OAH 22-1100-38047

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level Determination of Isaiah Jon Homan	**ORDER GRANTING MOTION FOR SUMMARY DISPOSITION**

This matter is pending before Administrative Law Judge Christa L. Moseng pursuant to a Notice and Order for Review of Risk Level Assignment filed with the Office of Administrative Hearings on January 18, 2022.

Ed Stockmeyer, Assistant Attorney General, represents the End-of-Confinement Review Committee (ECRC). Isaiah J. Homan (Petitioner) represents himself without legal counsel.

On January 26, 2022, the ECRC filed and served a Motion for Summary Disposition. Petitioner was personally served with the Motion on February 1, 2022. Petitioner filed no response to the ECRC's Motion. The record closed on February 15, 2022, the day that his response was due.

Based on the record and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

1. The ECRC's Motion for Summary Disposition is **GRANTED**.

1. Petitioner's appeal is **DISMISSED.**

2. Petitioner's assignment of Risk Level 2 is **AFFIRMED.**

Dated: March 14, 2022

CHRISTA L. MOSENG
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 244.052, subd. 6(c) (2020), this Order is the final decision in this case. Any person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63-.69 (2020).

MEMORANDUM

I. Legal Background

This case involves Petitioner's appeal of the risk level assigned to him by the ECRC pursuant to the Minnesota Community Notification Act (Act)[1]. Persons convicted of certain criminal offenses are considered "predatory offenders" and subject to the Act, which requires law enforcement agencies in the area where a predatory offender resides, expects to reside, is employed, or is regularly found, to disclose information "relevant and necessary to protect the public and to counteract the offender's dangerousness."[2] The extent of the information disclosed, and the persons to whom the disclosure is made, must relate "to the level of danger posed by the offender, to the offender's pattern of offending behavior, and to the need of community members for information to enhance their individual and collective safety."[3]

The scope of community notification required by the Act is determined by assignment of one of the three different risk levels defined by statute.[4] Each risk level is associated with a different degree of community notification.[5] If an offender is assigned Risk Level 1, notification of the offender's residence may be given to local law enforcement agencies as well as victims and witnesses related to the offender's criminal history.[6] Risk Level 2 permits additional notice to groups such as schools, child care facilities and individuals likely to be victimized by the offender.[7] Risk Level 3 permits notice to be given to any community member whom the offender is likely to encounter unless law enforcement determines public safety might be compromised by the disclosure or more limited disclosure is necessary to protect the identity of the offender's victim(s).[8]

Every predatory offender confined in a Minnesota state correctional or treatment facility must be assessed by the ECRC at the facility prior to release.[9] The ECRC is

[1] Minn. Stat. § 244.052 (2020).
[2] Minn. Stat. §§ 243.166, subd. 1b, 244.052, subd. 4(a) (2020).
[3] Minn. Stat. §§ 243.166, subd. 1b, 244.052, subd. 4(a).
[4] Minn. Stat. § 244.052, subd. 4(b).
[5] *Id.*
[6] *Id.*, subd. 4(b)(1).
[7] *Id.*, subd. 4(b)(2).
[8] *Id.*, subd. 4(b)(3).
[9] *Id.*, subd. 3.

responsible for assessing the public risk posed by each predatory offender upon release and determining the appropriate risk level assignment.[10]

When assessing risk and assigning a risk level, the ECRC is required by law to apply the risk factors set forth in Minn. Stat. § 244.052, subd. 3(g) (2020). The six risk factors to be considered are: (1) the seriousness of the offense should the offender reoffend, (2) the offender's prior offense history, (3) the offender's characteristics, (4) the availability of community supports to the offender, (5) whether the offender has indicated or credible evidence in the record indicates that he will reoffend if released to the community, and (6) whether the offender demonstrates a physical condition that minimizes the risk of re-offense.[11] This list is not exclusive.[12]

In addition to consideration of the statutory risk factors, the ECRC is also required to apply a risk assessment scale when assigning a risk level to a predatory offender.[13] The score from the risk assessment tool is translated into a presumptive risk level considered by the ECRC when assigning a risk level to a predatory offender. The ECRC, in its discretion, can deviate from the presumptive risk level by applying mitigating factors for a downward departure or special concerns for an upward departure.[14]

Based upon the offender's score on the risk assessment tool, application of mitigating factors or special concerns, and analysis of the statutory risk factors, the ECRC must assign a final risk level to the predatory offender. As part of the assignment, the ECRC must prepare a report that "specifies the risk level to which the offender has been assigned and the reasons underlying the committee's risk assessment decision."[15]

A predatory offender assigned Risk Level 2 or Risk Level 3 has the right to seek administrative review of the ECRC's determination within 14 days of receiving notice of the risk level assignment.[16] The administrative review is conducted by an Administrative Law Judge at the Office of Administrative Hearings and is subject to the contested case rules.[17] On review, "the administrative law judge shall decide whether the end-of-confinement review committee's risk assessment determination was erroneous and, based on this decision, shall either uphold or modify the review committee's determination."[18] The decision of the Administrative Law Judge is final and subject to appellate judicial review.[19]

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[10] *Id.*
[11] *Id.*, subd. 3(g).
[12] *Id.*
[13] *Id.*, subd. 2.
[14] Minnesota Department of Corrections Policy No. 205.220 (April 16, 2013); *see also In the Matter of the Risk Level Determination of R.B.P.*, 640 N.W.2d 351, 354 (Minn. Ct. App. 2002).
[15] Minn. Stat. § 244.052, subd. 3(f).
[16] *Id.*, subd. 6(a).
[17] *Id.*, subd. 6(d). The contested case rules are found at Minn. R. 1400.5010-.8401 (2021).
[18] *Id.*, subd. 6(c).
[19] Minn. Stat. §§ 14.63, 244.052, subd. 6(c) (2020).

Assignment of a risk level to a predatory offender is applicable for a minimum of 10 years.[20] During that time, the appropriate level of notice must be given every time the predatory offender changes residence.[21] The predatory offender may ask the ECRC to reassess the assigned risk level three years after the initial risk assessment and may renew the request once every two years following subsequent denials.[22]

II. Petitioner's Background

Petitioner is a 26-year-old male who is incarcerated after violating his probation. In October 2016, a 14-year-old girl reported to a Freeborn County Sheriff that she had been communicating with Petitioner via text message, and that he had sent her between five and ten nude images of himself.[23] Moreover, Petitioner had asked via text message for the victim to take nude pictures of herself. She did so, and sent them to Petitioner. Petitioner pleaded guilty to and was convicted of a charge of use of a minor in a sexual performance.[24] Imposition of Petitioner's sentence was stayed, subject to ten years' probation.

The conditions of Petitioner's probation included prior approval for internet usage and contact with persons under the age of 18. Petitioner's current confinement began on April 13, 2021, after Petitioner engaged in unapproved contact with minors–a 14-year-old girl and a 10-year-old boy—and unapproved use of the internet.[25] He is scheduled to be released on April 27, 2022, with supervision to continue until April 27, 2027.[26]

III. Procedural History

In preparation for Petitioner's release, Shelley Leutschaft, Ph.D., a licensed psychologist with the Department of Corrections (DOC), prepared a risk assessment recommendation for Petitioner.[27]

As part of the risk assessment, Dr. Leutschaft scored the MnSOST-4 for Petitioner.[28] According to the risk assessment tool, Petitioner's predicted probability of sexual recidivism is 1.82 percent which places Petitioner in the presumptive Risk Level 1 category.[29]

Dr. Leutschaft noted the applicability of two special concerns to Petitioner's risk level assignment: (1) a history of prior supervision failures, a recent history of engaging

[20] Minn. Stat. § 243.166, subd. 6(a) (2020).
[21] *Id.*, subd 3 (2020).
[22] *Id*.
[23] Exhibit (Ex.) 4 at 15.
[24] Ex. 4 at 33, 103, 123.
[25] Ex. 4 at 33–34, 66–72.
[26] Ex. 3 at 3.
[27] Ex. 3.
[28] Ex. 3a.
[29] Ex. 3 at 8.

in high-risk or grooming-type behaviors, or other behaviors suggesting an increased potential to reoffend; and (2) the nature of the victim pool suggests need for broader public notification.[30]

Based on Petitioner's score on the risk assessment tool, consideration of the statutory risk factors, and application of special concerns/mitigating factors, Dr. Leutschaft recommended assigning a Risk Level 2 to Petitioner. Dr. Leutschaft concluded that Petitioner's violations of correctional supervision, which included being terminated from community-based sexual-offense-specific treatment, accessing the internet and use of social media, unapproved contact with minors, and use of alcohol, as well as his unmet chemical dependency treatment recommendation, supported the risk assessment recommendation to the ECRC.[31]

The ECRC convened on December 13, 2021, to address Petitioner's risk level assignment.[32] Petitioner attended the meeting and was given an opportunity to be heard by the committee prior to their vote.[33] Petitioner deferred to his attorney, who addressed the committee.

Petitioner's counsel disputed Petitioner's knowledge of the age of the victim for the underlying conviction and disputed the factual basis for aspects of Dr. Leutschaft's rationale and recommendation. Petitioner's counsel also asserted that Petitioner's failure to complete recommended treatment was attributable to Petitioner's mental health function. At the conclusion of the meeting, the ECRC unanimously assigned Petitioner a Risk Level 2.[34] The ECRC cited Petitioner's pattern of inappropriate and sexual behaviors with juvenile females, his recent history of supervision failures, and a victim pool justifying broader public notification in support of its risk level assignment.

On December 21, 2021, Petitioner appealed the ECRC's risk level determination.[35] In his appeal, Petitioner again disputed facts underlying Dr. Leutschaft's rationale and recommendation. On January 18, 2022, the ECRC filed a Notice and Order for Hearing with the Office of Administrative Hearings.

On January 26, 2022, the ECRC filed a Motion for Summary Disposition. Petitioner was personally served with the Motion on February 1, 2022. Petitioner did not file a response to the ECRC's Motion. The record closed on February 15, 2022, the due date for Petitioner's response.

IV. Motion for Summary Disposition

[30] Ex. 3 at 8.
[31] Ex. 3 at 7.
[32] Ex. 2 at 1.
[33] Ex. 2 at 2; Ex. 9 (Audio Recording of ECRC meeting).
[34] Ex. 2 at 2.
[35] Ex. 1 (Notice of Appeal).

Summary disposition is the administrative law equivalent of summary judgment.[36] A motion for summary disposition may be granted when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law.[37] The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition in contested case matters.

The function of the Administrative Law Judge on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but to determine whether genuine, material factual issues exist.[38] The Administrative Law Judge does not weigh the evidence; instead, the judge views the facts and evidence in a light most favorable to the non-moving party.[39]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[40] A fact is material if its resolution will affect the outcome of the case.[41] If the moving party meets the initial burden, the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.[42] A genuine issue is not a "sham or frivolous" one, and it cannot rely on mere allegations or denials.[43] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[44]

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[45] Thus, summary disposition is only proper when no fact issues need to be resolved.[46]

V. Arguments

The ECRC asserts that Petitioner has not established a genuine issue of material fact with respect to whether the ECRC's risk assessment determination was erroneous.[47] In opposing his risk level assignment, Petitioner asserts that Dr. Leutschaft's Risk

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[36] *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2021).
[37] *See Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985).
[38] *See e.g., DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[39] *See Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[40] *See Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[41] *See O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996) (citing *Zappa v. Fahey*, 245 N.W.2d 258, 259-260 (Minn. 1976)).
[42] *See Thiele,* 425 N.W.2d at 583.
[43] *See Highland Chateau, Inc. v. Minnesota Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984) (citing *A & J Builders, Inc. v. Harms*, 179 N.W.2d 98, 103 (Minn. 1970)).
[44] *See* Minn. R. Civ. P. 56.05.
[45] *See Sauter*, 70 N.W.2d at 353.
[46] *See id*.
[47] ECRC Memorandum in Support of Summary Disposition (ECRC Mem.) (January 26, 2022).

Assessment Recommendation lacked factual support and therefore the ECRC's risk level determination was erroneous.[48]

VI. Analysis

Upon review of the ECRC's motion and Petitioner's claims, the Administrative Law Judge concludes that the ECRC's Motion should be granted.

Petitioner objects to assignment of Risk Level 2 because the ECRC relied on a recommendation that the Petitioner asserts lacked factual support. Specifically, Petitioner (1) disputes that he knew the age of his victim; (2) asserts that he was incarcerated for probation violations and not for re-offending; (3) contends that an evaluation by Dr. Peter Marston indicates that Petitioner is neither a pedophile nor a predator; and (4) that Petitioner's only contact with minors has been family members, and that Petitioner has no history of inappropriate behavior with family members.

None of the facts asserted by Petitioner in his Notice of Appeal concern an error in the ECRC's risk assessment. The ECRC heard and considered these claims at Petitioner's ECRC meeting.[49] Petitioner's assertions do not establish a genuine issue of material fact. Even taking the asserted facts as true, they would not establish that the ECRC's risk level determination was erroneous.

The special concerns noted by the ECRC are based in fact and reasonably support the ECRC's decision to assign Risk Level 2. The special concerns related to: Petitioner's behaviors while under supervision that suggest increased potential to reoffend, and the nature of the victim pool. Petitioner's probation violations resulting in his present confinement clearly support the special concern regarding behaviors suggesting an increased potential to reoffend. And the ECRC reasonably concluded that Petitioner's history of conduct supports a special concern relating to the nature of the victim pool.[50]

The two special concerns identified by the ECRC have factual support and justify assignment of Risk Level 2 to Petitioner. Even taking all facts alleged by Petitioner to be true, they would not controvert either of the special concerns the ECRC relied upon to justify the risk level assignment. Petitioner has therefore not established a genuine issue of material fact with regard to whether ECRC erred or abused its discretion in its risk level assignment.

VII. Conclusion

Because Petitioner has failed to raise a genuine issue of material fact related to the ECRC's risk level assignment, the ECRC's Motion for Summary Disposition is

[48] Ex. 1 at 1.
[49] Ex. 9.
[50] In 2013, Petitioner was adjudicated delinquent for third-degree criminal sexual conduct, with a different 14-year-old victim.

granted. Petitioner's appeal of his risk level determination is dismissed and assignment of Risk Level 2 is affirmed.

C. L. M.