

**FILED: September 25, 2013**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JASON J. GRIMM,  
Petitioner,

v.

BOARD OF PAROLE AND POST-PRISON SUPERVISION,  
Respondent.

Board of Parole and Post-Prison Supervision

A148397

Argued and submitted on September 27, 2012.

Jonah Morningstar, Deputy Public Defender, argued the cause for petitioner. With him on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Jeremy C. Rice, Assistant Attorney General, argued the cause for respondent. With him on the brief were John R. Kroger, Attorney General, and Anna M. Joyce, Solicitor General.

Before Wollheim, Presiding Judge, and Nakamoto, Judge, and Edmonds, Senior Judge.

WOLLHEIM, P. J.

Affirmed.

1                   WOLLHEIM, J.

2                   Petitioner, who is serving a dangerous offender sentence after being  
3 convicted of arson and other crimes in 2000, seeks judicial review of an order of the  
4 Board of Parole and Post-Prison Supervision (the board), arguing that the board erred in  
5 deferring his parole consideration date.<sup>1</sup> In particular, he asserts that the board erred in  
6 concluding that he has a condition predisposing him to the commission of crime to such a  
7 degree as to render him a danger to the health or safety of the community, and that the  
8 condition that made him dangerous is not in remission and that he remains a danger. *See*  
9 *generally* ORS 144.228(1)(b)(A) (at parole consideration hearing for dangerous  
10 offenders, the board may set a release date if it finds the petitioner no longer dangerous or  
11 that he remains dangerous but can be adequately controlled in the community); ORS  
12 144.226(2) (examining psychiatrist or psychologist shall make a report to the board as to  
13 whether the petitioner has a "mental or emotional disturbance, condition or disorder  
14 predisposing the person to the commission of any crime to a degree rendering the  
15 examined person a danger to the health or safety of others"). For the reasons set forth  
16 below, we affirm the board's order.

17                   We begin with a brief synopsis of the material that was before the board.  
18 Petitioner's current convictions arose out of a series of fires he set in 2000. Between  
19 1992 and 2000, petitioner had numerous juvenile adjudications and convictions for fire-  
20 related crimes, as well as theft crimes, many of which resulted in probationary sentences.

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<sup>1</sup> The board conducts such hearings pursuant to OAR 255-037-0005.

1 During those years, he was found in violation of his probation on numerous occasions.  
2 Over the course of his involvement with the juvenile and adult corrections systems,  
3 petitioner has been diagnosed with a number of conditions, including pyromania,<sup>2</sup>  
4 attention deficit hyperactivity disorder, borderline intellectual functioning, a conduct  
5 disorder (as a juvenile), and a personality disorder (as an adult). He was imprisoned on  
6 the present charges in 2000, and released on post-prison supervision (PPS) in 2007. He  
7 violated the conditions of his PPS and was returned to prison in 2008. Between his  
8 incarceration in 2000 and his release in 2007, petitioner received more than a dozen  
9 disciplinary sanctions for various acts of misconduct in prison, including disobedience,  
10 possession of contraband, assault, disrespect, and fraud. After his reincarceration in  
11 2008, he was disciplined for disobedience and providing false information to the board.

12           Petitioner has received numerous psychological evaluations over the years,  
13 the most recent of which were done in August 2008, after his PPS revocation, and in  
14 October 2009, shortly before the hearing in the present proceeding. The psychologist  
15 who prepared the 2008 evaluation concluded that petitioner had a severe antisocial  
16 personality disorder and was not amenable to community-based supervision. The 2009  
17 evaluation, which is the primary focus of petitioner's challenge in the present case,  
18 indicated that the psychologist who prepared the evaluation, reviewed petitioner's  
19 records, conducted a clinical interview of petitioner, and administered several tests,  
20 including one designed to measure the risk of violence on which petitioner scored in the

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<sup>2</sup>       *Stedman's Medical Dictionary* 1493 (27th ed 2000) defines "pyromania" as a "morbid impulse to set fires."

1 "moderate" range for risk of future violent behaviors. Petitioner was diagnosed with an  
2 antisocial personality disorder and a history of attention deficit hyperactivity disorder.  
3 The psychologist concluded that, in light of the material in the record, the test results, and  
4 petitioner's responses during the clinical interview, petitioner "makes marked use of the  
5 defensive strategies of minimization, rationalization, and denial." He further concluded  
6 that the test results indicated cognitive difficulties and lack of insight. He concluded, "As  
7 a result of the aforesaid, I can only conclude, in my clinical judgment, that [petitioner]  
8 would remain a danger to the community if he were to be released at this time. I consider  
9 his prognosis to be very guarded."

10           In its order deferring petitioner's parole consideration, the board referred to  
11 the most recent psychological report and concluded that petitioner had "a mental or  
12 emotional disturbance, deficiency, condition or disorder predisposing [petitioner] to the  
13 commission of any crime to a degree rendering the [petitioner] a danger to the health or  
14 safety of others; therefore, the condition which made [petitioner] dangerous is not in  
15 remission and [petitioner] does continue to remain a danger." (Capitalization omitted.)

16           Petitioner makes numerous arguments and subarguments in his assignment  
17 of error, three of which we discuss below. We reject petitioner's remaining arguments  
18 without discussion. We briefly turn to petitioner's argument that deferring parole  
19 consideration based on a disability violates his rights under the Americans with  
20 Disabilities Act (ADA), 42 USC sections 12101 to 12213, and ORS 659A.142(5)(a), both  
21 of which make it unlawful for government programs to discriminate against a person on

1 the basis of disability.<sup>3</sup> In the present proceeding, the board rejected petitioner's  
2 contentions, indicating that its "deferral of [petitioner's] parole consideration date was  
3 based on [his] dangerousness, not on [his] condition or disorder." That reasoning is  
4 consistent with our conclusion in *McCline v. Board of Parole*, 205 Or App 144, 148, 133  
5 P3d 439, *rev den*, 342 Or 46 (2006), that the board's deferral of parole release based on a  
6 finding that an inmate had a severe emotional disturbance and that he posed a threat to  
7 the health or safety of the community did not violate the Rehabilitation Act of 1973,  
8 because it was based on both his "severe emotional disturbance *and* his dangerousness."  
9 (Emphasis in original.) Petitioner points to nothing in either the ADA, ORS 659A.142,  
10 or case law interpreting those statutes, that would suggest that the board is obliged to  
11 release a dangerous inmate into the community simply because the dangerousness is  
12 related to, or the result of, a disability.

13           That brings us to petitioner's substantial evidence and substantial reason  
14 challenges. We understand petitioner to be arguing, in effect, that the record does not  
15 support the board's conclusion that he remains dangerous (and its implicit conclusion that  
16 he is not amenable to community-based treatment) and that the board did not adequately

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<sup>3</sup> 42 USC section 12132 provides, in pertinent part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

ORS 659A.142(5)(a) provides that it is unlawful "for state government to exclude an individual from participation in or deny an individual the benefits of the services, programs or activities of state government or to make any distinction, discrimination or restriction because the individual has a disability."

1 explain why it relied on the psychological report to reach that conclusion. Petitioner  
2 argues that the psychological report cannot support the board's conclusion because the  
3 record does not adequately establish the psychologist's credentials, relying on *Castro v.*  
4 *Board of Parole and Post-Prison Supervision*, 232 Or App 75, 84, 220 P3d 772 (2009)  
5 (noting dearth of information in the record with respect of one of the expert's credentials).

6 *Castro* does not assist petitioner here. In that case, the board had before it  
7 two psychological evaluations, a highly positive one from the petitioner's treating  
8 psychologist and a negative one from another psychologist, and our decision critiqued the  
9 thoroughness and conclusions of the latter. *Id.* at 80, 84. We concluded that, in a  
10 circumstance such as that, where "expert opinions have been offered on both sides of an  
11 issue" and one report is markedly less thorough than the other, the board is obligated to  
12 demonstrate its reasoning in relying on the less thorough report. *Id.* at 84-85; (citing  
13 *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206, 752 P2d 312 (1988) ("when the  
14 credible evidence apparently weighs overwhelmingly in favor of one finding and the  
15 [b]oard finds the other without giving a persuasive explanation[,] the order lacks  
16 "substantial reason")).<sup>4</sup> Here, in contrast to the petitioner in *Castro*, petitioner raised no  
17 challenge before the board to the credentials of the psychologist who prepared the report.  
18 More importantly, however, this case is unlike *Castro* in that the board did not have  
19 multiple reports expressing differing conclusions as to the inmate's suitability for parole

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<sup>4</sup> *Cf. Jenkins v. BOPPS*, 258 Or App 430, \_\_\_ P3d \_\_\_ (2013) (when the board offers a conclusion without explanation, the board's order may not be supported by substantial reason).

1 release.<sup>5</sup>

2           Similarly, petitioner offers critiques of several of the tests on which the  
3 psychologist relied, suggesting that they are "diagnostic" rather than "predictive" and thus  
4 do not provide an adequate basis for the psychologist's opinion. Again, petitioner raised  
5 no challenge to the adequacy of the psychological evaluation in that respect below and,  
6 given the absence of any evidence in the record supporting petitioner's claim that such  
7 tests should not be used or relied on in this circumstance, there is no basis for discounting  
8 the psychologist's opinions based on petitioner's criticism of those tests.

9           Finally, we turn to petitioner's argument that the record as a whole does not  
10 support the board's finding that he remains dangerous and cannot be adequately  
11 controlled in the community. Petitioner argues that most of his prison disciplinary  
12 violations occurred in the first five years of his confinement, and adds that a  
13 psychological report from 2007 noted a test result indicating that inmates with this type  
14 of profile tended to have difficulty with institutional adjustment, but that they did not  
15 have higher recidivism rates than average. From that, petitioner posits that "there is no  
16 nexus between petitioner's institutional adjudications and his possible future  
17 dangerousness if released on parole." We disagree with petitioner's conclusion.  
18 Petitioner not only has a lengthy and significant history of disciplinary violations while  
19 imprisoned, but also a lengthy and significant history of violating probation and PPS

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<sup>5</sup> We note that the earlier psychological reports in the record are largely consistent with the current report.

1 when not institutionalized. In short, petitioner's record of behavior both while in prison  
2 and while outside of prison support the board's conclusion that he cannot be adequately  
3 controlled in the community.

4 In sum, we conclude that substantial evidence in the record supports the  
5 board's decision to defer petitioner's parole consideration date.

6 Affirmed.