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May 30, 2024

Via eCourts

Joseph H. Orlando, Clerk
Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625

Re: M.R. v. New Jersey Department of Corrections
Docket No. 089371
Appellate Division Docket No. A-2825-22T2

On Petition for Certification to the Superior Court, Appellate
Division

Sat Below:

Hon. Francis J. Vernoia, P.J.A.D.

Hon. Katie A. Gummer, J.A.D.

Hon. Allison E. Accurso, J.A.D.

Letter Brief on Behalf of Respondent New Jersey Department
of Corrections in Opposition to Petition for Certification

Dear Ms. Baker:

Please accept this letter brief in lieu of a more formal submission on behalf
of Respondent, New Jersey Department of Corrections, in opposition to the
petition for certification filed by M.R.



TABLE OF CONTENTS

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS..... 2

ARGUMENT

THE PETITION FOR CERTIFICATION SHOULD BE DENIED BECAUSE PETITIONER FAILS TO SATISFY ANY OF THE GROUNDS FOR GRANTING CERTIFICATION..... 9

CONCLUSION 16

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

The Department relies primarily on its brief and appendix filed in the Appellate Division, and adds the following.

This appeal involves application of the Compassionate Release Act (CRA), N.J.S.A. 30:4-123.51e. (Ppa2).² Under the CRA, any inmate seeking release must obtain a “medical diagnosis” by “two licensed physicians designated by the commissioner” of the Department. N.J.S.A. 30:4-123.51e(b). Any diagnosis offered by these licensed physicians shall include, at a minimum,

¹ Because the Procedural History and Counterstatement of Facts are closely related, they are combined to avoid repetition and for the court’s convenience.

² “Pc” refers to the petition for certification, and “Ppa” refers to the appendix to the petition. “Cra” refers to the confidential appendix to the Department’s Appellate Division brief.

description of the condition; the prognosis concerning the likelihood of recovery; a description of the incapacity; and a description of any ongoing treatment that may be required. N.J.S.A. 30:4-123.51e(b); N.J.A.C. 10A:16-8.5. If an inmate obtains the requisite medical diagnosis that “determines that [he] is suffering from a terminal condition, disease or syndrome, or permanent physical incapacity,” his eligibility to apply for compassionate release is triggered. N.J.S.A. 30:4-123.51e(d)(2). A “terminal condition, disease, or syndrome” is defined as a prognosis by the designated physicians that the “inmate has six months or less to live.” N.J.S.A. 30:4- 123.51e(l). “Permanent physical incapacity” is the prognosis that “an inmate has a medical condition that renders the inmate permanently unable to perform activities of daily living, results in the inmate requiring 24-hour care, and did not exist at the time of sentencing.” Ibid. Upon the inmate receiving either of those diagnoses, the statute requires that the Department “shall promptly issue to the inmate a Certificate of Eligibility for Compassionate Release.” N.J.S.A. 30:4-123.51e(d)(2).

Petitioner, M.R., is an inmate at Northern State Prison. M.R.’s medical records confirmed that he underwent surgery and other treatment for medulloblastoma, a malignant form of brain cancer. (Ppa5). A February 4, 2021 chart note stated that M.R. has a past medical history of diabetes,

May 30, 2024

Page 4

“medulloblastoma [status post] tumor resection and C1 and partial C2 laminectomy on 1/14/21.” (Ppa5-6). Subsequent medical records from September 2022 and November 2022 specifically described the successful treatment that M.R. received for medulloblastoma, including “chemo and radiation treatment and craniectomy suboccipital resection cerebellar tumor.” (Ppa6). Under an “Oncology Follow-up Visit” heading in the November 2022 record, his current treatment was described as “none.” Ibid. Another medical record from November 2022, under the heading “Chronic Care Assessment & Plan,” provided, “[n]o evidence of any mass lesion in last MRI brain in 9/2022,” that there was “no evidence of any metastasis in MRI spine” in September 2022, and that M.R. had a follow-up MRI of his head scheduled for December 2022. Ibid.

On or about February 9, 2023, M.R. submitted a compassionate release request to the Department to determine his eligibility for compassionate release under N.J.S.A. 30:4-123.51e. In response to this request, Drs. Jeffrey Pomerantz, M.D., and Ruppert Hawes, M.D., reviewed M.R.’s medical records to determine if he satisfied the criteria for compassionate release. Ibid.

Dr. Pomerantz reviewed M.R.’s medical records and prepared a report regarding his eligibility for compassionate release on February 9, 2023. (Ppa7).

May 30, 2024

Page 5

The report noted that M.R.'s diagnoses included medulloblastoma, type two diabetes, and hyperlipidemia, and that he suffers from a terminal condition, disease, or syndrome. Ibid. However, Dr. Pomerantz further found that M.R. does not suffer from a permanent physical incapacity, "meaning he did not believe M.R. was unable to perform two activities of daily living such that he needed 24-hour care." Ibid. Dr. Pomerantz observed that M.R.'s "neurologist [had] document[ed] 'progressive neurological deficits with ataxic gait, speech dysarthria, and loss of dexterity on his hands predominantly on the right'" and that M.R. used a walker and wheelchair. Ibid. Dr. Pomerantz also concluded that M.R. will continue to require oncologic and neurologic care "as well as generalist control of [his diabetes and] hyperlipidemia." Ibid.

On February 16, 2023, Dr. Hawes reviewed M.R.'s medical records and prepared a report regarding his eligibility for compassionate release. Ibid. Dr. Hawes noted that M.R.'s diagnosis included medulloblastoma, diabetes, and hyperlipidemia. Ibid. Dr. Hawes concluded that M.R. does not suffer from a terminal condition, disease, or syndrome, and he does not suffer from a permanent physical incapacity requiring 24-hour care. Ibid. Dr. Hawes concluded that M.R. will continue to require oncologic and neurologic care, as well as continued management of his diabetes and hyperlipidemia, and that he

May 30, 2024

Page 6

has an ongoing need for physical and speech therapy “due to residual neurologic deficits (dysarthria, cranial 7 palsy, lack of coordination).” (Ppa7-8).

On February 22, 2023, Dr. Herbert Kaldany, the Department’s Director of Psychiatry and Acting Medical Director, prepared a memorandum to the Corrections Commissioner regarding M.R.’s request for compassionate release. (Ppa8). In the memo, Dr. Kaldany stated that, based on Drs. Hawes’ and Pomerantz’s reports, “there is no evidence that [M.R.] is suffering from a terminal condition, disease or syndrome, or permanent physical incapacity.” Ibid. Dr. Kaldany further explained (incorrectly) that both doctors’ attestations stated that M.R. did not have a diagnosis that has a prognosis of less than six (6) months. Ibid. Dr. Kaldany concluded that, pursuant to N.J.S.A. 30:4-123.51e(d)(2), M.R. was not medically eligible for consideration for compassionate release. Ibid.

On February 27, 2023, Lisa Palmiere, the Director of Classification for the Department’s Division of Operations, issued correspondence to M.R. notifying him of the decision to deny his request for a certificate of compassionate release under N.J.S.A 30:4-123.51e. Ibid.

M.R. appealed to the Appellate Division from the Department’s February 27, 2023 final decision denying his request for a certificate of compassionate

May 30, 2024

Page 7

release. (Ppa9). After the filing of the notice of appeal, the Department moved for a remand to reevaluate M.R.'s request for compassionate release "in light of the fact that the two doctors who [had] evaluated M.R. . . . reached different conclusions about his eligibility." Ibid.

On August 22, 2023, in response to the remand, Drs. Pomerantz and Hawes prepared updated reports regarding M.R.'s prognosis and his eligibility for compassionate release. (Ppa9-10). In his updated report, Dr. Pomerantz indicated that, contrary to his initial report, M.R. did not suffer from a terminal condition, and he did not suffer from a permanent physical incapacity requiring twenty-four hour care (Ppa9).³ In his updated report, Dr. Hawes noted that, "[a]s of 7/17/23, there was no evidence of recurrence [of cancer] on MRI," and again indicated that M.R. did not suffer from a terminal condition, or from a permanent physical incapacity requiring twenty-four hour care. (Ppa10).

On August 23, 2023, Dr. Kaldany prepared an updated memorandum to the Commissioner regarding M.R.'s request for compassionate release. (Ppa10). In the memo, Dr. Kaldany stated that Drs. Pomerantz and Hawes prepared new

³ As the Department explained in its decision following remand, there was no change in M.R.'s prognosis, but rather, in his February 9 report, Dr. Pomerantz made an error in indicating that M.R. had a terminal illness when he intended to indicate otherwise. (Cra1).

reports following the remand, and that, based upon his review of those reports, there was no evidence that M.R. is suffering from a terminal condition, disease or syndrome, or permanent physical incapacity. Ibid. Dr. Kaldany further noted that M.R. was “‘currently undergoing adjuvant chemotherapy with craniospinal radiation treatment,’ that a July 17, 2023 MRI had shown no evidence of recurrence, and that M.R. would ‘need repeated MRIs to monitor his condition.’” Ibid. Dr. Kaldany concluded that, pursuant to N.J.S.A. 30:4-123.51e(d)(2), M.R. was not medically eligible for consideration for compassionate release. Ibid.

On August 24, 2023, Palmiere issued correspondence to M.R. notifying him of the updated decision to deny his request for a certificate of compassionate release due to the fact that he did not have a terminal condition or a permanent physical incapacity. (Ppa11).

M.R. filed an amended Notice of Appeal to include the August 24, 2023 decision. Ibid.

On April 19, 2024, the Appellate Division affirmed the Department’s decision. (Ppa1-18). It rejected M.R.’s arguments that the Department failed to comply with the CRA and its implementing regulations “by not physically examining M.R. and by failing to make requisite findings in determining his

medical eligibility for compassionate release.” (Ppa11).

This petition for certification followed.

ARGUMENT

THE PETITION FOR CERTIFICATION SHOULD BE DENIED BECAUSE PETITIONER FAILS TO SATISFY ANY OF THE GROUNDS FOR GRANTING CERTIFICATION.

A petition for certification of a final decision of the Appellate Division will be granted only for special reasons. R. 2:12-4. Certification will be denied where the decision of the Appellate Division is essentially an application of settled principles to the facts of a case, does not present a conflict among judicial decisions requiring clarification or calling for supervision by the Supreme Court, and does not raise issues of general importance. See Fox v. Woodbridge Twp. Bd. of Educ., 98 N.J. 513, 515-16 (1985) (O’Hern, J. concurring); In re Route 280 Contract, 89 N.J. 1, 2 (1982).

M.R.’s case meets none of these requirements. This case simply involves application of well-settled legal principles of agency deference to the factual record developed below. The petition raises no question of general public importance because this appeal relates solely to the Department’s decision in M.R.’s case based on the unique facts presented. This matter does not present a question similar to a question raised in another appeal, nor does it conflict with

other decisions. And an ample record supports the Appellate Division's decision.

In his petition, M.R. argues that the Court should grant certification "to clarify that all inmates who apply for compassionate release are entitled to an in-person examination and that the DOC must provide sufficient reasoning to explain their eligibility decisions." (Pc9). According to M.R., in order to satisfy the CRA's requirements for a "medical diagnosis," the two designated physicians must conduct an in-person examination because the information necessary for diagnosis "will not be gleaned from medical records." (Pc5). This argument should be rejected.

Begin with the well-established principle that, when interpreting a statute, a court "must presume that every word in [the] statute has meaning and is not mere surplusage." (Pc13) (Citations omitted). Nothing in the CRA's plain language requires the doctors to conduct a physical examination prior to making an eligibility determination under the Act. N.J.S.A 30:4-123.51e. The Legislature is presumed to act deliberately when choosing words to include or exclude in a statute. State v. Smith, 429 N.J. Super. 1, 6 (App. Div. 2012); see also DiProspero v. Penn, 183 N.J. 477, 494 (2005) (observing that "the Legislature is presumed to be aware of judicial construction of its enactments")

(quoting N.J. Democratic Party, Inc. v. Samson, 175 N.J. 178, 195 n.6 (2002)).

Here, the Legislature specifically imposed a number of qualifications on the process, including that the physicians be licensed, but did not require physical examinations. N.J.S.A. 30:4-123.51e(b). Had it intended for the CRA to require physical (in-person) examinations by physicians prior to their diagnosis, it would have said so.

As the Appellate Division found, and contrary to M.R.'s assertion, the plain language of the CRA "says absolutely nothing about a physical examination of the inmate. Instead, the statute requires the designated licensed physicians to make a 'medical diagnosis' and then enumerates the requisite elements of that diagnosis, none of which is a physical examination." (Ppa14). The court also found that M.R.'s reliance upon a non-medical dictionary definition of "diagnosis" was unavailing because it was "not proof that a medical diagnosis must include a physical examination or of a legislative intent to require a physical examination, especially when the Legislature did not include a physical examination in its list of requirements for the medical diagnosis to be rendered by the designated licensed physicians." (Pc14-15).

M.R.'s argument that the regulations also required a physical examination is equally unavailing. M.R. argues that the Appellate Division did not correctly

interpret the term “required examinations” under N.J.A.C. 10A:16-8.6(a), and that “examination” must mean a physical examination. (Pc5-6). According to M.R., the Appellate Division ignored how the regulations distinguish the two designated doctors’ “required examinations” when making the medical diagnosis from the medical director’s “review of the medical records.” Ibid. However, as the Department argued below, the phrase “required examinations” must be understood in context. Mirroring the CRA, the Department’s regulations require the physicians to be licensed and designated by the DOC Commissioner as part of the necessary process. N.J.S.A. 30:4-123.51e(b); N.J.A.C. 10A:16-8.6(a). They also require that any diagnosis offered by these licensed physicians shall include, at a minimum, description of the condition; the prognosis concerning the likelihood of recovery; a description of the incapacity; and a description of any ongoing treatment that may be required. N.J.S.A. 30:4-123.51e(b); N.J.A.C. 10A:16-8.5. But neither the CRA nor the regulations impose further conditions on how the physicians reach this diagnosis, nor do they qualify that the examination must be a physical one. Rather, both the CRA and the regulations leave this in the hands of the licensed physicians charged with offering the supporting attestations. Also, the fact that the medical director’s role in the process refers to a “review of the medical

records” does not support a conclusion that the examination performed by the two designated physicians must be a physical examination.

In appropriate circumstances, the Department’s doctors conduct a physical examination of the incarcerated person to determine their eligibility for a Compassionate Release Certificate. See, e.g., State v. A.M., 252 N.J. 432, 446 (2023) (noting that, in A.M.’s case, the two doctors conducted a physical examination, and diagnosed her with progressive end-stage multiple sclerosis, and in Kamau’s case, the two doctors conducted a physical examination, and “diagnosed him with a serious medical condition and reported that he suffered from a ‘terminal condition,’ with less than six months to live, as well as a ‘permanent physical incapacity’”). But unlike in A.M., where both doctors evidently deemed a physical examination necessary, M.R. had already been previously diagnosed with medulloblastoma, and successfully treated for it, at the time that Drs. Pomerantz and Hawes evaluated him. (Ppa7-10). They concurred with the diagnoses, and also both ultimately concurred that his prognosis did not meet the CRA’s requirement of a terminal condition or a permanent physical incapacity, as those terms are defined under the CRA, N.J.S.A 30:4-123.51e(1). Ibid.

The Appellate Division correctly concluded that the regulations were

consistent with the CRA, that they “say nothing about a ‘physical examination’” and that they merely require “the physicians to forward to the medical director ‘relevant medical records.’” (Ppa16-17). The court concluded that “[a] comprehensive reading of the actual language of the regulation leads us to conclude ‘examination’ is a reference to a medical-record examination and not a requirement for a physical examination.” (Ppa17).

M.R. also argues that the Department failed to make the requisite findings in determining his eligibility for compassionate release, and only provided “barebones reasoning” for denying his application. (Pc8). According to M.R., Drs. Pomerantz and Hawes failed to provide an explanation for their findings that he does not suffer from a terminal condition, disease, or syndrome or permanent physical incapacity. Ibid. But those terms are defined by the CRA, N.J.S.A 30:4-123.51e(1), and both doctors referred to this standard in their evaluations, (Ppa7-10). Thus, by indicating that M.R. does not suffer from a terminal condition, disease, or syndrome, the doctors confirmed that he had more than six months to live, and by indicating that he does not suffer from a permanent physical incapacity, they confirmed that he is not permanently unable to perform daily living activities requiring 24-hour care. Ibid. Contrary to M.R.’s claim, no additional findings were necessary.

The Appellate Division agreed and found no merit in M.R.’s argument that the physicians failed to make requisite findings in determining his eligibility under the CRA. (Ppa18). The court correctly found that the physicians had properly addressed “each of the four subject matters” under N.J.S.A. 30:4-123.51e(b), and that “the reasons for their conclusions are clear.” Ibid. The court further noted the doctors’ findings that M.R.’s “MRIs have shown no evidence of a recurrence of the medulloblastoma since [his] surgery nor was there evidence of a permanent physical incapacity as defined by the statute.” Ibid.

M.R. further argues that the Appellate Division failed to consider the Legislature’s goal in passing the CRA “to increase the number of people released and show compassion to our sickest inmates.” (Pc6). However, this argument ignores the CRA’s eligibility requirements of having either a terminal illness or permanent physical incapacity, as those terms are defined under the statute. There is no dispute that brain cancer is a serious condition, but having a serious condition does not, by itself, qualify an inmate for compassionate release under the CRA.

Finally, the Appellate Division correctly found no ambiguity in the CRA’s language, but indicated that, if they did find an ambiguity, the legislative history

May 30, 2024
Page 16

“would lead us to conclude the Legislature did not intend in the CRA to require physical examinations of inmates seeking compassionate release.” (Ppa17). The court explained that the Legislature enacted the CRA to streamline the compassionate release process “with fewer, not more hurdles in the path of inmate applying for compassionate release[,]” and that “[r]equiring inmates to undergo physical examinations before the designated physicians render their medical diagnoses would have the effect of delaying and complicating the process, not streamlining it.” Ibid.

CONCLUSION

For these reasons, the Court should deny M.R.’s petition for certification.

Respectfully submitted,

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