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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-849**

Richard A. Bushway,
Appellant,

vs.

Lucinda Jesson, Commissioner of Human Services,
Respondent.

**Filed October 31, 2011
Affirmed
Johnson, Chief Judge**

Judicial Appeal Panel
File No. AP109018

David A. Jaehne, West St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, Barbara Berg Windels, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Johnson, Chief Judge; Kalitowski, Judge; and Stoneburner, Judge.

UNPUBLISHED OPINION

JOHNSON, Chief Judge

Richard A. Bushway is civilly committed for an indeterminate period of time as a psychopathic personality (PP). In 1992, the commissioner of human services provisionally discharged him to a community placement, subject to certain conditions. In

2010, Bushway's provisional discharge was revoked. A judicial appeal panel denied his petition challenging the revocation. We affirm.

FACTS

In 1989, Bushway was civilly committed for an indeterminate period as a psychopathic personality and as a chemically dependent person. At the time of his commitment, he had a criminal history that included arson, DWI, two thefts, and three assaults in a twelve-year period. The district court found that he had engaged in sexually assaultive behavior toward a former fiancée and former wives that “follow[ed] a pattern of beating, using his fists or objects; binding with rope, cloth, [or] wire . . . ; pouring fluid over the victim; shaving the victim's body hair; rape and sodomy.” He cut the cheek of one of his wives while she was sleeping, which caused bleeding and “extreme pain.” And on another occasion, she awoke to find Bushway standing over her with a knife at her throat. The district court found that Bushway suffered from sexual sadism, chemical dependency, and anti-social personality disorders.

After his indeterminate commitment, Bushway was placed in the Intensive Treatment Program for Sexual Aggressives (ITPSA) at the St. Peter Regional Treatment Center. In 1992, the commissioner granted Bushway's petition for provisional discharge to a community setting, but it was subject to revocation if he failed to comply with certain stated conditions, including the conditions that he abstain from alcohol, cooperate when asked to submit to random alcohol-screening tests, obey all laws, and not leave the state without permission.

In May 1993, ITPSA staff ordered Bushway to return to the treatment facility because they intended to revoke his provisional discharge based on a suspicion that he had consumed alcohol. Rather than returning, Bushway left the state. He testified that he traveled by bus to Boston and drank a quart and a half of alcohol on the first day of his trip. The district court issued an order for his apprehension and detention.

Bushway testified that, six months after he arrived in Boston, he found and retained steady employment but continued drinking, sometimes heavily. But in 1998, Bushway was arrested on several criminal charges, which later were dismissed, that arose out of an incident in which he threw bleach at a woman. And in 2001, Bushway was charged with sexual assault of a woman for an incident that occurred in his apartment. He acknowledged that he had been drinking that evening and that when the police arrived on the scene later and arrested him, there was blood in the apartment from cuts to the woman's hands caused by his sword, the woman's hands were tied behind her back, and her hair had been crudely cut off, and part of her eyebrow had been shaved. After Bushway was jailed for five years and eight months while awaiting trial on these charges, he pleaded guilty to assault and battery and assault with a dangerous weapon. Bushway insists that he did not commit any sexual offenses while on provisional discharge and notes that he had no convictions for sexual assault. He testified that he stopped drinking after his 2001 arrest and has maintained his sobriety since his release. He did not receive sex-offender treatment while in Massachusetts.

It was not until 2009 that the Minnesota Department of Human Services learned of Bushway's whereabouts. In January 2010, Bushway was served with the apprehend-and-

detain order and informed that he should return to Minnesota. He returned on January 31, 2010, and was placed in the Minnesota Sex Offender Program (MSOP) because the ITPSA program no longer existed. His provisional discharge was revoked. He brought a petition to appeal the revocation to the special review board. After a hearing, the board recommended denying Bushway's petition. Bushway then petitioned the judicial appeal panel for rehearing and reconsideration.

At the hearing before the judicial appeal panel, Bushway provided testimony as described above. Records from MSOP showed that Bushway's current diagnoses include, in relevant part: sexual sadism; alcohol dependence, in a controlled environment; and personality disorder, not otherwise specified, with anti-social traits. The court-appointed examiner, Dr. Thomas Alberg, agreed with this diagnosis, although he thought that Bushway's chemical dependency is primarily in remission. Dr. Alberg testified that there is no question that Bushway violated the conditions of his provisional discharge. However, he did not believe that Bushway's provisional discharge needed to be revoked, although he recommended that Bushway enroll in outpatient sexual offender and chemical dependency treatment programs and support groups. Actuarial tests administered by MSOP indicated that Bushway still posed a moderate to high risk of sexual recidivism, unless he participated in sex-offender treatment to ameliorate his dynamic risk factors.

After Dr. Alberg's testimony, the commissioner of human services moved to dismiss the petition pursuant to Minn. R. Civ. P. 41.02(b). The appeal panel granted the motion to dismiss and denied Bushway's petition. Bushway appeals.

DECISION

When reviewing findings by a judicial appeal panel, an appellate court “is not to weigh the evidence as if trying the matter *de novo*, but to determine from an examination of the record if the evidence as a whole sustains the appeal panels’ findings.” *Johnson v. Noot*, 323 N.W.2d 724, 728 (Minn. 1982). This court need not defer on questions of law. *In re Stilinovich*, 479 N.W.2d 731, 734 (Minn. App. 1992).

I.

Bushway argues that the judicial appeal panel erred by revoking his provisional discharge because, even though he violated the conditions of his provisional discharge, his current condition does not warrant revocation.

A person committed as a psychopathic personality may be provisionally discharged only as provided in Minn. Stat. § 253B.185, subd. 12 (2010); *see id.*, subd. 1(a) (providing that chapter 253B applies to individuals committed as psychopathic personality). “The head of the treatment facility may revoke the provisional discharge and . . . order that the patient be immediately returned to the treatment facility.” *Id.*, subd. 15(b). Grounds for revocation of provisional discharge exist if “(1) the patient has departed from the conditions of the provisional discharge plan; or (2) the patient is exhibiting behavior which may be dangerous to self or others.” *Id.*, subd. 15(a).

A committed person who is aggrieved by a revocation of provisional discharge may petition the special review board for review. *Id.*, subds. 9(c), 17. The committed person may then petition the judicial appeal panel for rehearing and reconsideration of the special review board’s decision. Minn. Stat. § 253B.19, subd. 2(b) (2010). The

petitioning party has the initial burden of going forward with the evidence by “presenting a *prima facie* case with competent evidence to show that the person is entitled to the requested relief.” *Id.*, subd. 2(d) (2010); *Coker v. Ludeman*, 775 N.W.2d 660, 663 (Minn. App. 2009), *review dismissed* (Minn. Feb. 24, 2010).

The issue before the judicial appeal panel was whether Bushway “departed from the conditions of the provisional discharge plan.” *See* Minn. Stat. § 253B.185, subd. 15(a). The judicial appeal panel determined that Bushway violated the terms of his provisional discharge in 1993 by failing to remain law abiding, leaving the state without permission, failing to abstain from alcohol, and failing to return to the treatment program when directed to do so. The evidence supports the panel’s findings, which Bushway has not disputed at the hearing or on appeal. Bushway admitted that he left the state without permission in 1993 after being told that his provisional discharge would be revoked. He also testified that he consumed alcohol on his bus trip to Boston and thereafter until his 2001 arrest. He further testified that he pleaded guilty to charges of assault and battery, and assault and battery with a dangerous weapon, arising out of the 2001 incident. Thus, the judicial appeal panel did not err by denying his appeal of the revocation of his provisional discharge.

II.

Bushway argues that the judicial appeal panel erred because his current condition does not require inpatient treatment and supervision pursuant to the MSOP program and because his provisional discharge plan provides a reasonable degree of protection to the public.

When a patient's provisional discharge has been revoked, the patient "must successfully re-petition the special review board and judicial appeal panel prior to being placed back on provisional discharge." Minn. Stat. § 253B.185, subd. 15(d). As the judicial appeal panel advised, if Bushway wants to seek provisional discharge now that his earlier provisional discharge has been revoked, he must petition the special review board for such relief. *Id.*, subd. 9(c). Because Bushway did not petition the special review board for a new or an amended provisional discharge, the judicial appeal panel was not permitted to consider such a request. Minn. Stat. § 253B.19, subd. 3 (2010). Likewise, we are unable to consider the issue for the first time on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Affirmed.