester*, 318 Mass. 681, 686 (1945). The granting of the extraordinary writ requires that a plaintiff establish that the error alleged is such as resulted in a substantial injury or manifest injustice to him. *Mass. Bay Trans. Authority v. Auditor of the Commonwealth*, 430 Mass. 783, 790 (2000).

The standard of review under G. L. c. 249 § 6, however, is also one at the same time which is flexible and case-specific, *Hoffer v. Board of Registration in Medicine*, 461 Mass. 451, 458 n. 9 (2001), and it "may vary according to the nature of the action for which review is sought," and the breadth of discretion exercised under the applicable statute under which the defendant public official acts. *Chandler v. County Commissioners of Nantucket County*, 437 Mass. 430, 434 (2002) (citations omitted). See also *Cepulonis v. Commissioner of Correction*, 15 Mass. App. Ct. 292, 293 (1983). *Certiorari* review "takes its color from the nature of the

administrative action that is being examined.” *Wightman v. Commissioner of Correction*, 19 Mas. App. Ct. 442, 445 (1985)

Ruling

The statute whose application is at issue in this case is G. L. c. 127 § 119A, enacted by the Legislature in 2018 and intended to permit medical parole for terminally ill and permanently incapacitated inmates to operate outside of the traditional parole-granting framework. The legislative purpose behind the statute has been elucidated in the recent Supreme Judicial Court decision *Commonwealth v. Buckman*, 484 Mass. 14 (2020). As outlined by the Court, the statute had its genesis in considerations both humanitarian and fiscal. Prior to its enactment, the Commonwealth had been one of only a small number of states which had not provided for some form of “compassionate release” to inmates at end-stage illness or in a severe and advanced condition of medical debilitation. *Id.*, at 19-20. At that time, the sole means for seeking release for an inmate in such condition was through application for grant of executive clemency, a process which the Court characterized as proving “almost invariably an exercise in futility.” *Id.*, at 20.

The Court noted that the Commonwealth was imprisoning an increasingly old population, having the highest percentage of its inmates of any state who were over fifty-five years of age. *Id.*, at 20. Those inmates, the ruling noted are significantly more susceptible to debilitating illnesses and are more expensive to incarcerate, with medical costs for older prisoners reported as nearly triple those of other inmates. *Id.*, at 21. Further, the presence of large numbers of very old and acutely ill inmates who cannot be housed in the general prison or jail population is serving to strain the capacity of state and county institutions to provide regular and short-term

medical care needed by other inmates. *Id.*

While cost saving was a significant factor in the Legislature's enacting the medical parole statute, the Court noted, that it also had its impetus in "the human element," to afford a mechanism enabling compassionate release among a population of elderly and very infirm prisoners "considered the least likely to re-offend when released." *Id.*

The predicate for application under the medical parole statute is a determination by a licensed physician that the inmate suffers from one or both of the following: "physical incapacitation" defined as "a physical or cognitive incapacitation that appears irreversible;" or a "terminal illness" defined as "a condition that appears incurable ... that will likely cause the death of the prisoner [within eighteen] months." C. 127 § 119A. Either of those two conditions is qualified by the requirement that it have rendered the inmate so debilitated that he does not pose a public safety risk. Once the application has been filed for the prisoner along with a medical parole plan, written diagnosis by a licensed physician, and an assessment of the risk for violence posed by the inmate to society, the package is forwarded by the Superintendent of the facility housing the inmate to the Commissioner, accompanied by his or her recommendation as to action on the application.

After receiving input from interested parties, including the petitioner, the prosecutor from the locality where the crime was prosecuted and the victim's family, the Commissioner is to render a decision accompanied by a statement of reasons. The statute requires the Commissioner make essentially three determinations: whether the prisoner is "terminally ill" or "permanently incapacitated;" if released, whether the prisoner will not violate the law; and finally, whether the prisoner's release is incompatible with the welfare of society. *Buckman, supra*, at 19. If the

answers to the first of these two questions are in the affirmative and the third in the negative, then she is to grant release to medical parole subject to terms and conditions imposed by the Parole Board.

The applicant, Mahdi, argues that Commissioner Mici's decision here to deny medical parole is not supportable on the administrative record assembled. He points to uncontroverted medical opinion contained in the record which cites his very advanced age of 89 years and his multiple diagnosed medical conditions as warranting the finding that he qualifies both as permanently incapacitated and terminally ill, with both conditions so debilitating that he does not pose risk to society. He argues that his severe physical and cognitive limitations are such that he poses no risk of law violation if released and that such release cannot be said on this record to be incompatible with the welfare of society.

The defendants in their memorandum in support of cross-motion assert that the Commissioner's decision on the application is legally unassailable based upon the record. While they concede that Mahdi suffers from a large array of serious medical ailments, they dispute that he meets the criteria for debilitation by virtue of either "incapacitation" or "terminal illness." While he unquestionably is wheelchair-bound, they note that when moved by staff from his bed to the bathroom area, he can attend to his own washing and can toilet on his own. They also cite Mahdi's continuing refusal to take certain recommended medical treatment as exacerbating his medical issues. They point to materials contained in DOC records and in Superintendent Silva's letter of negative recommendation which describe Mahdi as able to sit for periods on his bed and to be brought to religious services.

In addition, the defendants lay very great stress on the nature of the crimes for which

Mahdi was convicted fifty-two years ago, and his record as an inmate which included episodes of violence and threats. They also cite his having been turned down for parole on three prior occasions, which had cited the nature of his crimes and a lack of empathy, and the opposition expressed by the prosecutor and the crime victim's family to any grant of medical parole.

Evidence of the present medical condition of the applicant exists in the record in the form of the two reports from Doctors Blank and Decoteaux and the latter's testimony at the hearing as contained in the transcript. Dr. Blank in his report outlined Mahdi's medical conditions as including: congestive heart failure, tricuspid heart valve disease, anemia, chronic kidney disease, diabetes mellitus, severe leg swelling, impaired gait, elevated prostate specific antigen (PSA), and moderate dementia. (A.R., p. 41). Dr. Blank described these conditions as rendering Mahdi "quite incapacitated," and he noted that he spends his days sitting on the side of his bed. He did note Mahdi's unwillingness to heed medical advice to attend to certain of his medical issues, citing the elevated PSA level and anemia as potentially symptomatic of separate carcinomas. Dr. Blank noted that the diagnosis of dementia was unofficial, and he had not been addressing it formally as he believed it would not be beneficially treatable. He expressed the opinion that Mahdi's various medical conditions are serious enough to cause his death at any time, although he was unable to quantify his life expectancy. He concluded his report stating "[c]ertainly his physical condition would render him not dangerous in society."

Dr. Descoteaux in his report outlined the same medical conditions as did Dr. Blank. He noted that these conditions coupled with his dementia have led to Mahdi's slow but steady decline, and he also noted like Blank, Mahdi's refusal to follow certain medical advice such as having outside medical evaluations and refusing to take water pills and to use compression

stockings which might ease his leg edema. (A.R., p. 40). In assessing Mahdi's functional status, he noted the following: inability to walk with need for wheelchair and requiring assistance on any transfer to and from his bed; urinary incontinence requiring use of a catheter or urinal at all times; limitation on his ability to sit on the side of his bed to only a few hours before he is required to lie down; and dementia characterized as "moderate to severe." Dr. Descoteaux also noted, behaviorally, that Mahdi was a "non-violent person who keeps to himself." He concluded his report noting his medical assessment that Mahdi is "very old and permanently incapacitated," and "unable to function without consistent nursing care and without using a wheelchair." He stated that factoring in his age, he would predict death as likely within eighteen months or less.

In his testimony at the hearing, Dr. Descoteaux essentially repeated the findings contained in his written report, with some elaboration. In describing Mahdi's dementia, he stated that he suffers some mild delusions, as he explains his refusal to ingest water pills which would aid his heart condition because of his belief they contain cyanide. Dr. Descoteaux reiterated the status of Mahdi's immobility, stating that it takes one to two staff members to move him to and from his wheelchair. He added that staff at the prison's Clinical Stabilization Unit (CHU) where Mahdi's bed is located report that he has expressed paranoid thoughts, but is non-violent and keeps to himself. Finally, he testified that his conclusions which parallel those in his report were gleaned from reviewing Mahdi's chart and also from discussing his functional status with the nurses and medical providers on the CHU as well as from his own physical examination.

In her decision, Commissioner Mici asserted "[t]he evidence does not show that Mr. Mahdi is terminally ill or permanently incapacitated." (A.R. p. 2). In her explanation for that view, she goes through the reports of both physicians, outlining the numerous medical conditions

that each found the eighty-nine year old inmate to be suffering. She discounted the contention that he is “terminally ill,” noting that Dr. Blank, while opining that it is reasonably likely that Mahdi will not survive eighteen months, had couched that assessment by acknowledging that he was unable to give a formal life expectancy figure. With respect to Dr. Descoteaux, while conceding that he had made a prediction that Mahdi was likely to expire within eighteen months, she noted that the physician had made reference to “factoring in his age” along with his medical condition.¹

With respect to the opinion voiced by both medical professionals as to Mahdi’s permanent incapacitation, Commissioner Mici took issue with this also. With respect to Dr. Blank’s assessment, she provides no specific reason for disputing it other than referencing Dr. Blank’s description of Mahdi as “‘wheelchair bound’ and unable to walk.” (A.R., p. 2). Concerning Dr. Descoteaux’s medical assessment adjudging permanent incapacitation, she appears to cite two reasons for her rejection. First, she notes Mahdi’s ability to toilet and to shower if placed in his wheelchair and moved by staff to the bathroom. Second, she references his refusal to have followed certain medical advice including his refusal to take water pills due to his expressed belief they are poisoned or to use compression stockings. While noting Dr. Descoteaux’s conclusion as to Mahdi suffering “moderate to severe dementia,” she appears to attribute incapacitation as attributable to a certain extent to volition on Mahdi’s part.

It is perhaps arguable that the Commissioner’s conclusion as to the issue of existence of

¹ In his letter with recommendation against medical parole, which the Commissioner cites in her decision, Superintendent Silva discounted Dr. Blank’s assessment characterizing it as unduly turning upon Mahdi’s advanced age and failing to cite specific survival rates for particular illnesses. (A.R., p. 45).

terminal illness is sustainable on this record. It is correct to say that neither of the physicians made specific reference to life expectancy connected to any of the many serious illnesses from which Mahdi suffers. Viewed in this light, her conclusion that each opinion was placing an over-reliance on Mahdi's very advanced age without tying it into specifics as to his medical condition, it could perhaps be argued might provide some basis for rejecting the opinions offered by the two physicians in the manner in which they were set forth in their reports.

The same cannot be said of her rejection of the physician's medical opinion as to his state of permanent incapacitation. The reports of each of the two physicians who were familiar with Mahdi and his medical records stated without equivocation that as a consequence of his many serious medical conditions, he met the criteria for being medically incapacitated. There was nothing medically that indicated the conditions from which he suffered were remediable or were anything other than permanent. Further in his testimony at the hearing, Medical Director Descoteaux made clear that his written report and its conclusions, in terms of rendering medical evaluation of Mahdi's incapacitation was based upon, his "discussing his functional status with the nurses and medical providers on the unit and examining the patient myself." (A.R., p. 22). Commissioner Mici's rejection of the evidence provided by both of the Wellpath physicians, informed by consultation with the prison's medical staff, simply is not supportable.² The medical

² To the extent that Commissioner Mici's decision and to a greater extent Superintendent Silva's letter highlights Mahdi's refusal to follow medical advice as a factor relating to the question of his medical incapacitation, this does not appear on this record a basis for rejecting the conclusions of Doctors Decoteaux and Blank. First, there is no suggestion in their reports or elsewhere in the record that Mahdi's taking the water pills and using compression stockings or having his PSA or anemia issues addressed by specialists would remedy or correct his several medical issues which led to the medical conclusion of incapacitation. Secondly, to the extent that the decision might appear to point to Mahdi's own volition playing a role in the medical finding of incapacitation, the physician's opinion as to Mahdi's condition of dementia stands

evidence contained in the record establishes that Mahdi fits the definition under c. 127 § 119A as a person with physical or cognitive incapacitation which is irreversible and so debilitating and limiting that he does not pose a public safety risk.³

The legislative enactment authorizing grant of medical parole also implicates the Commissioner's determination of two other factors, formally separate in the statute but certainly conceptually intertwined. These are first, whether the prisoner if released will not violate the law, and second, whether his release is incompatible with the welfare of society. Plainly these questions were answered adversely to Mahdi in the Commissioner's decision. In doing so, she placed very great stress upon the nature of the crimes of which Mahdi was convicted and incidents during his very long history as an inmate in the state penal system. To address the propriety of the Commissioner's ruling under the statutory framework which governs medical parole, it is necessary to examine the criminal history background of Mahdi, his institutional history with DOC, and the interrelation of both with his present circumstances as they bear on his application for medical parole.

The background of Mahdi's criminal history and of the course of his fifty-two years in the

unrebutted, notwithstanding the assertions in Superintendent Silva's letter which sought to link instances of distorted thinking Mahdi may have displayed at earlier times in his institutional history to his current mental state.

³ The decision and the letter recommending against medical parole appear to question the physician's conclusion as to Mahdi's meeting this standard as to level of debilitation on the basis that Mahdi is able to sit on the edge of his bed and write for a few hours until he tires, that he can wash, and that he is brought in his wheelchair at his request to religious services in the prison. As Superintendent Silva's testimony makes clear, none of the activity takes place as a product of Mahdi's own motive force, as these activities require he be pushed in the wheelchair. (A.R., p. 10). Dr. Decoteaux amplified the same point in his testimony, noting that transfer to and from his bed requires effort from one to two persons. (A.R., p. 14).

prison system can be gleaned from materials submitted by DOC and by his own counsel in the the administrative record and from the background facts of the crime for which he remains committed on the life sentence for second degree murder. Mahdi initially had been convicted of first degree murder in May of 1968. The facts as set forth in the Supreme Judicial Court decision on his appeal of that conviction, reflect that he was among three men who entered a store in Springfield, armed with a gun, intending to commit robbery. *Commonwealth v. Mahdi*, 388 Mass. 679, 683 (1983). During that robbery, both of the store's employees, a father and son, were shot, the younger man fatally. The crime was one which was cold-blooded, and the evidence plainly reflected that Mahdi played a leading role, shooting both men himself. The Court reversed the conviction on the basis of unfair prejudice raised during the prosecutor's cross-examination of Mahdi and in closing argument to the jury which it ruled sufficiently egregious to pose a substantial risk of a miscarriage of justice, *Id.*, at 690.⁴

When Mahdi's case was returned to the Hampden County Division of this Court, it apparently was disposed by way of plea after it had been reduced to second degree murder. He was sentenced to the mandatory life term with parole eligibility on that charge after fifteen years. In addition, Mahdi was convicted of charges from a second incident involving a robbery and wounding of a person a few weeks prior to the murder. He received sentences ranging from

⁴ Mahdi had been a member of the Nation of Islam and a practitioner of that faith for a substantial period of time prior to the homicide. In cross-examination, the prosecutor focused his questioning of Mahdi on certain tenets of his religion, which he then characterized in his closing as hateful, seeking to explain the homicide and Mahdi's state of mind in starkly racial terms as a product of his religion, employing this in a manner in the Court's words, "to inject racial hatred into the trial." *Id.*, at 691-693 and n. 12

fiveto ten years to forty or fifty years on the armed robbery count.⁵ While in custody, Mahdi confessed to an unsolved murder in Connecticut of an off-duty police officer which had occurred in the same general time frame. While a warrant at one point had been lodged by that state's authorities against Mahdi, it is no longer active. While Connecticut authorities have expressed up to the recent past interest in investigating that 1968 homicide, no efforts have been made to seek to institute criminal action.

Prior to the criminal matters referenced above, Mahdi who turned thirty-seven years old during that year had no criminal record beyond possible motor vehicle fines. He is an honorably discharged veteran of the United States Navy, who according to his counsel had served four years active duty and after discharge had been fairly steadily employed.

Mahdi's earlier prison history, as set forth in Superintendent Silva's letter and in DOC records contained in the administrative record, was tumultuous. That letter reports an assault on another inmate and threats in 1971 along with multiple disciplinary episodes. At a time of exceptionally great violence and racial tension in the state prison system, Mahdi was identified as a leader of the faction identifying themselves as members of the Nation of Islam at a time they were in conflict with other inmate groups. This led to Mahdi being removed from MCI-Walpole to the federal Penitentiary in Atlanta for two years, a physical move he attempted to resist by assaulting a correction officer. Upon his return, disciplinary infractions continued which included threats to prison administration, inciting a riot, and assaults. The last of these sorts of infractions occurred in 1989.

Since 1989, as Mahdi has aged, his disciplinary infractions became fewer and far less

⁵ Mahdi has wrapped up all of those sentences well prior to the present application.

serious. A Classification Report, Personalized Program Plan and Risk Assessment compiled by the DOC dated April 17, 2019 as part of this application process reported that in 2003, he was written up for being in possession of another inmate's identification card, and also for improperly possessing or forging legal documents. (A.R., p. 54-55). It also states that he has been cited for refusing direct orders and contraband, without elaboration. His last disciplinary report was eight years ago in 2012 for refusing to go to an off-site medical visit. The accompanying Classification Report notes a recommendation for custody level of minimum or below, which, however, effectively is overridden by two factors: his imprisonment for a crime resulting in loss of life and Mahdi's medical needs which prevent his being moved to lower security.

As is set forth in Superintendent Silva's letter, a standing risk assessment which had been performed on Mahdi in 2010 categorized him as "Risk of Violence noted as low risk of recidivism noted as low." (A.R., p. 44).⁶ In addition, while the portion of his letter recounting his mental health history highlights Mahdi's clinging to paranoid thoughts and delusions that staff may wish to harm or kill him in, it also includes the observation that Mahdi "has never attempted any aggressive acts (self-defensive or otherwise) towards staff as a result of these beliefs." (A.R., p. 47).

Mahdi has been parole eligible for a substantial number of years, and he has appeared before the Parole Board four times in 1999, 2004, 2014, and 2019. The first three resulted in denial of parole based upon his past repetitive criminal behavior, and lack of remorse and

⁶ There is no material in the record to reflect that this assessment of low risk both of violence and of recidivism has changed in the intervening ten years.

empathy. He has not received any ruling from the Board after his latest appearance before it a year ago in March of 2019. In connection with his medical parole application, Mahdi has submitted "atonement letters" in connection with this present petition. (A.R., p. 141-143). These are of a rambling nature and the expressions of remorse and sympathy they contain for the families of the victims are only obliquely stated.

In her ruling, Commissioner Mici addresses at some length just prior to its conclusion submissions she received from the murder victim's family and the prosecution office and the very strong sentiments they voiced opposing grant of medical parole. The sentiments expressed by the family members and the searing loss still experienced are heartfelt and plainly not diminished for them by the passage of half a century. It is also true that they have been able to experience no solace as a consequence of Mahdi's having not offered any substantial expression of remorse or regret over that period for the heinous crimes he committed. The issue that must be determined in this case, however, is whether or not Mahdi comes within the category of persons who qualify for medical parole due to a very substantial and irreversible permanent incapacitation, and in addition, whether his debilitated state is such that he does not pose risk to public safety and will not break the law. The clear and uncontroverted medical evidence in the record establishes Mahdi's condition of extreme debilitation. Coupled with a review of his observed conduct during his last several decades in the penal system, it is difficult to discern risk to public safety or prospect of law-breaking behavior if he is released on terms of medical parole.

In the concluding paragraph of her decision, Commissioner Mici, after outlining in detail the objections raised by the Assistant District Attorney and the victim's family, states that she agrees with their opinion that the nature of the crimes themselves and the possibility that some

medical treatment will render Mahdi's condition improved justify denial of medical parole. (A.R., p. 7). Her view as to the realistic prospect for the improvement of Mahdi's condition, again, is not one which is consistent with the medical evidence that has been presented. Neither is her assertion which follows that Mahdi is insufficiently debilitated by his incapacitating condition that he poses risk to the public safety on the basis of this record. The severity of Mahdi's crimes which she cites as central to her conclusion is not as c. 127 § 199A is written a basis of itself to deny medical parole. The issues of incapacitation, extent of debilitation, risk to public safety, likelihood of future law-breaking, and societal welfare do not under the statute operate as strict correlates to the magnitude of the sentenced criminal acts.

The Commissioner's conclusion includes as a third factor in her decision, in addition to the severity of the crime and "the current state of health," "other evidence," presumably related to risk posed to public safety. She does not, however, set forth specifically what exactly that is. It is not found in evidence in the record either of Mahdi's present physical and mental state, nor in institutional records which describe the last decades of his incarceration. In light of the clear direction of the statute on medical parole, her determination as to its non-applicability to Mahdi and her ultimate conclusion as to his release under the statute as incompatible with societal welfare cannot be supported on the record before the Court.

Order

The motion of the plaintiff for judgement on the pleadings is Allowed, and the defendants' cross-motion for judgement on the pleadings is Denied. The plaintiff is ordered released to the Parole Board for imposition of terms and conditions of medical parole.

Date: March 31, 2020

A handwritten signature in black ink, appearing to read 'Thomas A. Connors', is written over a horizontal line.

Thomas A. Connors
Justice of the Superior Court

2020 WL 4347617

Only the Westlaw citation is currently available.

Superior Court of Massachusetts,
Suffolk County..

Jerry ADREY

v.

DEPARTMENT OF CORRECTION et al.

193786H

|

June 19, 2020

MEMORANDUM AND ORDER ON MOTION FOR JUDGMENT
ON PLEADINGS AS SUPPLEMENTED AFTER REMAND

Peter B. Krupp, Justice of the Superior Court

*1 Plaintiff Jerry Adrey 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 June 21, 2019 petition for medical parole under [G.L.c. 127, § 119A](#) (eff. Apr. 13, 2018).¹ Finding inconsistencies in the Commissioner's decision, the relevant superintendent's failure to prepare a “medical parole plan” as required by statute, and an apparent failure of the Commissioner to decide a later-filed petition for medical parole, I remanded the matter to the Commissioner for reevaluation on an expedited schedule based on plaintiff's current medical condition and with the benefit of a medical parole plan by the superintendent. On remand, the Commissioner again denied plaintiff medical parole. The case is now before me on plaintiff's motion for judgment on the pleadings, as supplemented after remand.² For the following reasons, I allow the motion and enter an appropriate order for prompt compliance.

BACKGROUND

Plaintiff is almost 71 years old. In 1974, at the age of 25, he was convicted of second degree murder and sentenced in the Essex Superior Court to life in prison with the possibility of parole after 15 years. The Supreme Judicial Court upheld his conviction, *Commonwealth v. Adrey*, 376 Mass. 747 (1978), and affirmed the denial of his new trial motion. *Commonwealth v. Adrey*, 391 Mass. 751 (1986).

*2 After serving more than 17 years, plaintiff was paroled on November 13, 1990. He lived in the community for almost 17 years. Although the record indicates he had some violations while on parole, each time he remained on parole despite his problem with drug addiction.

On April 17, 2007, plaintiff was re-incarcerated at the age 57 after he was arrested for drug distribution, and found in possession of a .357 Taurus revolver, two types of ammunition, heroin, and amphetamine. A suppression motion was allowed and all charges against plaintiff were nolle prossed in May 2008. Plaintiff nonetheless has remained in custody for the last 13 years following revocation of his parole. According to the Parole Board, after plaintiff was initially re-incarcerated, he received a number of disciplinary reports. In 2013, the Parole Board denied plaintiff parole, with plaintiff eligible for review in five years.

In 2019, plaintiff was housed at MCI-Shirley. On or about June 21, 2019, plaintiff petitioned for medical parole under [G.L.c. 127, § 119A](#), a statute that had taken effect only a year before. Plaintiff's petition and cover letter indicated that plaintiff "is wheelchair-bound[,] suffers from [Hepatitis C](#), ... [and] requires nursing home care." Plaintiff proposed "as his medical parole plan that he be released to the first available nursing home bed following a grant of release, and that his medical care will then be provided through his nursing home, to be funded by Medicaid."

On July 15, 2019, Colette Goguen, then the Superintendent at MCI-Shirley ("the Superintendent"), responded to the petition by letter to the Commissioner recommending denial of medical parole. The Superintendent indicated that "[c]urrent information indicates that Mr. Adrey resides safely in general population, is independently ambulatory, and does not require assistance with daily living activities." Relying on an "updated medical evaluation" from Dr. Maria Angeles, the medical director at MCI-Shirley,³ the Superintendent stated: "I do not find that Mr. Adrey meets the standard required by [G.L.c. 127, § 119A\(a\)](#) of permanent incapacitation '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 Superintendent also found plaintiff does not have a "terminal illness." The Superintendent did not reference plaintiff's medical records, did not prepare or include a "medical parole plan" for plaintiff, and did not explicitly provide an assessment of the risk for violence that plaintiff poses to society.

On August 29, 2019, the Commissioner denied plaintiff's medical parole petition in accordance with the Superintendent's recommendation. The Commissioner characterized the Superintendent's letter as containing "an updated medical assessment and an evaluation of the risk of violence plaintiff poses to society."⁴ The Commissioner also indicated she reviewed plaintiff's April 1, 2019 classification report,⁵ personalized program plan,⁶ and the Parole Board's decisions in 2008 and in 2013, but noted that plaintiff "did not submit medical records in support of the petition" and found the "medical parole plan" that plaintiff proposed to be "insufficient." But see [Buckman v. Commissioner of Correction](#), 484 Mass. 14, 17, 24-25 (2020) (superintendent must prepare medical parole plan).

*3 On December 4, 2019, plaintiff filed this action for certiorari review. Plaintiff argued that he was denied medical parole solely because of the nature of his offense of conviction and because of his prior addiction, which has been managed over the last several years due to methadone prescribed for pain management. Plaintiff argues denial of his petition was an abuse of discretion, was not supported by substantial evidence, and an error of law.

After hearing, in early May I remanded the matter to the Commissioner to reconsider her decision based on plaintiff's current medical condition and entire medical record, and after preparation by the Superintendent of a medical parole plan for plaintiff, as required by *Buckman*. See Order for Remand on Expedited Schedule (May 5, 2020).

On May 15, 2020, the Superintendent of MCI-Shirley again recommended denial of medical parole and the Commissioner agreed. The Commissioner found that "[a]lthough Mr. Adrey's medical condition appears to have deteriorated to a degree from the date of my previous decision on August 29, 2019, *I do not find him to be terminally ill or permanently incapacitated* as defined in [G.L.c. 127, § 119A\(a\)](#)" (emphasis added).

The Commissioner quoted from three medical professionals. The information quoted by the Commissioner is set out in the text chronologically in the following three paragraphs. Additional relevant information from the medical professionals, but not addressed in the Commissioner's letter, is included in footnotes 7, 8, and 10.

First, according to the Commissioner, Nurse Practitioner Cheryl Kurtz conducted an updated medical evaluation of plaintiff on April 29, 2020, describing plaintiff's condition as follows:

Mr. Adrey has a history of hepatitis C, liver cirrhosis, splenomegaly, abdominal distention and ascites, esophageal varices, lower extremity edema, and chronic pain ... Mr. Adrey has medical restrictions for bottom bunk and first-tier housing, uses a wheelchair, has an unstated gait, and is a fall risk.⁷

N.P. Kurtz “concluded that Mr. Adrey ‘does not meet the definition of permanent *and total incapacitation*’ ” (emphasis added).

The Commissioner states that on May 7, 2020, Dr. Descoteaux wrote in his updated medical evaluation that “Mr. Adrey has advanced liver disease and ‘may decompensate rapidly within the coming 12-18 months.’ ... Mr. Adrey can conduct activities of daily living (“ADL”) independently, can walk 25-50 feet, and can propel himself short distances in his wheelchair.”⁸ According to the Commissioner, “Dr. Descoteaux described Mr. Adrey as having some degree of incapacitation but ‘for a person to be described as permanently incapacitated, the usual level of function is very low: bed bound, unable to dress or feed themselves, and totally dependent on others.’ ”⁹

*4 The Commissioner states that on May 15, 2020, Drs. Descoteaux and Angeles concluded that “while Mr. Adrey's liver disease is progressing, he is not likely to die within the next 18 months.” In their joint updated medical evaluation, Drs. Descoteaux and Angeles “described that Mr. Adrey ‘has a degree of incapacitation that requires assistance from someone to push his wheelchair, however, *he is not considered totally incapacitated*’ ” (emphasis added). The Commissioner does not explain or try to reconcile the significant differences between Dr. Descoteaux's May 7 evaluation and the medical conclusions offered on May 15.¹⁰

Based on these medical evaluations, the Superintendent recommended denial of the medical parole petition, concluding that Mr. Adrey “is not statutorily eligible for medical parole” and “resides safely in general population.” The Superintendent's evaluation does not contain an assessment of the risk for violence that plaintiff poses to society. In apparent disregard of my remand order, the Superintendent also did not prepare and submit to the Commissioner a “medical parole plan” for plaintiff as required.

After describing this information provided by the Superintendent, the Commissioner concludes: “Mr. Adrey has some degree of incapacitation but maintains the ability to conduct ADL and retains independent mobility. Further, according to Dr. Descoteaux and Dr. Angeles, Mr. Adrey is not likely to die within the next 18 months and is not *totally incapacitated*”¹¹ (emphasis added). “Accordingly,” the Commissioner concludes, “Mr. Adrey's current medical condition does not qualify him for release pursuant to the medical parole statute.” The Commissioner does not reference having reviewed, nor does the record reflect, a “medical parole plan” prepared by the Superintendent as required by statute or an assessment of the risk for violence plaintiff poses to society if released.

*5 On this amended record, plaintiff's motion for certiorari review is before me. Plaintiff argues that on remand the Commissioner and the Superintendent applied the wrong legal standard, failed to comply with the applicable statute in material respects, and that the Commissioner's decision was arbitrary, capricious and an abuse of discretion.

DISCUSSION

Adrey v. Department of Correction, Not Reported in N.E. Rptr. (2020)

Medical parole is not discretionary. It is not about remorse or the type of rehabilitation that might animate traditional parole. See, e.g., [G.L.c. 127, § 130](#). It is not limited to prisoners who have committed only certain types of offenses. See, e.g., [Vazquez v. Superintendent, Massachusetts Correctional Institution, Norfolk](#), 484 Mass. 1058, 2020 WL 2791920 at * 1 (May 29, 2020) (rescript) (medical parole granted to prisoner convicted of first-degree murder).

The medical parole statute requires that a prisoner “*shall* be released on medical parole” “[i]f the commissioner determines” that 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\(e\)](#) (emphasis added). The statute defines “[t]erminally ill” as “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 that the prisoner does not pose a public safety risk.” [Id. § 119A\(a\)](#). It defines “[p]ermanent incapacitation” 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.” *Id.* The definition of “[p]ermanent incapacitation” does not require “total incapacitation” or the absence of independent functioning, but rather, in relevant part, “a physical ... incapacitation that appears irreversible” as determined by a physician.

When a petition for medical parole is filed, the superintendent of the petitioner’s facility must review the petition and develop a recommendation for the Commissioner within 21 days. [Id. § 119A\(c\)\(1\)](#). The superintendent must then transmit to the Commissioner the petition and the superintendent’s recommendation together with: “(i) a medical parole plan; (ii) a written diagnosis by a physician licensed to practice medicine ...; and (iii) an assessment of the risk for violence that the prisoner poses to society.” *Id.* See [Buckman](#), 484 Mass. at 18. The superintendent is responsible for preparing the medical parole plan, physician’s diagnosis, and the risk assessment. [Id. at 17, 24-25](#).

According to the statute, the “medical parole plan” must include:

a comprehensive written medical and psychosocial care plan specific to a prisoner and including, but not limited to: (i) the proposed course of treatment; (ii) the proposed site for treatment and post-treatment care; (iii) documentation that medical providers qualified to provide the medical services identified in the medical parole plan are prepared to provide such services; and (iv) 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 access to other adequate financial resources for the duration of the medical parole.

*6 [G.L.c. 127, § 119A\(a\)](#). In finding the superintendent responsible to prepare the medical parole plan, the SJC wrote in [Buckman](#):

the department [of correction] also has staff who are dedicated to developing individual reentry plans. Each correctional institution has an institutional reentry committee, which includes medical staff and “a medical/mental health discharge planner” who is required to “schedule appointments with [c]ommunity [p]roviders” and to assist prisoners in signing up for MassHealth ... [T]o the extent that this obligation may require the allocation of additional reentry resources, the Legislature would have recognized that such a reallocation is well justified economically, given the enormous cost savings that may accrue to the department from the medical release of permanently incapacitated or terminally ill prisoners.

In effect, by enacting § 119A, the Legislature intended to trigger a collaborative process whereby the health care provider for the institution, reentry staff, and the prisoner (or his or her attorney or next of kin) work together to prepare a medical parole plan for the prisoner and obtain a written diagnosis by a licensed physician.¹²

Buckman, 484 Mass. at 28-29 (quoting Department of Correction regulations).¹³

The decision about whether a prisoner meets the standard for medical parole belongs to the Commissioner, but her decision must be based on certain inputs. For one, the statute requires the input of “a licensed physician” to assess whether the prisoner has (i) an “incurable” condition that “will likely cause ... death ... in not more than 18 months”; and/or (ii) “a physical or cognitive incapacitation that appears irreversible.” G.L.c. 127, § 119A(a). The Commissioner must then consider a superintendent’s “assessment of the risk for violence that the prisoner poses to society,” and the “medical parole plan” prepared by or at the direction of the superintendent. Based on these inputs, the Commissioner must determine whether the petitioner’s condition is “so debilitating that the prisoner does not pose a public safety risk,” *id.*, and that the petitioner, if released, “will live and remain at liberty without violating the law and that the release will not be incompatible with the welfare of society.” If the Commissioner so finds, “the parole board imposes the terms and conditions for medical parole.” *Buckman*, 484 Mass. at 19. See G.L.c. 127, § 119A(e), (f).

The Superintendent and the Commissioner have twice reviewed plaintiff’s petition for medical parole. During the first review, the Superintendent failed to follow the statute in making her recommendation. The Superintendent failed to provide a medical parole plan, and also failed to provide an assessment of the risk of violence plaintiff posed if released in society. In the second review on remand, despite the Court’s direction that the Superintendent provide a medical parole plan as required by the statute and as found in *Buckman*, the Superintendent again failed to provide a medical parole plan. The Superintendent, and then the Commissioner, failed to reconcile or explain the subtle but significant changes in Dr. Descoteaux’s medical evaluations, failed to explain why they both preferred the joint evaluation of Dr. Descoteaux and Dr. Angeles, failed to obtain a medical opinion about the irreversibility of plaintiff’s condition, and failed to provide or assess plaintiff’s risk of violence in the community if released. Notably, none of the medical professionals contradicted the notion that plaintiff’s current level of incapacitation was anything other than permanent, and would get worse in the near term. The Superintendent, and then the Commissioner, also applied the wrong legal standard. The Commissioner found that plaintiff was not permanently incapacitated because he was not *totally* incapacitated. This is an incorrect statement of the law.

*7 There can be no doubt that these failings affected plaintiff’s substantive rights. Almost a year has passed since plaintiff first applied for medical parole. The Superintendent’s failure to marshal the resources of his reentry staff to prepare a medical parole plan for plaintiff in this time disregards the language of the statute, the holding in *Buckman*, and this Court’s remand order. Plaintiff has advanced liver disease. He is on *methadone* for pain, which also has the effect of managing his addiction. He is almost 71 years old, suffers from lower extremity edema, chronic pain, and a host of other ailments, which at least one physician indicated would be “terminal.” Plaintiff is only able to walk short distances, has an unsteady gait, is a fall risk, and uses a wheelchair. He has limited ability to move the wheelchair himself and requires assistance in moving from place to place, or to travel by vehicle.¹⁴ Had the Commissioner applied the correct legal standard, based on plaintiff’s condition, medical parole would have been granted.

This case is before me on certiorari review under G.L.c. 249, § 4. As the SJC stated in 2017 in *City of Revere v. Massachusetts Gaming Commission*:

Generally, the standard of review for a certiorari action is calibrated to the nature of the action for which review is sought ... “Ordinarily, where the action being reviewed is a decision made in an adjudicatory proceeding where evidence is presented and due process protections are afforded, a court applies the ‘substantial evidence’ standard.” ... On the other hand, “where the

decision under review was not made in an adjudicatory proceeding,” but rather “entails matters committed to or implicating a board’s exercise of administrative discretion, the court applies the ‘arbitrary or capricious’ standard.”

476 Mass. 591, 604-05 (citations omitted). “On certiorari review, the Superior Court’s role is to examine the record ... and 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) (internal quotations omitted), quoting *Firearms Records Bureau v. Simkin*, 466 Mass. 168, 180 (2013). “In reviewing the decisions of administrative bodies which, like the parole board, are accorded considerable deference, ... the arbitrary and capricious standard of review applies.” *Doucette*, 86 Mass.App.Ct. at 541 (citations omitted). “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). Certiorari relief is warranted where plaintiff shows substantial and 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).

Such is the condition for plaintiff here. In the context of medical parole petitions, time is of the essence. The statute places a strict 21-day time limit on a superintendent’s collection, preparation, and transmittal of the relevant documents and a recommendation to the Commissioner, G.L.c. 127, § 119A(c)(1), and on the Commissioner’s review and decision on the petition. *Id.* § 119A(e). The Superintendent and the Commissioner have had two opportunities to consider plaintiff’s petition. Each time they applied the wrong legal standard and each time they failed to follow the statute’s requirement to consider certain factors, including the risk of violence plaintiff presents if released and a medical parole plan that addresses the issues articulated in the statute. Most recently, the Commissioner issued a decision, which was based on a conclusion that plaintiff was not likely to die within the next 18 months, A.R. 3, which was unsupported by the medical evidence provided to the Commissioner; and “is not totally incapacitated,” *id.*, which is the wrong legal standard. Yet it was on these findings, that the Commissioner denied plaintiff’s petition.

ORDER

*8 Plaintiff’s Motion for Judgment on the Pleadings, as amended after remand, is *ALLOWED*. Plaintiff has demonstrated that he meets the definition of a person who is permanently incapacitated such that if he is released he will live and remain at liberty without violating the law and that release will not be incompatible with the welfare of society. Plaintiff is granted medical parole. The matter is remanded to the Commissioner to transmit plaintiff’s file to the Parole Board for it promptly to set such conditions of parole as the Parole Board deems appropriate. The Parole Board should consider placement of plaintiff in a nursing home that will accept MassHealth and where plaintiff can be maintained on his existing methadone treatment regimen and receive other medical care as required. The Court will retain jurisdiction over this matter and will conduct a status conference on July 10, 2020 at 10 a.m. by Zoom to determine if further relief is necessary.

All Citations

Not Reported in N.E. Rptr., 2020 WL 4347617

Footnotes

- 1 The Commissioner denied the initial petition before the decision in *Buckman v. Commissioner of Correction*, 484 Mass. 14 (2020), and before the Covid-19 pandemic.

- 2 The supplemental record after remand consists of a letter from Carol A. Mici, Commissioner of the Department of Correction, dated May 15, 2020; a letter from Steven P. Kenneway, Superintendent of MCI-Shirley, dated May 15, 2020; the Wellpath Medical Parole Addendum by Dr. Steven Descoteaux, Statewide Medical Director of Wellpath, and Dr. Maria Angeles, Medical Director at MCI-Shirley, dated May 15, 2020; the Wellpath Medical Parole Addendum by Dr. Descoteaux dated May 7, 2020; the Wellpath Medical Parole Assessment by Cheryl Kurtz, NP and Dr. Descoteaux dated April 29, 2020; and 486 pages of historical medical records, which were not available to plaintiff at the time of his initial petition. But see *Committee for Public Counsel Services v. Chief Justice of the Trial Court*, 484 Mass. 1029, 1032 (2020) (“All correctional facilities shall accept requests [for medical records] by electronic mail, and shall make copies of medical records immediately available to the incarcerated person upon request, or to the individual's attorney upon request accompanied by signed permission by the incarcerated person”). Defendant has also provided a disc with hours of video recorded in the first part of May 2020 from inside the facility, which the parties describe as showing plaintiff walking a short distance slowly. Defendant concedes the video does not show plaintiff walking up or down stairs or being on the upper tier of his assigned unit.
- 3 Dr. Angeles described plaintiff's pertinent medical history as *cirrhosis*, *esophageal varices*, history of *chronic hepatitis C* infection, history of *gallstones*, and chronic abdominal pain. She indicated that plaintiff “ambulates independently,” is independent with activities of daily living, and resides in general population.
- 4 The Superintendent's letter does not contain any express assessment of the risk of violence, if any, plaintiff poses in society.
- 5 Plaintiff's April 1, 2019 classification report reflects that plaintiff had no convictions in the last four years, no history of attempts to escape, no history of institutional violence in the last four years, no disciplinary reports in the last 12 months, and no discipline in the last 18 months, A.R. 39; and that plaintiff was classified to a minimum security facility “or below,” but was held at a medium security facility only because of the nature of his offense of conviction. A.R. 40. Plaintiff's only disciplinary report in the last seven years was in December 2016 for use of obscene, abusive or insolent language or gesture. A.R. 45.
- 6 Under a tab marked “Risk Assessment,” the record contains a “Personalized Program Plan,” which appears to have been printed on June 27, 2019. A.R. 54. I cannot tell when it was prepared, but it reflects plaintiff's program participation through April 10, 2019. *Id.* The only risk factor identified is substance abuse. A.R. 54-55. The Personal Program Plan indicates that anger, cognitive behavior, criminal thinking, and sex offending are “[n]ot considered a need area for this offender.” A.R. 54. Nothing in the “Personal Program Plan” purports to assess plaintiff's risk of violence if released to the community.
- 7 The April 29, 2020 Medical Parole Assessment, bears the *names* of both N.P. Kurtz and Dr. Descoteaux. The assessment states further that plaintiff's “chronic abdominal pain and pain in lower extremities limits his mobility.”
- 8 Dr. Descoteaux's Medical Parole Addendum dated May 7, 2020 states: “Mr. Adrey has advanced liver disease and *this condition is terminal*. Though he has been managed with procedures to remove fluid from his abdomen intermittently, he may decompensate rapidly within the coming 12-18 months. Mr. Adrey is able to perform the most basic aspects of selfcare including *dressing*, bathing, and feeding himself. *He is however, unable to walk distances further than 25-50 feet and for that reason he uses a wheelchair*. He has a person in his housing unit who pushes his wheelchair for him. *Due to upper extremity weakness, he cannot propel himself in the wheelchair unless he is going very short distances*” (emphasis added). Dr. Descoteaux described Mr. Adrey's level of functioning as follows: “If released to the community, it is conceivable that [Mr. Adrey] could be release[d] to a private home, but he would need to live with a dedicated friend or family member who can provide the assistance he needs to get pushed in his wheelchair, and potentially help them get into and out of a car or van. He does not have nursing needs with respect to medication management, though a home care agency may find him eligible for some basic in-home care. He would need to live on a first floor or in a place with ramps, elevator, or minimal stairs ... *Mr. Adrey does have a degree of incapacitation that is permanent. As the months wear on, he will become increasingly dependent on others for assistance*” (emphasis added). Dr. Descoteaux also suggests that Mr. Adrey's *methadone* prescription “for chronic pain” will have to be maintained and that “[t]here may be an unintended consequence from the *methadone* that diminishes [Mr. Adrey's] urge to return to opiate abuse and *relapse*.”

- 9 This conception is more akin to total incapacitation. It is not the medical parole statute's definition of "permanently incapacitated." See, *infra*, at 9.
- 10 The Medical Parole Addendum by Drs. Descoteaux and Angeles dated May 15, 2020 is largely based on and repeats Dr. Descoteaux's Medical Parole Addendum a week earlier, including its description of plaintiff's condition and level of functioning. See, *supra*, at 6, n.8. Two parts of Dr. Descoteaux's initial addendum, however, have been watered down or rendered conclusory. First, in his initial addendum, Dr. Descoteaux wrote "Mr. Adrey has advanced liver disease and *this condition is terminal*. Though he has been managed with procedures to remove fluid from his abdomen intermittently, he may decompensate rapidly *within the coming 12-18 months*" (emphasis added). The joint addendum dated May 15, 2020, changes this to state: "Mr. Adrey has advanced liver disease. Though statistics may predict a steadily worsening disease course, Mr. Adrey has done surprisingly well. Though he has been managed with procedures to remove fluid from his abdomen intermittently, he may decompensate rapidly *within the coming years*" (emphasis added). Second, Dr. Descoteaux's May 7 addendum states: "Mr. Adrey does have a degree of incapacitation that is *permanent*. As the *months* wear on, he will become increasingly dependent on others for assistance" (emphasis added). A week later, this was changed to: "Mr. Adrey does have a degree of incapacitation, but he does not meet the definition of permanently incapacitated."
- 11 Drs. Descoteaux and Angeles do not opine that plaintiff "is not likely to die within the next 18 months." Instead, they tiptoe around plaintiff's prognosis, seemingly intentionally giving an outer limit without committing to a likely life expectancy. While Dr. Descoteaux's May 7 evaluation was that plaintiff's "condition is terminal" and "he may decompensate rapidly within the coming 12-18 months," his assessment a week later with MCI-Shirley's medical director simply stated "he may decompensate rapidly within the coming years." To the extent the Commissioner found that plaintiff was not likely to die in the next 18 months, see A.R. 2, 3, the finding was not supported by the evidence and was arbitrary and capricious.
- 12 In the cover letter accompanying plaintiff's petition, plaintiff's counsel offered "to collaborate" with the Superintendent to develop a suitable medical parole plan. There is no indication that any such collaboration occurred.
- 13 Finding them contrary to the statute, *Buckman* struck down many of the regulations promulgated by the Secretary of the Executive Office of Public Safety and Security to implement the medical parole program set out at 501 C.M.R. § 17.00, et seq. 484 Mass. at 27, 29-30, 33. It does not appear the Secretary has yet promulgated replacement regulations.
- 14 To call plaintiff in this condition "independently ambulatory" as the Superintendent did in July 2019 borders on misrepresentation by omission.

NOTIFY

12

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2184CV01061

ARNOLD EMMA

Emailed to
All Parties
05.26.21 (P.K.)

vs.

CAROL MICI, AS COMMISSIONER OF THE
DEPARTMENT OF CORRECTIONS

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

Arnold Emma (Emma) is a 67-year-old man in the custody of the Department of Corrections (DOC), and currently incarcerated at MCI-Shirley. On October 1, 2020, Emma was granted medical parole and released pursuant to the medical parole statute, G. L. c. 127, § 119A. Emma was returned to DOC custody on a parole detainer on December 10, 2020 and has been in custody since. On January 29, 2021, Emma filed a second petition for medical parole which the defendant, Carol Mici, the Commissioner of the DOC (Commissioner) denied in a written decision dated March 29, 2021. Emma appeals the denial of his second request for medical parole pursuant to G. L. c. 249, § 4 and the medical parole statute. Emma filed his emergency appeal in the Supreme Judicial Court for Suffolk County. The case was transferred to the Superior Court Department on April 2, 2021 and filed on May 7, 2021.¹

notice
sent
05-28-21
/cc
CLO
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Given that Emma's doctors have determined that he is terminally ill, and every day counts, I sought expedited briefing from the DOC and set this case for hearing on cross-motions for judgment on the pleadings on May 24, 2021. After hearing and review, and for the reasons stated below, Emma's Motion for Judgment on the

¹ It is not entirely clear to me what caused the delay in filing in the Superior Court.

Pleadings is **ALLOWED**. The DOC's Motion for Judgment on the Pleadings is **DENIED**. The matter is remanded to the Commissioner to transmit Emma's file to the Parole Board, which is hereby **ORDERED** to make arrangements for Emma's immediate release.

BACKGROUND

The following facts are taken from the administrative record. Some facts are reserved for later discussion.

Emma is presently serving his seventh adult term of incarceration. The governing offense for his present term of incarceration is breaking and entering a dwelling with intent to commit a felony and armed assault with intent to rob or murder. His sentence of eight years to eight years and one day is scheduled to expire on August 3, 2024.

Emma was diagnosed with terminal liver cancer in 2020. After the Commissioner determined that Emma satisfied the medical parole statute, Emma was released on medical parole on October 1, 2020. He was returned on a parole detainer on December 10, 2020. According to his Parole Violation Report, Emma was alleged to have committed two violations: engaging in "irresponsible conduct" and violating his home plan.

In support of the allegation that Emma engaged in irresponsible conduct, the report alleged that Emma absconded from his placement at Farren Care Center (Farren) on December 9, 2020. It stated that on that day, at approximately 2:00 p.m., Emma refused to get into a transportation vehicle to return to Farren following a chemotherapy session at Boston Medical Center (BMC). Fifteen minutes later, the transportation vehicle driver witnessed Emma leave the BMC campus in a private vehicle. At approximately 3:00 p.m., Emma's parole officer was notified that he had returned to BMC to retrieve his medications. Emma was subsequently picked up at BMC by warrant officers.

In support of the allegation that Emma violated his home plan, the report asserted that Emma failed to comply with the conditions of his Home Plan when he was discharged from Farren. Emma's discharge paperwork stated that, "Discharge was necessary for [Emma's] welfare and his needs could not be met in the nursing home. On 12/9/20, Mr. Emma refused to return . . . after chemotherapy treatment and was returned to Dept. of Corrections for violation of Parole."

On February 11, 2021, following a hearing, the Parole Board affirmed the revocation of Emma's medical parole.² The Parole Board affirmed the revocation of Emma's parole based on the second violation alleged in the Parole Violation Report, namely, that Emma had violated the conditions of his home plan. The Parole Board did not affirm based on the allegation that Emma had engaged in irresponsible conduct.

Since Emma has returned to DOC custody his medical condition has worsened. Emma contracted COVID-19 and was hospitalized at BMC from January 28, 2021 to February 6, 2021. Emma's BMC doctors have indicated that chemotherapy has failed and Emma's body continues to weaken. They opine that Emma will succumb to his cancer within three to six months. The director of the DOC's contracted medical provider, Wellpath, agreed, and indicated in his updated medical evaluation that Emma has remained quite weak. The medical director at MCI-Shirley reported that Emma resides in the Nursing Care Unit, requires mobility assistance devices and a wheelchair van for transport, and would likely die from his terminal illness within the next 18 months. In addition to cancer, Emma also suffers from hepatitis C, cirrhosis, diabetes mellitus, hypertension, and deep vein thrombosis in his left knee.

On February 12, 2021, MCI-Cedar Junction³ Superintendent Douglas DeMoura recommended that Emma's second petition for medical parole be allowed. In his

² That decision was appealed and has been argued before the Supreme Judicial Court.

³ Although Emma is presently incarcerated at MCI-Shirley, he was incarcerated at MCI-Cedar Junction at the time he filed the medical parole request that is presently at issue.

recommendation, Superintendent DeMoura wrote that Emma was at “high risk for incapacitation” and was “so medically compromised” he did not have “the strength necessary to reoffend.” Superintendent DeMoura additionally stated that he did not consider Emma’s December 2020 parole violations to be serious violations and that Emma did not present “a risk to public safety.”

On February 19, 2021, the Norfolk District Attorney’s Office issued a statement averring that the office “takes no position regarding Mr. Emma’s current medical parole petition.” The statement nonetheless noted that if Emma were released again on medical parole, he would require “close supervision.” Further, citing Emma’s violent criminal record, history of escapes, past substance abuse issues, and recent medical parole violation, the District Attorney’s Office asserted that “even with a terminal illness, Mr. Emma poses a risk to commit a crime while out on parole” and requested that any medical parole plan include GPS monitoring.

In her March 29, 2021 denial of Emma’s second petition, the Commissioner stated that she “concur[red] with the concerns” of the District Attorney’s Office “regarding the risk Mr. Emma would pose to the community if released.” The Commissioner additionally stated that:

While the information provided indicates that Mr. Emma has serious medical conditions and that he is terminally ill within the definition of G. L. c. 127, § 119A, there is no evidence that he is suffering permanent incapacitation so debilitating that he does not pose a public safety risk. Indeed a recent medical evaluation provided on March 23, 2021 by the MCI-Shirley Medical Director specifically indicates that Mr. Emma is not permanently incapacitated. Considering Mr. Emma’s lengthy criminal record, his history of escaping from incarceration and committing new crimes while on escape, his history of probation and parole violations, and most notably the fact that he violated his medical parole on December 9, 2020, only two months after release, I am convinced that Mr. Emma’s release, at this time, would be incompatible with public safety and the welfare of society.

The Commissioner also found that the circumstances of Emma's parole violation, viz., the fact that he refused to get in the van to return to Farren, arranged to be picked up by an unknown vehicle, and his subsequent discharge from Farren "amply demonstrate" that Emma "will not live in compliance with the law if released." She added that "[d]espite his weakened condition, [Emma] clearly has the ability to reoffend and given his lengthy criminal history," she believed he would do so if released.

DISCUSSION

I. Standard of Review on Certiorari

The medical parole statute provides that a prisoner aggrieved by a decision denying medical parole may petition for relief in the nature of certiorari pursuant to G. L. c. 249, § 4. See G. L. c. 127, § 119A(g). "On certiorari review, the Superior Court's role is to examine the record . . . and to 'correct substantial errors of law apparent on the record adversely affecting material rights.'" Doucette v. Massachusetts Parole Bd., 86 Mass. App. Ct. 531, 540–541 (2014), quoting Firearms Records Bureau v. Simkin, 466 Mass. 168, 180 (2013). The standard of review "var[ies] according to the nature of the action for which review is sought." Forsyth Sch. for Dental Hygienists v. Board of Registration in Dentistry, 404 Mass. 211, 217 (1989). Where, as here, "the decision was not made in an adjudicatory proceeding" but rather is an "exercise of the board's administrative discretion," the "arbitrary and capricious" standard applies. Revere v. Massachusetts Gaming Comm'n, 476 Mass. 591, 605 (2017) (citation omitted). See also Diatchenko v. District Attorney for Suffolk Dist., 471 Mass. 12, 31 (2015) ("Because the decision whether to grant parole to a particular . . . offender is a discretionary determination by the board . . . an abuse of discretion standard is appropriate."); Doucette, 86 Mass. App. Ct. at 541 ("In cases reviewing the decisions of administrative bodies which, like the parole board, are accorded considerable deference . . . the arbitrary and capricious standard of review applies."). "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 Com’r of Cambridge, 473 Mass. 716, 729 (2016), quoting Doe v. Superintendent of Schs. of Stoughton, 437 Mass. 1, 6 (2002). Certiorari relief is warranted where a petitioner shows errors in the underlying decision that “are so substantial and material that, if allowed to stand, they will result in manifest injustice to a petitioner who is without any other available remedy.” Johnson Products, Inc. v. City Council of Medford, 353 Mass. 540, 541 n.2 (1968).

II. 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 Supreme Judicial Court (SJC) has recognized that 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 quotation marks omitted). “Although the focus was on cost savings, there was also a human element to the legislation.” Id. at 22. More particularly, legislators realized 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 prescribed by the statute begins when a petition for release on medical parole is submitted by or on behalf of a prisoner to the superintendent of the prison in which the individual is incarcerated.” Harmon, 487 Mass. at 472, citing G. L. c. 127, § 119A(c)(1). “Within twenty-one days of receiving a petition, the superintendent ‘shall review the petition and develop a recommendation as to the release of the prisoner.’” Id., quoting G. L. c. 127, § 119A(c)(1). The superintendent is then required to send the Commissioner the petition and a recommendation as to

whether medical parole should be granted, “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.” *Id.* “Within forty-five days of receiving the petition and recommendation, the commissioner in turn ‘shall issue a written decision’ as to whether ‘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.’” *Id.*, quoting 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.” *Id.*, quoting G. L. c. 127, § 119A(e).

III. Emma’s Motion for Judgment on the Pleadings

After hearing and careful review of the administrative record, I conclude that the Commissioner committed substantial errors of law apparent on the record and the decision was arbitrary or capricious and constituted an abuse of discretion decision.

As set forth above, the medical parole statute required the Commissioner to determine whether Emma was “terminally ill or permanently incapacitated such that if [he] is released [he] 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) (emphasis added). The Commissioner was therefore required to determine whether Emma fell into one of “two narrow categories” of incarcerated persons: those who are terminally ill and those who are permanently incapacitated. *Buckman*, 484 Mass. at 17.

The regulations applicable to medical parole decisions define “terminally ill” as:

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, that is so debilitating that the prisoner does not pose a public safety risk.

501 Code Mass. Regs. § 17.02.

The regulations define “permanent incapacitation” 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.

Id.

Both definitions encompass a requirement that the person seeking medical parole be “debilitated” to the extent they do not pose a public safety risk. The regulations define a “debilitating condition” 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.

Id.

Here, the record contains three medical evaluations, each of which concluded that Emma was terminally ill. The Commissioner acknowledged that Emma was terminally ill but found that there was “no evidence that he is suffering from *permanent incapacitation* so debilitating that he does not pose a public safety risk.” This constituted a legal error insofar as it collapsed the two separate statutory categories of prisoners into one and suggested that an incarcerated person must be permanently incapacitated *and* terminally ill to be eligible for medical parole.

After acknowledging that three separate medical evaluations resulted in findings that Emma was terminally ill, the Commissioner was required to consider whether his *terminal illness* was so debilitating that he did not pose a public safety risk. Instead, she considered whether Emma suffered from permanent incapacitation so debilitating he did not pose a public safety risk. This line of analysis was quickly disposed of in view of her previous conclusion that Emma did not suffer from permanent incapacitation in the first place. That error was one of law and a misapprehension of the medical parole statute.

If the Commissioner *had* considered whether Emma's acknowledged *terminal illness* was so debilitating that he did not pose a public safety risk, the evidence in the record could have led her to only one conclusion: yes. By all accounts, Emma's condition continues to weaken. He is unable to walk on his own and requires a wheelchair. See 501 Code Mass. Regs. § 17.02 (defining a "debilitating condition" as one that "causes a prisoner significant and serious impairment of strength or ability to perform daily life functions such as eating breathing, toileting, walking or bathing").

The Commissioner also committed legal error insofar as her decision relies on allegations in Emma's December 2020 Parole Violation Report that the Parole Board did not affirm. The Parole Board, after hearing, did not affirm Emma's revocation based on the allegations that formed the basis of the charge of "irresponsible conduct." The Commissioner failed to consider the informed conclusion of the Parole Board regarding those allegations. Even assuming the Commissioner could rely on the unsubstantiated allegations that Emma had violated his parole by engaging in "irresponsible conduct" notwithstanding the Parole Board's failure to affirm, the Commissioner failed to consider that the Superintendent concluded that the alleged misconduct did not constitute a "serious" violation of Emma's parole.

Moreover, only two things changed after Emma first was granted medical parole: (i) Emma was alleged to have committed a non-criminal, technical parole violation; and (ii) Emma's medical condition has declined significantly. However, in denying Emma's second medical parole petition, the Commissioner placed heavy emphasis on Emma's criminal record. In 2020, despite his lengthy criminal history, the Commissioner concluded that Emma did *not* pose a public safety risk. She had to reach that conclusion for Emma to have been released. Emma's criminal record did not change between his release on medical parole and his return to DOC custody for a parole violation. Accordingly, the Commissioner's focus on factors that *did not previously render Emma*

ineligible for medical parole, combined with the errors of law detailed above, renders the Commissioner's decision arbitrary and capricious and an abuse of discretion.

The medical parole statute provides that an incarcerated person "*shall* be released on medical parole if he suffers from a terminal illness so debilitating that he "will live and remain at liberty without violating the law" or pose a public safety risk. See G. L. c. 127, § 119A(e) (emphasis added); 501 Code Mass. Regs. § 17.02. The Legislature's choice of the word "*shall*," reflects its intent to limit the Commissioner's discretion to deny medical parole to an incarcerated person who fulfills the statute's requirements. See Wiedmann v. Bradford Group, Inc., 444 Mass. 698, 709-710 (2005), and cases cited ("*shall*" imposes a mandatory obligation). Emma fulfills the statutory requirements, yet was denied medical parole based on an analysis tainted by errors of law and lacking a rational basis that reasonable persons might support. Given Emma's deteriorating condition, time is of the essence. In view of the foregoing considerations, and in furtherance of the medical parole statute's purpose of not only reducing costs but extending compassion to elderly inmates suffering from debilitating terminal conditions, justice requires Emma's immediate release.

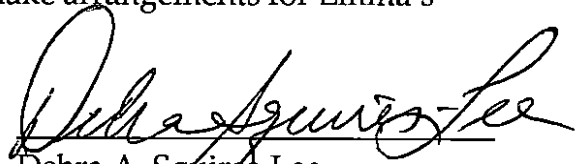
I have considered the Commissioner's argument that I lack the authority to order that Emma be placed on medical parole. I disagree. First, the medical parole statute provides that a prisoner denied medical parole may petition for certiorari review and states that "[a] decision by the court affirming or reversing the commissioner's grant or denial of medical parole shall not affect a prisoner's eligibility for any other form of release permitted by law." G. L. c. 127, § 119A(g). The statute thus contemplates that the Court will "reverse" the Commissioner's "denial" of medical parole. A reversal of a denial is the grant of medical parole. Also, while the DOC correctly notes that certiorari review does not generally authorize judges to substitute their judgment about parole release decisions as that is a matter for the Parole Board, the medical parole statute is different in kind from regular parole. See Adrey v. Department of Corr., 2020 Mass.

Super. LEXIS 86, at *9 (Mass. Super. 2020) (Krupp, J.) (recognizing that medical parole “is not about remorse or the type of rehabilitation that might animate traditional parole” nor is it “limited to prisoners who have committed only certain types of offenses”); see also G. L. c. 127, § 130. If a prisoner satisfies the medical parole statute, the legislature has mandated that prisoner’s release. Further, the certiorari statute provides that the court may “enter judgment quashing or affirming such proceedings *or such other judgment as justice may require.*” G. L. c. 249, § 4 (emphasis added). Emma has a terminal illness and runs a risk of dying before the administrative niceties of remand can be effectuated. Justice requires that medical parole premised on a terminal illness be expedited. Justice requires a judgment providing for that to happen.⁴ Finally, the difference between issuing a judgment reversing the Commissioner’s denial and remanding for proceedings consistent therewith and ordering medical parole is one without any substantive difference.

ORDER

For the reasons stated above, Emma’s Motion for Judgment on the Pleadings is **ALLOWED**. The DOC’s Motion for Judgment on the Pleadings is **DENIED**. Emma has demonstrated that he meets the requirements of G. L. c. 127, § 119A and is granted medical parole. The matter is remanded to the Commissioner to transmit Emma’s file to the Parole Board, which is hereby **ORDERED** to make arrangements for Emma’s immediate release.

May 26, 2021


Debra A. Squires-Lee
Justice of the Superior Court

⁴ Emma has placements available to him at nursing homes for his care upon release and the Commissioner raised no issues with his proposed placements.