STATE OF MICHIGAN

COURT OF CLAIMS

DERRICK LASHON BRADDOCK #216630,

Plaintiff,

v

MICHIGAN PAROLE BOARD,

Defendant.
_____/

OPINION AND ORDER

Case No. 22-000134-MB

Hon. Elizabeth L. Gleicher

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION AND DENYING AN AWARD OF TAXABLE COSTS, AND GRANTING PLAINTIFF'S MOTION TO FILE AN AMENDED COMPLAINT

Pending before the Court is defendant's October 12, 2022 motion for summary disposition under MCR 2.116(C)(8) and (C)(10). Plaintiff's response includes a request to file an amended complaint. The Court construes the request as a motion and GRANTS it; the amended complaint is accepted for filing. The Court has reviewed the summary disposition briefing and dispenses with oral argument. For the reasons discussed below, defendant's motion for summary disposition is GRANTED. Defendant's motion for an award of taxable costs is DENIED.

I. BACKGROUND

Plaintiff Derrick Braddock, a prisoner under the jurisdiction of the Michigan Department of Corrections (DOC), seeks a writ of mandamus compelling defendant Michigan Parole Board to "hold a lifer law public hearing conducted by one of its members who will be involved in the formal recommendation to grant or deny parole to Mr. Braddock in compliance with MCL

791.234(8)(c), MCL 791.244(2)(f) and (h), and Mich Admin Code, R 791.7760(4)." Braddock also seeks to compel through a writ of mandamus a final parole decision made "by a concurrence of a majority vote of" the Parole Board's "participating members," which Braddock contends is commanded by MCL 791.246 and Mich Admin Code, R 791.7765(2), along with an order that the "Director of the MDOC . . . cast . . . a tie-breaking vote if the vote of [the] Parole Board ends in a tie[.]"

In 2004, Braddock was sentenced to life in prison with the possibility of parole after a jury convicted him of assault with intent to murder, MCL 750.83, and several other offenses carrying lesser penalties. He became subject to the Parole Board's jurisdiction regarding his life sentence in July 2021. See MCL 791.234(7)(a). Consistent with the parole consideration procedure described in MCL 791.234(8), Braddock was interviewed by Parole Board member Rev. Jerome L. Warfield, Sr., in June 2021. A majority of the Parole Board later voted, in August 2021, to convene a public hearing.

A public hearing was held on October 19, 2021. Parole Board member Sonia Warchock presided at the hearing. Approximately six weeks later, on November 28, 2021, Warchock resigned from the Parole Board and accepted other employment.

On December 10, 2021, the Parole Board issued a decision regarding Braddock's parole, announcing: "The Parole Board has decided to withdraw interest in your case and will not proceed toward release on parole at this time. Your case will be reviewed, as required by law, on or about the date indicated below." The date indicated is July 1, 2026. The decision included an "explanation" and "recommendations for corrective action which may facilitate release."

Although the full Parole Board consists of 10 members, two Parole Board positions were vacant on the date Braddock's parole decision was issued. Eight members of the Board – its full complement at the time – participated in the public hearing, and eight voted on whether to grant Braddock parole. The eight Parole Board members split evenly, with four voting that they had "interest" in granting parole, and four voting that they had "no interest" in granting parole.

Braddock then filed a three-count complaint seeking a writ of mandamus. He sought to compel this Court to order that: (1) "all ten" members of the Parole Board must consider whether to grant or deny parole; (2) the Director of the Michigan Department of Corrections must cast a final vote in the event that the Parole Board is unable to comply with its legal duty to render a final parole decision to either grant or deny parole by a concurrence of the majority members; and that (3) Sonia Warchock must be involved in the formal recommendation to grant or deny parole.

The Parole Board moved for summary disposition under MCR 2.116(C)(8) and (C)(10), submitting affidavits attesting that Warchock was not a Parole Board member at the time the Board convened in executive session to consider Braddock's parole, and that there were only eight Parole Board members when the vote to withdraw interest in Braddock's parole was conducted. The Board argued that because MCL 791.246[1] provides that parole decisions are to be made by a majority vote of the Board and "the eight-member decision was made by the entire Board," no legal violation occurred. Further, the Board contended, no statute authorizes the Director of the Department of Corrections to break a tie when the Board is evenly split regarding a parole decision, and no statute required that Warchock participate in the hearing after her resignation. Braddock

[1] MCL 791.246 was amended effective March 11, 2022, but the amendment does not impact the resolution of this matter. See MCL 791.246, as amended by 2022 PA 29.

had not identified the breach of any clear legal right or clear legal duty, the Board concluded, foreclosing the issuance of a writ of mandamus.

Braddock responded with a proposed amended complaint withdrawing his contention that "all 10" Board members should be compelled to vote on his parole, conceding that the Parole Board "has authority under the common law of this State to render parole decisions with a quorum of less than all ten of its members." Nevertheless, Braddock urged, "all 'decisions' of the Parole Board must be made by a 'majority vote' – regardless of the number of Parole Board members participating," which requires either a re-vote until a majority is reached, or the participation of the Director of the MDOC as a tie-breaker. Under MCL 791.244(2)(f) and (2)(h), Braddock insisted, a public hearing "shall" be conducted by " 'at least 1 member of the parole board who will be involved in the formal recommendation' " to grant or deny parole, which means that Warchock, who conducted the meeting, must be compelled to vote on his parole.

II. ANALYSIS

A motion to dismiss under MCR 2.116(C)(8) tests the legal sufficiency of the claim as alleged in the complaint. *Bailey v Antrim Co*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 357838); slip op at 5. "A motion under MCR 2.116(C)(8) may . . . be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id.* (citation and quotation marks omitted). The Court considers the factual allegations in the complaint as true for purposes of a (C)(8) motion. *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 206; 920 NW2d 148 (2018).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). The

evidence submitted by the parties is reviewed in a light most favorable to the nonmovant. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Summary disposition under MCR 2.l16(C)(10) is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Greene v AP Prod, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (citation and quotation marks omitted). A genuine issue of material fact exists when the "record which might be developed . . . would leave open an issue upon which reasonable minds might differ." *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013) (citation and quotation marks omitted).

"[T]he issuance of a writ of mandamus is proper only where (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial and involves no exercise of discretion or judgment, and (4) no other remedy exists, legal or equitable, that might achieve the same result." *Morales v Mich Parole Bd*, 260 Mich App 29, 41; 676 NW2d 221 (2003). Mandamus is an "extraordinary remedy and it will not lie to review or control the exercise of discretion vested in a public official or administrative body." *Id.* at 41-42. However, "[w]hen agencies of government fail to perform duties imposed by the Legislature or the constitution, the courts will not hesitate to order performance." *Teasel v Dep't of Mental Health*, 419 Mich 390, 411; 355 NW2d 75 (1984).

A. THE "MAJORITY" RULE

The Legislature created the Parole Board as part of the DOC. MCL 791.231a(1). The Board consists of 10 members serving staggered terms. *Id.* Most parole decisions are made by three-member panels of the Parole Board, but decisions involving prisoners serving a life sentence

are made by majority vote of all the members of the Parole Board. *In re Elias*, 294 Mich App 507, 511; 811 NW2d 541 (2011). Given that the Parole Board consists of 10 members, tied votes are predictable. The question presented is whether a tie vote of the full Parole Board constitutes a legally binding denial of parole.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to legislative intent. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212; 501 NW2d 76 (1993). The first step in the interpretive process is to review the language of the statute itself. *People v Blunt*, 282 Mich App 81, 83; 761 NW2d 427 (2009). A court considers both the plain meaning of the words or phrases used in the statute, and their placement and purpose in the statutory scheme. *Id.* at 84. "[T]he meaning of statutory language, plain or not, depends on context." *King v St Vincent's Hosp*, 502 US 215, 221; 112 S Ct 570; 116 L Ed 2d 578 (1991).

MCL 791.246 states: "All decisions and recommendations of the parole board required by this act must be by a majority vote of the parole board or, except as otherwise prohibited by this act, a parole board panel created pursuant to section 6(2) [MCL 791.206]." The statutory framework governing parole makes it clear that "matters of parole lie solely within the broad discretion of the [Board] . . . ." *Jones v Dep't of Corrections*, 468 Mich 646, 652; 664 NW2d 717 (2003). For example, a grant of parole is subject to a number of conditions, including that the Parole Board has "reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety." MCL 791.233(1)(a). MCL 791.233(1)(e) directs that

> [a] prisoner must not be released on parole until the parole board has satisfactory evidence that arrangements have been made for such honorable and useful employment as the prisoner is capable of performing, for the prisoner's education, or for the prisoner's care if the prisoner is mentally or physically ill or incapacitated.

And MCL 791.234(11) emphasizes the discretionary nature of the Board's decision to grant parole:

> [A] prisoner's release on parole is discretionary with the parole board. The action of the Parole Board in granting a parole is appealable by the prosecutor of the county from which the prisoner was committed or the victim of the crime for which the prisoner was convicted. The appeal must be to the circuit court in the county from which the prisoner was committed, by leave of the court.

The operative language in MCL 791.246 provides that the Parole Board's "decisions and recommendations . . . must be by a majority vote[.]" In context, the Court interprets this language to mean that a decision or recommendation to *grant* or *recommend* parole requires a majority vote. The statutory environment of the "majority vote" provision demonstrates that it applies to the affirmative act of granting parole rather than the determination that a prisoner is not entitled to parole.

MCL 791.236(1) states: "All paroles must be *ordered* by the parole board and must be signed by the chairperson." (Emphasis added.) "The release of a prisoner on parole must be *granted* solely upon the initiative of the parole board. There is no entitlement to parole." MCL 791.235(1) (emphasis added). The Court must examine the statute "as a whole, reading individual words and phrases in the context of the entire legislative scheme." *People v Comer*, 500 Mich 278, 287; 901 NW2d 553 (2017). Doing so leads to the conclusion that the purely discretionary decision whether to grant parole requires a majority vote. The determination that a prisoner has not met the conditions for parole is not a "decision" or a "recommendation" as those terms are meant in MCL 791.246. Moreover, had the Legislature intended that all determinations of any sort made by the Parole Board required a majority vote, it would have either structured the Board with an odd number of members, or created a tie-breaking provision.

Braddock's interpretation of the "majority" rule ignores that the consequence of requiring a majority for every Parole Board decision is that a prisoner undergoing parole consideration potentially would be positioned in parole purgatory, with no ability to successfully move to a successive parole determination. The parole statutes do not contemplate such a situation. Rather, MCL 791.234(8)(b) provides that the Parole Board "shall review the prisoner's file at the conclusion of 15 calendar years of the prisoner's sentence and every 5 years thereafter until the prisoner is paroled, discharged, or deceased." This scheme of systematic reviews suggests that the Legislature intended that until a majority vote in favor of parole is garnered, a prisoner would not be paroled. Because no clear legal duty compels the Parole Board to re-vote until a majority is reached or to appoint a tie-breaking member, Braddock is not entitled to a writ of mandamus regarding this claim.

B. THE PARTICIPATION OF A PAROLE BOARD MEMBER INVOLVED IN THE FORMAL PAROLE RECOMMENDATION

Next, Braddock argues that he was entitled to a public hearing conducted by a Parole Board member "involved in the formal recommendation to grant or deny Mr. Braddock parole as required" by various statutes and a section of the Michigan Administrative Code. As mentioned above, Sonia Warchock presided at Braddock's public hearing but resigned from the Board before a parole vote was taken.

According to Braddock, MCL 791.244(2)(f) and (h) and Mich Admin Code R 791.7760(4) compelled the Board to require Warchock's participation in the vote. The statute states:

> (2) Except in cases in which a commutation is requested based in part on a prisoner's medical condition and in which the governor has requested that the parole board expedite its review and hearing process under section 44a, upon its own initiation of, or upon receipt of an application for, a reprieve, commutation, or pardon, the parole board shall do all of the following, as applicable:

* * *

(f) Conduct a public hearing not later than 90 days after making a decision to proceed with consideration of a recommendation for the granting of a reprieve, commutation, or pardon. The public hearing must be held before a formal recommendation is transmitted to the governor. *One member of the parole board who will be involved in the formal recommendation may conduct the hearing*, and the public must be represented by the attorney general or a member of the attorney general's staff.

* * *

(h) Conduct the public hearing under the rules promulgated by the department. Except as otherwise provided in this subdivision, a person having information in connection with the pardon, commutation, or reprieve must be sworn as a witness. A person who is a victim must be given an opportunity to address and be questioned by the parole board at the hearing or to submit written testimony for the hearing. In hearing testimony, the parole board shall give liberal construction to any technical rules of evidence. [MCL 791.244(2)(f) and (h) (emphasis added).]

The relevant portion of the administrative rule provides:

(4) If a public hearing is held, it shall be conducted by at least 1 member of the parole board who will be involved in the formal recommendation to grant or deny the application for pardon, reprieve, or commutation. The parole board shall give liberal construction to any technical rules of evidence. [Mich Admin Code R 791.7760(4)].

By their plain terms, the statute and the administrative rule apply to commutations, reprieves, and pardons, and not to parole determinations. Braddock acknowledges as much, but contends that the procedure was incorporated within the parole process by MCL 791.234(8)(c), which states:

(8) A parole granted to a prisoner under subsection (7) is subject to the following conditions:

* * *

(c) A decision to grant or deny parole to the prisoner must not be made until after a public hearing *held in the manner prescribed for pardons and commutations in sections 44 and 45*. Notice of the public hearing must be given to the sentencing judge, or the judge's successor in office. Parole must not be granted if the sentencing judge files written objections to the granting of the parole within 30 days

> of receipt of the notice of hearing, but the sentencing judge's written objections bar the granting of parole only if the sentencing judge is still in office in the court before which the prisoner was convicted and sentenced. A sentencing judge's successor in office may file written objections to the granting of parole, but a successor judge's objections must not bar the granting of parole under subsection (7). If written objections are filed by either the sentencing judge or the judge's successor in office, the objections must be made part of the prisoner's file. [MCL 791.234(8)(c), (emphasis added).]

Because public hearings must be "held in the manner prescribed for pardons and commutations," Braddock argues, the Parole Board member who conducted the public hearing (Warchock) had to be involved in the formal recommendation "to grant or deny" his parole.

Again, Braddock has detached the language from its context. The sentence on which Braddock relies states: "If a public hearing is held, it shall be conducted by at least 1 member of the parole board who will be involved in the formal recommendation to grant or deny the application for pardon, reprieve, or commutation." This sentence, however, plainly applies only to the commutation, reprieve, or pardon process, which involve a "formal recommendation" to the Governor. See MCL 791.244(2)(f) ("The public hearing must be held before a formal recommendation is transmitted to the governor. One member of the parole board who will be involved in the formal recommendation may conduct the hearing, and the public must be represented by the attorney general or a member of the attorney general's staff."). The parole process does not involve a "formal recommendation," but rather a "grant" of parole by the Board. Accordingly, the provision of Mich Admin Code, R 791.7760(4) requiring the participation of a Board member involved in the public hearing is inapplicable. Because no clear legal duty compels Warchock to vote regarding Braddock's parole, Braddock is not entitled to a writ of mandamus regarding this claim.

C. COSTS

The Board requests nominal costs in the amount of $40.00 under MCR 2.625(A) and (F), as well as MCL 600.2591 (which relates specifically to frivolous-action sanctions). The Court declines to award costs to the Board. Plaintiff's arguments were innovative, his brief was extremely well written, and his arguments raise issues of important public interest. Although plaintiff ultimately does not prevail, his claims were not frivolous. And the Board presents no other basis to depart from the American rule for attorney fees. See *Haliw v Sterling Heights*, 471 Mich 700, 707; 691 NW2d 753 (2005) ("Under the American rule, attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award.").

III. CONCLUSION

For the reasons discussed, defendant's motion for summary disposition is GRANTED, but defendant's request for taxable costs is DENIED. Plaintiff's motion to amend the complaint is GRANTED.

This is a final order that resolves the final claim and closes the case.

Date: January 25, 2023

Elizabeth L. Gleicher
Judge, Court of Claims