**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A16-1822**

In the Matter of the Civil Commitment of: James Allen Barber

**Filed April 24, 2017**
**Affirmed**
**Klaphake, Judge**[*]

Judicial Appeal Panel
File No. AP14-9013
Rice County File No. 66-P4-03-001752

Lance R. Heisler, Lampe Law Group, L.L.P., Northfield, Minnesota (for respondent Barber)

Lori Swanson, Attorney General, Anthony R. Noss, Assistant Attorney General, St. Paul, Minnesota; and

John Fossum, Rice County Attorney, Faribault, Minnesota (for appellant Commissioner of Human Services)

Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and Klaphake, Judge.

**U N P U B L I S H E D  O P I N I O N**

**KLAPHAKE**, Judge

The parties challenge a judicial appeal panel decision that grants the petition of a civilly committed individual seeking transfer and denies his request for a provisional

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

discharge. Because the record supports the finding that respondent-petitioner's offense history has been sufficiently established and appellant points to no other bar to respondent's transfer, we affirm the judicial appeal panel's transfer decision. Because respondent's proffered provisional discharge plan is insufficient to provide reasonable safety to the public, we affirm the judicial appeal panel's denial of his provisional discharge.

**D E C I S I O N**

After the special review board makes a recommendation on a petition made by a petitioner, the petitioner may seek rehearing and reconsideration of the judicial appeal panel. Minn. Stat. § 253D.28, subd. 1 (2016). Before the judicial appeal panel, the petitioner has the burden of going forward with "sufficient, competent evidence that, if proven, would entitle the petitioner to relief," and if the petitioner satisfies this burden, the commissioner must prove by clear and convincing evidence that relief should be denied. *Larson v. Jesson*, 847 N.W.2d 531, 535 (Minn. App. 2014) (quotation omitted). The judicial appeal panel "must address" any applicable statutory factors when making its decision. *Piotter v. Steffen*, 490 N.W.2d 915, 919 (Minn. App. 1992), *review denied* (Minn. Nov. 17, 1992); *see also Larson*, 847 N.W.2d at 534-35. On appeal, we review the decisions made by a judicial appeal panel for clear error and examine the record to determine if "the evidence as a whole" sustains its findings. *Larson*, 490 N.W.2d at 534. A judicial appeal panel clearly errs if it ignores the "vast weight of the evidence." *Piotter*, 490 N.W.2d at 920. If the record sustains the findings of the panel, it is immaterial that it might also support contrary findings. *Rydberg v. Goodno*, 689 N.W.2d 310, 314 (Minn. App. 2004).

Following his conviction for first-degree criminal sexual conduct involving his young daughter, respondent James Barber was civilly committed in 2004 as a sexually dangerous person and a sexual psychopathic personality. In 2013, he petitioned for discharge, provisional discharge, or a transfer to Community Preparation Services (CPS). After his request was denied, Barber sought rehearing before the judicial appeal panel, which granted his request for transfer but denied his request for provisional discharge. The state appealed the transfer decision, and Barber filed a notice of related appeal to challenge the denial of his request for provisional discharge.

## I. Transfer to CPS

Following a four-day hearing, the judicial appeal panel determined that "[t]he totality of the testimony and the exhibits submitted support a transfer by a preponderance of the evidence." The commissioner argues that the judicial appeal panel erred in ordering Barber to be transferred to CPS, a placement with less security than the razor-wire ringed "secure perimeter" where Barber had been receiving treatment through the Minnesota Sex Offender Program (MSOP). Transfer is governed by Minn. Stat. § 253D.29, which states:

> The following factors must be considered in determining whether a transfer is appropriate:
>
> (1) The person's clinical progress and present treatment needs;
>
> (2) The need for security to accomplish continuing treatment;
>
> (3) The need for continued institutionalization;
>
> (4) Which facility can best meet the person's needs; and
>
> (5) Whether transfer can be accomplished with a reasonable degree of safety for the public.

Minn. Stat. § 253D.29, subd. 1 (2016). "[A] petition for transfer imposes the burdens of production *and* persuasion on the petitioner at the hearing before the judicial appeal panel."

*Foster v. Jesson*, 857 N.W.2d 545, 548 (Minn. App. 2014). We review the judicial appeal panel's factual findings to determine "whether the evidence as a whole sustains the appeal panels' findings." *Larson*, 847 N.W.2d at 534. If the "record as a whole sustains" the finding, we will not reverse. *Rydberg*, 689 N.W.2d at 313. Where the findings necessary for a conclusion are adequately supported, inclusion of unsupported findings is not reversible error. *Id*. at 314. We review the judicial appeal panel's construction of the law de novo. *Larson*, 847 N.W.2d at 534.

The commissioner argues that the judicial appeal panel clearly erred in its findings related to the testimony of the risk assessors and an administrator. The judicial appeal panel found that evidence produced by the first risk assessor was "more supportive of a transfer than non-supportive of one," that the second risk assessor's opposition to transfer was not "as decisive" as her opposition to provisional discharge, and that one of the administrator's testimony relied only on an unsupported review of Barber's records.

The first risk assessor testified that she would support a transfer if Barber gave a non-deceptive full disclosure polygraph test before the transfer. The MSOP uses polygraph tests to establish a committed person's full offense history and arousal pattern. But the judicial appeal panel found that though Barber does not admit to abusing his daughter, he "admitted in a therapy group on June 13, 2016 that he had masturbated to fantasies of his daughter when he was in prison," that he "wished that he had molested her," and he stated he would have molested her if he had had the opportunity. The judicial appeal panel concluded that Barber's admissions "support a finding that he has made significant progress on understanding his sexual deviancy." We read this as a finding that Barber's

sexual offense history was sufficiently revealed, and that neither a full-disclosure polygraph nor a penile plethysmograph test (PPG), which generally follows a full disclosure polygraph test and defines an arousal pattern, need not occur before Barber's transfer to CPS. The record supports this finding. Barber's treating clinician testified that the polygraph and PPG should be used as treatment tools rather than barriers to Barber's progress. Because the judicial appeal panel had found that the tests identified by the first risk assessor were unnecessary, the judicial appeal panel did not clearly err in finding that the first risk assessor's overall testimony supported a transfer.

The panel's characterization of the second risk assessor is similarly supported by the record. The panel found that the second risk assessor's opinion opposing Barber's transfer was not "as decisive" as her opinion opposing his provisional discharge. Though she testified that all five statutory factors weighed against transfer, her recommendation against transfer focused heavily on the completeness of Barber's offense history and his failure to give a full disclosure polygraph. The judicial appeal panel found that Barber's offense history was sufficiently complete, and therefore properly found the second risk assessor's testimony concerning transfer less compelling than her testimony on provisional discharge.

The commissioner also argues that the judicial appeal panel erred when it found that an administrator's testimony on Barber's need to be confined within a secure perimeter was not supported by Barber's treatment scores. The record shows that Barber received one score that was less than satisfactory—a "Needs Attention" score in the category "Cooperate with sexual assessments." In the remaining 89 categories, Barber's scores were

mainly high, including the scores related to his ability to internalize treatment and understand his triggers. The judicial appeal panel did not err in rejecting the administrator's testimony.

The commissioner further argues that the judicial appeal panel erred in concluding that transfer was appropriate under the statute, asserting that the decision focused too much on clinical progress and not enough on public safety, and that all credible witnesses except for Barber's treating clinicians and Barber himself counseled against transfer.

The judicial appeal panel found that Barber's "present treatment needs and clinical progress support a transfer to CPS." This is supported by the testimony of Barber's treating clinicians that his behavior has been well-managed, Barber's written treatment reports, and his high treatment scores. The commissioner argues that Barber continues to need to complete a full-disclosure polygraph and a PPG, but the judicial appeal panel found that such testing was not required before transfer.

The judicial appeal panel also found that "[t]he security safeguards in CPS are sufficient for [Barber] to accomplish continuing treatment," and that Barber "does not need continued institutionalization within the secure perimeter." Barber's primary clinician testified that Barber has had no complaints against him, and that he is "willing to do the work" and will continue to do so. Both clinicians who testified stated that they do not have concerns about Barber completing treatment in a less institutionalized setting. Testimony by treating professionals may be given greater weight than that given to evaluators who spend less time with patients. *See Piotter*, 490 N.W.2d at 920. Moreover, the first risk assessor explicitly concluded that Barber does not need to be in a razor-wire facility. The

only evidence suggesting that a higher degree of security or institutionalization was necessary is the second risk assessor's testimony that Barber should establish his offense history and arousal patterns in an institutional setting for his own safety because he has a history including self-harm. Because the judicial appeal panel found that Barber's offense history and arousal pattern have been sufficiently established, that testimony is not inconsistent with a finding that Barber is not in need of further institutionalization.

We also conclude that the judicial appeal panel's finding that Barber's "present placement or placement at CPS meet [his] needs equally" is supported by the record. An MSOP administrator testified that upon transfer to CPS, Barber will remain in the middle of Phase II of sex-offender treatment and would have the same expectations, with a relatively less secure environment. Having concluded that Barber does not pose a security threat, we believe that the judicial appeal panel correctly concluded that either facility would meet Barber's needs.

Finally, we conclude that the judicial appeal panel's finding that "[t]ransfer to CPS can be accomplished with a reasonable degree of safety for the public" is supported. There is no evidence in the record suggesting that Barber's transfer would be unsafe. An administrator testified that Barber would be able to walk on campus with staff escorts at CPS, but did not suggest that he would have access to the public.

For these reasons, we affirm the judicial appeal panel's order for Barber's transfer to CPS.

## II. Provisional Discharge

Barber argues that the panel erred when it determined that the state established by clear and convincing evidence that his request for provisional discharge should be denied. The applicable statute provides:

> The following factors are to be considered in determining whether a provisional discharge shall be granted:
>
> (1) whether the committed person's course of treatment and present mental status indicate there is no longer a need for treatment and supervision in the committed person's current treatment setting; and
>
> (2) whether the conditions of the provisional discharge plan will provide a reasonable degree of protection to the public and will enable the committed person to adjust successfully to the community.

Minn. Stat. § 253D.30, subd. 1(b) (2016). In denying Barber's request for provisional discharge, the judicial appeal panel addressed both statutory factors and found that neither weighed in favor of provisional discharge.

The statute requires the panel to consider whether there is "a need for treatment and supervision in the committed person's current treatment setting." Minn. Stat. § 253D.30, subd. 1(b)(1). The judicial appeal panel expressed concern regarding Barber advancing beyond the scope of what his treatment has covered and concluded that Barber needs to "complete some Phase II and Phase III modules" and experience increasing deinstitutionalization at CPS before being provisionally discharged.

Barber argues that he no longer needs the intense level of treatment he is receiving, and that both treating clinicians' testimony supports his request for provisional discharge. Though Barber's clinicians did testify positively regarding his progress, their testimony does not overcome other evidence pertaining to Barber's continued need for treatment and

supervision. *Rydberg*, 689 N.W.2d at 314. Barber has completed only Phase I and portions of the Phase II modules, which focus on commitment to change, learning program expectations, and understanding offense dynamics. He has yet to receive any Phase III treatment, which is geared toward reintegration in the community. Therefore, the panel did not err when it determined that Barber continues to need treatment and supervision, especially in the area of reintegration, before being provisionally discharged.

We next address the panel's determinations related to the second statutory factor, the adequacy of Barber's provisional discharge plan. The statute requires "the conditions of the provisional discharge plan" to "provide a reasonable degree of protection to the public and . . . enable the committed person to adjust successfully to the community." Minn. Stat. § 253D.30, subd. 1(b)(2). The panel found that Barber's provisional discharge plan does not adequately address his treatment needs or include specific provisions concerning monitoring and living arrangements, and accordingly, does not provide a reasonable degree of safety to the public.

The record includes extensive testimony about the insufficiency of Barber's provisional discharge plan, emphasizing that the plan is vague and incomplete. The plan does not include an address; Barber instead states: "I plan to live wherever I can afford to start with." While the lack of a specific address does not, alone, render a plan unable to provide protection to the public, *see In re Civil Commitment of Kropp*, __ N.W.2d. __, __ No. A16-1944, slip. op. at 9 (Minn. App. Apr. 10, 2017), the plan lacks specificity in other crucial areas. It does not propose a specific employment opportunity; Barber instead states he is "open to finding a job and getting adjusted to living in the community again." He

explains that he "will get a car, truck or motorcycle . . . [or] use public transportation." He also does not provide specific plans for treatment program participation. Additionally, though he indicates that he will "comply with monitoring services," he does not explain what monitoring would be used. Barber's provisional discharge plan was sufficiently vague for the judicial appeal panel to conclude that its conditions would not "provide a reasonable degree of protection to the public." Minn. Stat. § 253D.30, subd. 1(b)(2).

Indeed, Barber does not argue that his plan adequately provides for public safety. Instead, he argues that MSOP is statutorily obligated to assist committed persons with the development of a sufficiently detailed provisional discharge plan. The civil commitment statute states:

> A provisional discharge plan shall be developed, implemented, and monitored by the executive director in conjunction with the committed person and other appropriate persons. The executive director shall, at least quarterly, review the plan with the committed person and submit a written report . . . concerning the committed person's status and compliance with each term of the plan.

Minn. Stat. § 253D.30, subd. 2 (2016). The parties dispute when the MSOP assistance must occur. The commissioner argues that MSOP must assist with drafting a provisional discharge plan only after a provisional discharge, pointing to the provision's emphasis on compliance with the plan. However, the commissioner's interpretation ignores that another statutory provision that requires the committed person to proffer a provisional discharge plan to the SRB and the judicial appeal panel to consider before provisional discharge is granted. Minn. Stat. § 253D.35, subd. 2 (2016). Because we must assume that the

legislature intends the entire statute to be effective, we do not adopt the state's proposed construction. Minn. Stat. § 645.17(2) (2016).

Instead, we read the statute as requiring MSOP to develop a provisional discharge plan with the committed person at some point before provisional discharge is granted. The statute does not indicate at what time such assistance must be offered, and we decline to dictate a timeline here. Though it seems logical that MSOP would assist a committed person in drafting a provisional discharge plan before such a plan is submitted to the SRB, we will not write in a statutory term that the legislature did not include. Because an MSOP administrator testified that MSOP works with committed persons who have reached the appropriate stage in their treatment to draft provisional discharge plans, and that a generic provisional discharge plan template is available to committed persons upon their request, we conclude that Barber did not demonstrate a statutory violation by MSOP. Accordingly, we affirm the judicial appeal panel's denial of Barber's motion for provisional discharge.

**Affirmed.**