

Commonwealth of Massachusetts

Suffolk, ss.

Superior Court No. 2184-CV-2007-D

Khalid Ali Mustafa,

Petitioner

v.

Gloriann Moroney,
As Chairperson of Massachusetts Parole Board,

Respondent.

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
2022 DEC -9 P 12:00
MICHAEL JOSEPH DONOHUE
CLERK / MAGISTRATE

Petitioner's Reply Memorandum

On November 21, 2022, Petitioner Khalid Ali Mustafa moved for judgment on the pleadings under Superior Court standing order 1-96, Rule 4 and Mass. R. Civ. P. 12(c). The respondent, Massachusetts Parole Board, filed a cross motion and supporting memorandum ("Cross Motion") on December 6, 2022. Under Rule 4, which incorporates Superior Court Rule 9A, "the moving party may file a reply memorandum limited to matters raised in the opposition that were not and could not reasonably have been anticipated and addressed in the moving party's initial memorandum."

The Board's Cross Motion urges this court to (1) find this case moot and (2) find that this Court has no power to terminate parole. Both are incorrect.

1. The case is not moot.

Mr. Mustafa petitioned for termination of his parole in 2020. Two years have passed. The unlawfulness of the denial still presents an ongoing controversy. The Board now argues that the case is "moot" because the Board "is agreeing to provide the relief available to petitioner in an action in the nature of certiorari." Cross Motion at 3. To the contrary, the Board has provided no such relief. It has not provided the relief requested: to terminate Mr. Mustafa's parole. The Board has merely said

that it will reconsider Mr. Mustafa's termination request at some unknown future date under some unpromulgated regulations. Cross Motion at 3 ("The Board expects that the new regulation will be promulgated within a matter of weeks from today's date.").

This is a hollow claim. In its July 6, 2022, decision on the motion to dismiss, this Court wrote that although the Board had published no regulations, "this should change soon." Doc. 6 at n. 2. This has not changed in six months. There are still no regulations. Indeed, the Parole Board has been promising to promulgate new regulations on termination for almost *a year*. See *Cheek, et al. v. Parole Bd.* (SJ-2021-0430) (Parole Board agreeing to promulgate new regulations in January of 2022); *Id.* The Parole Board cannot moot a case by assuring the Court that it will someday reconsider it under regulations that it "expects" will be promulgated. See *Wolf v. Comm'r of Pub. Welfare*, 367 Mass. 293, 299 (1975) ("to establish mootness in such circumstances, a defendant bears a heavy burden of showing that there is no reasonable expectation that the wrong will be repeated; and a defendant's mere assurances on this point may well not be sufficient.").

Second, the fact that the Board *intends* to promulgate new regulations is not relevant to this case. As this Court recognized in its July decision, "Neither party to this matter argued that the regulations might moot Mustafa's claim here." Doc. 6 at n. 2 (emphasis added). This argument was not raised in a motion to dismiss under M.R.C.P. 12(b) and not raised at the motion to dismiss hearing.¹ And yet, here, the Board is making this precise argument. The argument is waived. See *Butler v. Turco*, 93 Mass. App. Ct. 80, 89 (2018). The argument is also wrong. The Board did not argue this point at the hearing because the petition was properly filed in 2020 pursuant to G.L. c. 127 §130A; it did not make sense to apply future regulations retroactively to evaluate a petition filed before the regulations were even enacted. *Koe v. Commissioner of Probation*, 478 Mass. 12, 16 (2017) (law is

¹ This Court even raised the issue of new regulations at the hearing, but the Board agreed they were not relevant.

retroactive when “new legal consequences attach to events completed before enactment”). It did not make sense then; it certainly does not now.

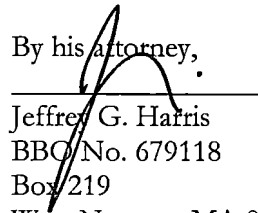
2. This Court can terminate parole.

The Board has argued that it “need not address the merits of the abuse of discretion claim” because it has “agree[d] to provide the relief available to petitioner in an action in the nature of certiorari.” In this way, the Board has waived its opportunity to argue that Mr. Mustafa is not suitable for termination. The only question, says the Board, is what relief is actually available to the petitioner. But the cases cited by the Board are *parole release cases* under G.L. c.127 §130. The Board has cited **no case** standing for the proposition that a Court cannot grant termination under §130A, or at the very least, find that termination is appropriate and remand with an order to proceed consistent with this finding.

For the foregoing reasons, the petitioner requests that this Court enter judgment in favor of the petitioner and grant the petitioner termination of parole.

Respectfully submitted,
Khalid Ali Mustafa

By his attorney,



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