OAH 5-1100-39061

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

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| In the Matter of the Risk Level Determination of James P. Stevens | **ORDER GRANTING MOTION FOR SUMMARY DISPOSITION** |

This matter is pending before Administrative Law Judge Jim Mortenson pursuant to a Notice and Order for Hearing filed with the Office of Administrative Hearings on April 6, 2023.

Lisa Lodin, Assistant Attorney General, represents the End-of-Confinement Review Committee (ECRC) for the Department of Corrections (DOC) Central Office. James P. Stevens (Petitioner) represents himself and appears without legal counsel.

On April 27, 2023, the ECRC filed a Motion for Summary Disposition (Motion). The ECRC served Petitioner personally on May 3, 2023.[1] Petitioner did not file a response to the ECRC's Motion. The record closed on May 17, 2023, the due date for Petitioner's response.

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

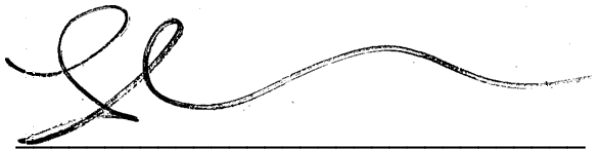
**ORDER**

1. The ECRC's Motion is **GRANTED**.

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

3. Petitioner's assignment of risk level II is **AFFIRMED**.

Dated: July 27, 2023



JIM MORTENSON
Administrative Law Judge

[1] *See* Affidavit of Personal Service (May 11, 2023).

## NOTICE

Pursuant to Minn. Stat. § 244.052, subd. 6(c) (2022), 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 (2022).

## 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). Minnesota law provides that individuals convicted of certain criminal offenses are considered "predatory offenders" and are subject to the Act.[2] Under the Act, law enforcement agencies in the area where a predatory offender resides, expects to reside, is employed, or is regularly found, must disclose information "relevant and necessary to protect the public and to counteract the offender's dangerousness."[3] The extent of the disclosure, 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."[4]

The ECRC assesses each offender using a risk assessment scale.[5] The scale "assigns weights to the various risk factors listed in subdivision 3, paragraph (g), and specifies the risk level to which offenders with various risk assessment scores shall be assigned."[6] The risk factors the risk assessment scale weighs 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.[7] The offender's score translates into a presumptive risk level to be considered by the ECRC.

The ECRC may consider additional factors.[8] Thus, in its discretion the ECRC may deviate downward from the presumptive risk level by applying mitigating factors or may increase the risk level based on special concerns.[9] Based on these considerations, the ECRC assigns a final risk level to the predatory offender and prepares a report that "specifies the risk level to which the offender has been assigned and the reasons underlying the committee's risk assessment decision."[10]

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[2] *See* Minn. Stat. §§ 243.166, subd. 1b, 244.052, subd. 4(a) (2022).
[3] Minn. Stat. § 244.052, subd. 4(a).
[4] *Id.*
[5] *Id.*, subd. 2 (2022).
[6] *Id.*
[7] *Id.*, subd. 3(g).
[8] *Id.*
[9] Minnesota Department of Corrections Policy No. 205.220 (Aug. 28, 2022); *see also In re the Risk Level Determination of R.B.P.*, 640 N.W.2d 351, 354 (Minn. Ct. App. 2002).
[10] Minn. Stat. § 244.052, subd. 3(f) (2022).

A predatory offender assigned to a risk level II or risk level III may seek administrative review of the ECRC's determination within 14 days of receiving notice of the risk level assignment.[11] The administrative review is conducted by an administrative law judge at the Office of Administrative Hearings and is subject to the contested case rules.[12] The offender has the burden of proof to show, by a preponderance of the evidence, that the ECRC's determination was erroneous.[13] On review, the "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."[14] The decision of the judge is final and subject to appellate judicial review.[15] A predatory offender may also 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.[16]

## II. Background

Petitioner is a 53-year-old man who is required to register as a predatory offender based upon convictions for first degree criminal sexual conduct in 2002, first degree criminal sexual conduct in 2003, and fourth degree criminal sexual conduct in 2017.[17] The details of these predatory offense convictions are recounted below.

In 2002, Petitioner was charged in with four counts of first degree criminal sexual conduct.[18] The victim was Petitioner's eleven-year-old niece.[19] Petitioner pleaded guilty and was sentenced to 144 months on one count of first degree criminal sexual conduct.[20]

In 2003, Petitioner was charged with four counts of first degree criminal sexual conduct.[21] These offenses occurred during the same time frame as his prior 2002 conviction but were reported while Petitioner was already serving his sentence on first degree criminal sexual conduct charged from 2002.[22] This victim was Petitioner's seven-year-old daughter.[23] For this new offense, Petitioner was sentenced to 144 months on one count of first degree criminal sexual conduct.[24]

Petitioner was first confined to a Minnesota correctional facility on August 7, 2002, for his first-degree criminal sexual conduct case involving his niece.[25] Subsequently in 2003, Petitioner was sentenced for the first-degree criminal sexual conduct case involving

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[11] *Id.*, subd. 6(a).
[12] *Id.*, subd. 6(d). The contested case rules are found at Minn. R. 1400.5010-.8401 (2021).
[13] Minn. Stat. § 244.052, subd. 6(b) (2022).
[14] *Id.*, subd. 6(c).
[15] Minn. Stat. §§ 14.63, 244.052, subd. 6(c).
[16] Minn. Stat. § 244.052, subd. 3(i) (2022).
[17] Ex. 4 (Criminal Record Report) at 73.
[18] Ex. 3 (Risk Assessment Recommendation) at 1; Ex. 4 (Complaint and Order of Detention dated Aug. 7, 2002) at 199-201.
[19] Ex. 3, at 2.
[20] *Id.* at 1; Ex. 4 (Pre-Sentence Investigation Report dated Aug. 2, 2002) at 192.
[21] Ex. 3, at 1; Ex. 4 (Complaint and Warrant dated Sept. 03, 2003), at 182-185.
[22] Ex. 3, at *2.*
[23] *Id.*
[24] *Id.* at 1.
[25] *Id. at 3.*

his daughter.[26] Petitioner was eligible for supervised release on these offenses in 2010.[27] On June 21, 2010, the ECRC met and assigned Petitioner risk level I.[28]

Petitioner was released on October 25, 2010.[29] He violated supervised release and returned to a Minnesota correctional facility in 2012.[30] The ECRC reviewed Petitioner's risk level because his release violation was for felony domestic assault.[31] The ECRC assigned Petitioner risk level II before he was released onto Intensive Supervised Release on August 15, 2013.[32] Petitioner was discharged from supervision on March 26, 2017.[33]

On October 26, 2017, approximately seven months after he was discharged from supervision, Petitioner was charged with one count of fourth degree criminal sexual conduct in St. Louis County.[34] The victim was a juvenile female staying overnight at a friend's house where Petitioner was also staying.[35] Petitioner pleaded guilty to the fourth-degree charge and was sentenced to 102 months, with an expected release date of June 26, 2023.[36]

## III. Procedural History

In preparation for his present release, Jack Rusinoff M.A., a licensed psychologist and sex offender treatment professional with the DOC, prepared a risk assessment recommendation for Petitioner.[37] As part of the risk assessment, Mr. Rusinoff scored the MnSOST-4.0 for Petitioner.[38] Based on his score, Petitioner's predicted probability of sexual recidivism is 1.65 percent, which places Petitioner in the presumptive risk level I category.[39] However, Mr. Rusinoff applied three special concerns, and recommended the ECRC assign Petitioner to risk level II.[40] Rusinoff reasoned that the impulsive nature of Petitioner's offenses warranted a higher risk level. He also noted that Petitioner reoffended seven months after his supervision expired for his prior confinement, and that he is subject to lifetime supervision against his participation and favorable progress in both chemical dependency and sex offender treatment programs. These were all aggravating factors warranting an upward department from the presumptive risk level.[41]

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[26] *Id.*
[27] Ex. 4 (Risk Assessment Recommendation dated June 21, 2010) at 161-163.
[28] Ex. 4 (Risk Assessment Report dated June 28, 2010) at 157-158.
[29] Ex. 3, at 3.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*; Ex. 4 (Complaint dated Oct. 27, 2017) at 106-109.
[35] Ex. 3, at 1; Ex. 4 (Initial PRT Report dated Oct. 03, 2022) at 6-7.
[36] Ex. 3, at 1.
[37] Ex. 3; Ex. 8 (Jack Rusinoff's Curriculum Vitae).
[38] Ex. 3a (MnSOST-4.0 Scoring Sheet).
[39] Ex. 3, at 1-2.
[40] *Id.* at 5.
[41] *Id.*

The ECRC convened on February 7, 2023, to address Petitioner's risk level assignment.[42] Petitioner attended the meeting and spoke to the committee.[43] Petitioner stated "I get my history shows patterns, but I have done a lot of work on myself and taking ownership of what I have done. I have completed CD treatment, got into the dog program, taken lots of classes and shown growth and honesty in presenting assignments."[44]

At the conclusion of the meeting, the ECRC could not reach a consensus, but a majority of the committee members determined that Petitioner would be assigned risk level II.[45] In so concluding, the ECRC applied three special concerns: a history of sexual reoffending after initial detection; a history of prior supervision failures, recent history of engaging in high-risk or grooming-type behaviors, or other behaviors suggesting increased potential to reoffend; and, time in the community.[46]

On February 19, 2023, Petitioner appealed the ECRC's risk level determination,[47] and this contested case ensued. On April 6, 2023, the ECRC filed a Notice and Order for Hearing with the Office of Administrative Hearings, thereby initiating this contested case proceeding.[48] The ECRC filed its Motion for Summary Disposition on April 27, 2023.[49]

## IV. Summary Disposition Standard of Review

Summary disposition is the administrative law equivalent of summary judgment.[50] 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.[51] The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition of contested case matters.[52]

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 factual issues exist.[53] In other words, the

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[42] Ex. 2 (Risk Assessment Report dated February 9, 2023); Ex. 2a (Risk Assessment Report dated March 30, 2023). The ECRC explains it amended its Risk Assessment Report for Petitioner on March 30, 2023. ECRC Notice of Motion and Motion for Summary Disposition (Motion) at 1, Ex. 2a. The amended Risk Assessment Report contains corrections to the presumptive risk level from a risk level III to a risk level I and adds the three special concerns under the Special Concerns section of the report. *Compare* Ex. 2; Ex. 2a. The amended Risk Assessment Report dated March 30, 2023, aligns with Mr. Rusinoff's Risk Assessment Recommendation dated January 12, 2023. *See* Ex. 2a; Ex. 3.

[43] Ex. 2; Ex. 2a; Ex. 9 (Audio recording of ECRC meeting, dated February 7, 2023).

[44] Ex. 2, at 3; Ex. 2a, at 3.

[45] Ex. 2, at 4; Ex. 2a, at 4.

[46] Ex. 2a, at 4.

[47] Ex. 1 (Notice of Appeal).

[48] Notice and Order for Hearing (Apr. 6, 2023).

[49] Motion.

[50] *Pietsch v. Minn. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K).

[51] *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).

[52] Minn. R. 1400.6600.

[53] *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

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.[54]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[55] A fact is material if its resolution will affect the outcome of the case.[56] If the moving party meets the initial burden, then the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.[57] A genuine issue is not a "sham or frivolous" one, and it cannot rely on mere allegations or denials.[58] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[59]

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[60] Thus, summary disposition is only proper when no factual issues need to be resolved.[61]

## V. Analysis

The ECRC argues that Petitioner does not raise any issues of material fact, and that the ECRC is entitled to judgment as a matter of law that an assignment to risk level II was not in error. Petitioner did not reply to the ECRC's Motion, so his arguments are drawn from his Notice of Appeal.

In the Notice of Appeal, Petitioner asserts that the ECRC risk level determination was wrong because the ECRC only looked at his past and "judging me by the cover of the book."[62] Petitioner argues that the ECRC did not consider the changes he has made while in prison or that he has completed chemical dependency treatment and is almost done with the sex offender treatment program.[63] Petitioner states that the following facts show he was assigned the wrong risk level: certificates from completed programs in prison; letters he has written to programs for support; and his discharge summary and quarterly reviews from chemical dependency and sex offender treatment programs.[64]

Petitioner does not assert that the ECRC erred in the scoring of the MnSOST-4.0 or considering the noted special concerns. Nevertheless, the Judge has carefully reviewed the scoring and concludes that Mr. Rusinoff did not commit a material error in the scoring of the tool.

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[54] *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[55] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[56] *O'Malley v. Ulland Bros*., 549 N.W.2d 889, 892 (Minn. 1996).
[57] *Thiele,* 425 N.W.2d at 583.
[58] *Highland Chateau, Inc. v. Minn. Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).
[59] *See* Minn. R. Civ. P. 56.05.
[60] *Sauter*, 70 N.W.2d at 353.
[61] *Id*.
[62] Ex. 1.
[63] *Id.*
[64] *Id.*

Mr. Rusinoff scored Petitioner with four felony offenses and three prior predatory offenses.[65] Petitioner was also scored for victims in multiple age groups and suicidal concern.[66] However, Petitioner also received credit for completing chemical dependency and sex offender treatment.[67] Under the MnSOST-4.0 Coding Rules, "individuals are given credit for treatment completion if they completed on treatment program and are actively participating in the second treatment program"[68] which was Petitioner's situation.[69] The objections Petitioner raised were considered and his score fell within the presumptive risk level I category.[70] This does not create a material dispute of fact as to Petitioner's MnSOST-4.0 score.

Here, the ECRC deviated from the presumptive risk level and assigned Petitioner to risk level II by considering the three aggravating factors (special concerns) recommended by Mr. Rusinoff.[71] The special concerns identified by Mr. Rusinoff and the ECRC included special concern 1 (history of sexual reoffending after initial detection); special concern 2 (history of prior supervision failures, a recent history of engaging in high-risk or grooming-type behaviors, or other behaviors suggesting increased potential to reoffend); and special concern 8 (time in the community).[72]

According to the MnSOST-4.0 Special Concerns guidance, special concern 1 applies where an offender has "two separate felony-level sexual offenses and minimal criminal histories."[73] Petitioner has three felony-level sexual offenses, all against children.[74] This consideration, alone, justifies an upward departure from Petitioner's presumptive risk level.

Special concern 2 applies to:

> [I]ndividuals who have engaged in sexual misconduct while under correctional custody or supervision or have multiple probation or supervised release failures involving revocations or new non-sexual offense(s). This can also apply to individuals who refuse to cooperate with post-release attempts to place them in a supportive environment or refuse to provide a release address. This also applies to the individual who is in a position of authority over individuals within the age range of the identified victim pool and/or the individual befriends family members of potential victims and minimizes the offense history or and keeps the offense history private.[75]

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[65] Ex. 3a.
[66] *Id.*
[67] *Id.*
[68] Ex. 5 (MnSOST-4.0 Coding Rules).
[69] Ex. 3, at 3-4.
[70] *Id.* at 1-2.
[71] *Id.* at 3-4.
[72] Ex. 2a, at 4.
[73] Ex. 6 (Special Concerns).
[74] Ex. 3, at 1.
[75] Ex. 6.

Mr. Rusinoff applied special concern 2, stating Petitioner:

> sexually abused two preadolescent female relatives, during the same time period in 2002. He served prison sentences from 2002 to 2010 for these offenses, and he was originally assigned a risk level of one. He was released (with SUD treatment but without sex offense specific treatment) and he was returned to prison for Domestic Assault. He was re-released, with a risk level of two, his supervision expired, and he reoffended against an adolescent female acquaintance, about seven months after he was released from his earlier confinement.[76]

Because Petitioner reoffended against a known child – someone whom he presumably had a position of authority over and befriended – special concern 2 is also a basis to depart from Petitioner's presumptive risk level.

The third special concern noted applies to "the individual who has not been in the community for a substantial amount of time since the assignment of the risk level and has not demonstrated he or she no longer poses the same risk to the community."[77] Petitioner has not spent time in the community since 2017 when he was released from confinement by the DOC in March 2017, and then committed a new sexual offense in October 2017.[78] This was correctly applied to Petitioner to elevate his risk level.

Based on the administrative record, the ECRC has demonstrated there are no material facts in dispute and that there are no material errors as alleged by Petitioner. His risk level assignment meets the criteria for risk level II. Summary disposition is warranted in this case.

## VI. Conclusion

The ECRC has demonstrated that there are no material facts in dispute and it is entitled to judgment as a matter of law. Accordingly, the ECRC's Motion for Summary Disposition is **GRANTED**. Petitioner's appeal of his risk level determination is **DISMISSED**, and the ECRC's assignment of risk level II is **AFFIRMED**.

**J. R. M.**

[76] Ex. 3 at 3-4.
[77] Ex. 6.
[78] Ex. 3 at 3.