**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A23-1641**

In the Matter of the Civil Commitment of: Gary Spicer.

**Filed April 1, 2024**
**Affirmed**
**Gaïtas, Judge**

Commitment Appeal Panel
File No. AP22-9162

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Keith Ellison, Attorney General, Anthony R. Noss, Assistant Attorney General, St. Paul, Minnesota (for respondent Commissioner of the Minnesota Department of Human Services)

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Considered and decided by Worke, Presiding Judge; Bjorkman, Judge; and Gaïtas, Judge.

**NONPRECEDENTIAL OPINION**

**GAÏTAS**, Judge

Appellant Gary Spicer, who is indeterminately civilly committed, challenges the decision of the Commitment Appeal Panel (CAP) denying his petition for provisional discharge. He argues that the CAP clearly erred because "the record as a whole supports [his] petition for provisional discharge." Because the record supports the CAP's decision to deny Spicer's petition for provisional discharge, we affirm.

## FACTS

Spicer, who is 70 years old, was indeterminately civilly committed as a sexually dangerous person and sexual psychopathic personality in 2013. His civil commitment was predicated on convictions for sexual offenses and on uncharged criminal sexual conduct. Spicer's criminal history includes a conviction for fifth-degree criminal sexual conduct for sexual abuse of his stepdaughter that began when she was a minor and continued until 2004, when she was an adult; attempted fifth-degree criminal sexual conduct for an act in 2004 involving his stepdaughter's minor friend; and fourth-degree criminal sexual conduct for the sexual abuse of another adult stepdaughter in 2011. In addition to these criminal convictions, Spicer has admitted to a lengthy history of uncharged sexual offenses that began when he was 14 years old.

In August 2017, a Special Review Board (SRB)[1] granted Spicer's request for a transfer. Spicer was eventually transferred to Community Preparation Services (CPS)[2] in November 2021.

In October 2021, just before Spicer was transferred to CPS, he petitioned for provisional discharge and full discharge. A year later, a hearing was held on this petition.

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[1] A special review board "shall consist of three members experienced in the field of mental illness," and "shall hear and consider all petitions for a reduction in custody." Minn. Stat. § 253B.18, subd. 4c(a) (2022). A "'reduction in custody' means transfer out of a secure treatment facility, a provisional discharge, or a discharge from commitment." Minn. Stat. § 253D.27, subd. 1(b) (2022).

[2] CPS "is in a non-secure facility at [the Minnesota Sex Offender Program's] St. Peter location." *In re Civ. Commitment of Fugelseth*, 907 N.W.2d 248, 251 (Minn. App. 2018), *rev. denied* (Minn. Apr. 17, 2018).

Following the hearing, the SRB recommended that Spicer be provisionally discharged but recommended denial of his request for full discharge.

The Commissioner of the Minnesota Department of Human Services requested rehearing and reconsideration of the provisional discharge recommendation before the CAP.[3] Spicer initially requested rehearing and reconsideration of the SRB's decision denying his request for full discharge, but he later withdrew the request. Thus, the CAP only considered Spicer's request for provisional discharge.

Spicer had an evidentiary hearing before the CAP on July 27, 2023. That hearing consisted of two parts—a "first-phase hearing" and a "second-phase hearing." During the first-phase hearing, Spicer presented evidence to support his petition for provisional discharge. And during the second-phase hearing, the commissioner offered evidence in opposition to provisional discharge. During both phases of the hearing, the CAP received into evidence exhibits and testimony from multiple witnesses. The evidence presented at the hearing is summarized as follows.

***First-Phase Hearing***

Spicer presented an October 2022 Sexual Violence Risk Assessment (SVRA) authored by Dr. Mallory Jorgenson. Dr. Jorgenson opined in the SVRA that Spicer posed an average risk of recidivism based on actuarial risk assessments. Although Dr. Jorgenson

[3] The CAP, also referred to as a "judicial appeal panel," considers appeals from the recommendation of the special review board. Minn. Stat. § 253D.28, subd. 1 (2022). It is comprised of three judges appointed by the supreme court. Minn. Stat. § 253B.19, subd. 1 (2022).

determined that Spicer did not meet the requirements for full discharge, her SVRA concluded that "Spicer does meet the requirements for a provisional discharge."

Court-appointed examiner Dr. Paul Reitman testified at the hearing and submitted a report and recommendation in support of Spicer's request for provisional discharge. In assessing Spicer, Dr. Reitman administered the Minnesota Multiphasic Personality Inventory-3 (MMPI) and the Hare Psychopathy Checklist-Revised (PCL-R), a test that measures the likelihood of recidivism. According to Dr. Reitman, the MMPI revealed that Spicer has a history of externalizing behavioral problems, a strong tendency to deny personal problems, and narcissistic-like characteristics, and the PCL-R showed that Spicer had a moderate to high likelihood of recidivating. But Dr. Reitman agreed with Dr. Jorgenson's determination that Spicer was at an average risk of recidivism. Dr. Reitman noted that Spicer is currently being treated for bipolar disorder and has had past treatment for pedophilia and substance abuse. He testified that he was impressed by Spicer's progress in treatment, including Spicer's improved honesty, his remorse for his actions, and his empathy for his victims. According to Dr. Reitman, Spicer has made "profound characterological changes" and is a very satisfactory candidate for provisional discharge, so long as Spicer first completes an anger management program. Although Spicer experienced a period of "emotional dysregulation" during the review period of January to April 2023, Dr. Reitman did not believe that this situation showed a lack of treatment progress. As to whether provisional discharge would increase the risk to the community, Dr. Reitman testified that he was not concerned because Spicer would be supervised by his parole officer and likely would live in a residential program for a period.

Spicer also called his primary therapist to testify. According to the therapist, Spicer was a prosocial community member, followed rules, and worked hard to address his mental health. Last year, Spicer completed a Penile Plethysmograph (PPG), and continued to process the results in group therapy. The therapist commended Spicer for taking this invasive test, which will help him understand his arousal patterns and work toward achieving healthy sexuality.

During the therapist's testimony, the CAP received Spicer's Quarterly Treatment Progress Report and Annual Treatment Progress Report in evidence. These reports detailed Spicer's progress and areas for improvement.

Finally, the Reintegration Director for the Minnesota Sex Offender Program (MSOP) testified that, if Spicer were granted a provisional discharge, he would be assigned a reintegration agent who would be available at all times and would work to support Spicer's successful transition to the community. Additionally, Spicer would initially reside in a staffed residence with cameras and door alarms, and he would be GPS monitored.

At the conclusion of the first-phase hearing, the CAP found that Spicer had established a prima facie case for provisional discharge. The burden then shifted to the commissioner and the county to show by clear and convincing evidence that provisional discharge should be denied.

***Second-Phase Hearing***

To support its request to deny provisional discharge, the commissioner called Dr. Thomas Edwards, a forensic evaluator who submitted a June 9, 2023 SVRA. Dr. Edwards's SVRA concluded that Spicer did not meet the criteria for provisional

discharge. Although Dr. Edwards had supported provisional discharge in 2019, he explained that the PPG results and Spicer's response to those results caused him concern. According to Dr. Edwards, his concern stemmed in part from the PPG result showing that Spicer's sexual arousal for female adults and children is undifferentiated. Dr. Edwards also testified that Spicer continued to experience anger, which was a precursor for offending. He noted that there were parallels between Spicer's recent period of emotional dysregulation and his sex offense dynamics. While Dr. Edwards agreed with Dr. Jorgenson's determination that Spicer posed an average risk for recidivism, he did not agree with Dr. Reitman's use of the MMPI to assess risk of reoffending. In Dr. Edwards's opinion, there was no outpatient setting that could treat Spicer while also ensuring public safety.

The CAP received a Special Review Board Treatment Report from June 2023. That report states that MSOP clinical leadership does not support Spicer's provisional discharge because he has substantial treatment needs.

Finally, the MSOP Clinical Courts Service Director testified that Spicer was making good progress. However, because Spicer has significant remaining treatment needs regarding his sexuality, arousal patterns, and fantasies, the witness testified that lower intensity treatment in a community setting would not be helpful.

Following the hearing, the CAP denied Spicer's petition for provisional discharge. The CAP determined that the commissioner had presented clear and convincing evidence that Spicer required inpatient treatment and supervision and that Spicer continued to pose a risk to the community.

Spicer appeals.

## DECISION

Spicer argues that the CAP's decision to deny his provisional discharge request was clearly erroneous because "the record as a whole supports [his] petition for provisional discharge." He contends that the record shows that he has "sufficiently managed his course of treatment and present mental status in his current setting," which demonstrates his readiness for provisional discharge. And he argues that the CAP erred by concluding that the provisional discharge plan would not provide a reasonable degree of protection to the public and that he would not successfully adjust in the community.

A provisional discharge is essentially a reduction in custody during which the committed individual must abide by the terms and conditions of a provisional discharge plan that is developed and monitored by MSOP and any other designated agency. *See* Minn. Stat. § 253D.30 (2022). When a petition for full or provisional discharge comes before the CAP, the committed person "bears the burden of going forward with the evidence, which means presenting a prima facie case with competent evidence to show that the person is entitled to the requested relief." Minn. Stat. § 253D.28, subd. 2(d) (2022); *Coker v. Jesson*, 831 N.W.2d 483, 485-86 (Minn. 2013). The petitioner must satisfy this threshold burden by producing "sufficient, competent evidence that, if proven, would entitle the petitioner to relief." *Coker*, 831 N.W.2d at 486 (quotation omitted). This occurs during a "first-phase hearing." *Id.* If satisfied, the CAP then proceeds to a "second-phase hearing" where the respondent "bears the burden of proof by clear and convincing evidence that the discharge or provisional discharge should be denied." *Id.* (quotation omitted).

Here, following the first-phase hearing, the CAP found Spicer had satisfied his burden of production.

"[T]he criteria for a provisional discharge are more lenient than the criteria for a [full] discharge." *Larson v. Jesson*, 847 N.W.2d 531, 535 (Minn. App. 2014). A petitioner who is civilly committed as a sexually dangerous person "shall not be provisionally discharged unless the committed person is capable of making an acceptable adjustment to open society." Minn. Stat. § 253D.30, subd. 1(a). This determination is made by considering two factors: "(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." *Id.*, subd. 1(b); *see Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995) (noting that "a slight change or improvement in the person's condition is not sufficient to justify discharge").

When a CAP denies a petition for provisional discharge, the petitioner may appeal to this court. On review, we consider whether the CAP clearly erred. *In re Civ. Commitment of Kropp*, 895 N.W.2d 647, 650 (Minn. App. 2017), *rev. denied* (Minn. June 20, 2017). This requires us to examine the record "to determine whether the evidence as a whole sustains the panel's findings." *Id.* In performing this review, we "review[] the record in the light most favorable to the findings of fact." *In re Civ. Commitment of Spicer*, 853 N.W.2d 803, 807 (Minn. App. 2014). And "we do not reweigh the evidence as if trying the matter de novo. If the evidence as a whole sustains the panel's findings, it is immaterial

that the record might also provide a reasonable basis for inferences and findings to the contrary." *Kropp*, 895 N.W.2d at 650 (citations omitted); *see also Fugelseth*, 907 N.W.2d at 253 (same). However, we review de novo "questions of statutory construction and the application of statutory criteria to the facts found." *Kropp*, 895 N.W.2d at 650.

Spicer challenges the CAP's findings regarding both requirements for provisional discharge. We examine each finding in turn.

## I. The record supports the CAP's finding that Spicer still requires treatment and supervision.

The CAP found that Spicer "continues to require inpatient treatment and supervision in his current setting." But Spicer contends that this finding was clearly erroneous because the record demonstrates that he "has sufficiently managed his course of treatment and present mental status in his current setting." In support of his argument, Spicer challenges several of the CAP's underlying factual findings as clearly erroneous.

First, Spicer challenges the CAP's finding that he "has significant treatment work to do on the topic of sexuality and working through the results of the PPG," including on his "sexuality, arousal patterns, and fantasies." He argues that the record shows he has "sufficiently addressed his sexuality and sexually deviant interests in his current treatment setting." He notes his improved ability to reflect, share, and develop insight on his sexual offending. He asserts that the CAP "misconstru[ed] both the value of the PPG and the significance of its results" because the PPG "is a measuring stick for arousal, not a risk tool." And he points out that he would continue sex offender specific treatment in the community as a requirement of his provisional discharge.

Notwithstanding the evidence showing that Spicer has made progress in treatment, the record supports the CAP's finding. The MSOP Clinical Courts Services Director testified that one of Spicer's primary needs is in the area of sexuality; he testified that, although Spicer made progress, he requires more treatment. This witness noted that Spicer negatively reacted to the PPG results, did not see the results as accurate or helpful, and has not returned to work on processing the results. Spicer's therapist also discussed the PPG results, testifying that Spicer still required further processing of the results as part of his treatment. And Dr. Edwards testified that, although he recommended provisional discharge in 2019, the PPG "has brought to light some new information that is relevant that he's just beginning to address."

The CAP also found that Spicer "still has not offered a clear picture of why he sexually offended," and the record supports that finding. The therapist testified that Spicer "has very appropriate participation" in treatment and "has a good general understanding of his [offense] cycle, big picture." But she also noted that Spicer is "still in the process of understanding all the different components that went into his offense cycle." She observed that Spicer still has "important pieces [of work to do]," including "exploring how arousal and . . . masturbation and fantasy played a part in his offense dynamic" and learning how to "intervene on" his "sexual offending schemas and dynamics."

Given this evidence, the record supports the CAP's determination that Spicer "has significant treatment work to do on the topic of sexuality and working through the results of the PPG." Although the record may contain contrary evidence, our role as a reviewing court does not permit us to reweigh the evidence. *Kropp*, 895 N.W.2d at 650. Thus, we

reject Spicer's argument that the CAP clearly erred in finding that he still has significant treatment work.

Second, Spicer challenges the CAP's finding that he "has significant remaining treatment needs related to resiliency and managing negative emotionality during times of increased stress." Spicer argues that the record shows that he has "sufficiently addressed his emotionality in his current treatment setting." He contends that the CAP unfairly emphasized a "three-week period of emotional dysregulation" during which Spicer was preparing for his CAP hearing and experienced "breakthrough anxiety symptoms." Spicer argues that he reacted appropriately by processing his feelings and using his treatment support options. He stresses that this three-week period did not include "acting out physically or sexually." And Spicer emphasizes that, during his distressing three-year wait to move to CPS, he "remained rule-compliant and steadily progressing in treatment" and eventually had a successful transition.

We again conclude that the record supports the CAP's finding. Spicer's therapist testified that Spicer still had "important pieces [of work to do]," including developing "consist[ent] emotional regulation despite stress and adversity." She observed that the period of dysregulation demonstrated that Spicer's "intervention/management skills either are not effective, or he has not yet internalized how to use them" and that it is still a work in progress because "under certain amounts of stress, he can slip back into those same patterns." And the MSOP Clinical Courts Services Director testified that, during Spicer's three-week period of emotional dysregulation, Spicer "did not withdraw from treatment" but was "more closed to hearing . . . supportive folks and . . . was more focused on his own

irritation and externalization of blame." Based on the testimony of these witnesses, we determine that the record adequately supports the CAP's finding that Spicer "has significant remaining treatment needs related to resiliency and managing negative emotionality during times of increased stress."

Third, Spicer contends that his "present mental status has greatly improved his ability to build healthy relationships and strengthen prosocial bonds while in his current treatment setting" and that "substantial weight should be given to this treatment development." He argues that "the record shows he continues to address his mental health through the use of intervention skills, psychiatric appointments, and dedication to his medication regimen" and that the panel "erred in not considering [his] present mental status." However, Spicer's "present mental status" was considered by the CAP, which acknowledged his "commendable" progress in treatment.

Finally, Spicer argues that the CAP clearly erred in questioning the appropriateness of Dr. Reitman's use of the MMPI. The CAP found the results of the MMPI "are not evidence of an assessment of [Spicer's] risk for recidivism."

This finding, which is supported by the testimony of Dr. Edwards, is not clearly erroneous. Dr. Edwards testified that, although the MMPI is "a viable objective personality assessment," the test "is not a risk assessment" and he was "not familiar with research that correlates MMPI results . . . to risk of sexual recidivism."

We conclude that the record supports the CAP's finding that Spicer "continues to require inpatient treatment and supervision in his current setting." Accordingly, we reject Spicer's argument that the finding is clearly erroneous.

## II. The record supports the CAP's finding that provisional discharge will neither adequately protect the public nor enable Spicer to successfully adjust to the community.

The CAP found that Spicer's "risk to the community has not been mitigated" and he is "not capable of making an acceptable adjustment to open society." Spicer challenges this finding as clearly erroneous. He notes that provisional discharge would provide a "graduated model of reintegration and supervision structure." Spicer points out that his provisional discharge plan provided "for continued protection to the public" by including "24/7 GPS monitoring, reintegration agents, . . . placements based on client needs[,] . . . unscheduled reintegration agent visits, participation in any alcohol or drug testing, visitor approval, searches, and following the recommendation of treatment providers to attend psychiatric appointments or take prescribed medications." And Spicer observes that, in addition to these protections, his "average risk scores, history of rule compliance, [and] desire to continue exploring treatment" show he would transition well into the community.

However, because the record supports the CAP's finding, the finding is not clearly erroneous. Dr. Edwards testified that the provisional discharge plan would not provide a reasonable degree of protection to the public due to Spicer's long offense cycle and because Spicer had not "reached a point where he can intervene quickly enough on his own to prevent potentially returning to a pattern of reoffending." The MSOP Clinical Courts Services Director testified that no provisional discharge plan would enable Spicer to adjust successfully to the community because "low intensity treatment in community placement would not facilitate the changes he needs to make in order to better manage his risks."

Additionally, the CAP found that Spicer "has not participated in reintegration activities to the extent that he can transition successfully to the community." Again, the hearing testimony directly supports this finding. The MSOP Clinical Courts Services Director testified that Spicer had been approved for medical and legal trips into the community but had not made any such trips. And although Spicer applied for "additional liberties" for both on-campus and off-campus activities, his request had been denied.

Spicer also asserts that the CAP clearly erred when it stated that Dr. Jorgenson did not support provisional discharge, "when she did in fact support . . . Spicer for provisional discharge." He contends that any reliance on this erroneous factual finding, "directly calls into question the accuracy of the rest of [the CAP's] opinions and whether any of the information from the 2022 SVRA was taken into account." We agree that the CAP's opinion erroneously states that Dr. Jorgenson opined that Spicer did not meet the criteria for provisional discharge. However, for two reasons, we are not persuaded that this clear error impacted the CAP's decision. First, the CAP only referenced the clearly erroneous factual finding concerning Dr. Jorgenson's opinion once and did so only in passing. Second, in denying provisional discharge, the CAP relied on two significant events in Spicer's treatment that occurred *after* Dr. Jorgenson completed her SVRA in October 2022—Spicer's PPG results and responses, and Spicer's period of emotional dysregulation. Thus, although the CAP clearly erred in finding that Dr. Jorgenson did not support provisional discharge, we are convinced that this finding did not affect the CAP's ultimate decision.

As Spicer notes, the record contains some evidence that could support a finding that his provisional discharge plan would adequately protect public safety. But as a reviewing court, we do not reweigh the evidence. *Kropp*, 895 N.W.2d at 650. Because the record supports the CAP's finding that Spicer's "risk to the community has not been mitigated" and he is "not capable of making an acceptable adjustment to open society," the finding is not clearly erroneous.

In sum, we conclude that the CAP did not clearly err in its factual findings. Thus, we discern no error in the CAP's decision to deny Spicer's petition for provisional discharge.

**Affirmed.**