

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level
Determination of Anthony Eugene Wadley

**ORDER GRANTING
MOTION FOR SUMMARY
DISPOSITION**

This matter is pending before Administrative Law Judge Jeanne M. Cochran pursuant to a Notice and Order for Review of Risk Level Assignment filed with the Office of Administrative Hearings on December 11, 2017.

Michael Everson, Assistant Attorney General, represents the End-of-Confinement Review Committee (ECRC). Anthony Wadley (Petitioner) represents himself without legal counsel.

On December 20, 2017, the ECRC filed a Motion for Summary Disposition. Petitioner was personally served with the motion and exhibits on December 28, 2017. Petitioner did not file a response to the ECRC's motion. The record closed on January 12, 2018, 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 for Summary Disposition is **GRANTED**.
2. Petitioner's appeal is **DISMISSED**.
3. Petitioner's assignment of Risk Level 2 is **AFFIRMED**.

Dated: February 9, 2018



JEANNE M. COCHRAN
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 244.052, subd. 6(c) (2016), 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 (2016).

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). 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."¹ 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."²

The scope of community notification required by the Act is determined by assignment of one of the three different risk levels defined by statute.³ Each risk level is associated with a different degree of community notification.⁴ 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.⁵ Risk Level 2 permits additional notice to groups such as schools and daycares and individuals likely to be victimized by the offender.⁶ Risk Level 3 permits notice to be given to any member of the community whom the offender is likely to encounter unless law enforcement determines public safety might be compromised or more limited disclosure is necessary to protect the identity of the offender's victim(s).⁷

Every predatory offender confined in a Minnesota state correctional or treatment facility must be assessed by the ECRC at the facility prior to release.⁸ The ECRC is responsible for assessing the public risk posed by each predatory offender upon release and determining the appropriate risk level assignment.⁹

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). The six risk factors to

¹ Minn. Stat. §§ 243.166, subd. 1b, 244.052, subd. 4(a) (2016).

² Minn. Stat. §§ 243.166, subd. 1b, 244.052, subd. 4(a).

³ Minn. Stat. § 244.052, subd. 4(b) (2016).

⁴ *Id.*

⁵ *Id.*, subd. 4(b)(1).

⁶ *Id.*, subd. 4(b)(2).

⁷ *Id.*, subd. 4(b)(3).

⁸ *Id.*, subd. 3 (2016).

⁹ *Id.*

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.¹⁰ This list is not exclusive.¹¹

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.¹² 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.¹³

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."¹⁴

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.¹⁵ The administrative review is conducted by an Administrative Law Judge at the Office of Administrative Hearings and is subject to the contested case rules.¹⁶ 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."¹⁷ The decision of the Administrative Law Judge is final and subject to appellate judicial review.¹⁸

Assignment of a risk level to a predatory offender is applicable for a minimum of ten years.¹⁹ During that time, the appropriate level of notice must be given every time the predatory offender changes residence.²⁰ The predatory offender may ask the ECRC to

¹⁰ *Id.*, subd. 3(g).

¹¹ *Id.*

¹² *Id.*, subd. 2 (2016).

¹³ 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).

¹⁴ Minn. Stat. § 244.052, subd. 3(f).

¹⁵ *Id.*, subd. 6(a) (2016).

¹⁶ *Id.*, subd. 6(d) (2016).

¹⁷ *Id.*, subd. 6(c) (2016).

¹⁸ Minn. Stat. §§ 14.63, 244.052, subd. 6(c).

¹⁹ Minn. Stat. § 243.166, subd. 6(a) (2016).

²⁰ *Id.*, subd 3 (2016).

reassess the assigned risk level three years after the initial risk assessment, and may renew the request once every two years following subsequent denials.²¹

II. Petitioner's Background

In September 2011, Petitioner was charged in Steele County with first-degree and third-degree criminal sexual conduct based on allegations that he physically attacked and sexually assaulted a woman in her apartment.²² Petitioner had been invited to the woman's apartment for a party and did not leave when the party ended.²³ Petitioner pleaded guilty to one count of third-degree criminal sexual conduct and received a sentence of 76 months.²⁴ Criminal sexual conduct is a predatory offense that requires registration under the Act.²⁵

Petitioner was incarcerated in April 2012.²⁶ Prior to his release from prison, the ECRC at Minnesota Correctional Facility (MCF) Faribault convened and assigned Petitioner a Risk Level 1.²⁷ Petitioner was released into the community as a Risk Level 1 in October 2016.²⁸

In September 2017, Petitioner was charged with violating the terms of his supervised release for failure to remain law abiding, engaging in assaultive or violent behavior, and breaking curfew.²⁹ Petitioner was charged and pleaded guilty to fourth-degree assault on a peace officer for assaulting law enforcement officers at the Nicollet County Jail.³⁰ Petitioner was also charged with four counts of fifth-degree assault for punching an unknown woman on the street, but pleaded guilty to disorderly conduct.³¹ Petitioner's supervised release was revoked and he was sent back to prison.³²

III. Procedural History

In preparation for Petitioner's release, Jack Rusinoff, a licensed psychologist with the Department of Corrections (DOC), prepared a risk assessment recommendation for Petitioner.³³

As part of the risk assessment, Mr. Rusinoff scored the MnSOST-3.1.2 for Petitioner.³⁴ According to the risk assessment tool, Petitioner's predicted probability of

²¹ *Id.*

²² Ex. 1 at 277-81 (Steel County criminal complaint).

²³ *Id.*

²⁴ Ex. 1 at 251 (DOC presentence investigation report); Ex. 1 at 238 (DOC initial PRT report).

²⁵ Minn. Stat. § 243.166, subd. 1b(a)(1)(iii).

²⁶ Ex. 1 at 237 (DOC initial PRT report).

²⁷ Ex. 1 at 49 (ECRC risk assessment report dated June 27, 2016).

²⁸ *Id.*

²⁹ Ex. 1 at 15-16 (DOC Notice of Violation Hearing).

³⁰ Ex. 1 at 30-34 (Nicollet County criminal complaint); Ex. 1 at 303 (register of actions for 52-CR-17-327).

³¹ Ex. 1 at 25-29 (Nicollet County criminal complaint); Ex. at 299 (register of actions for 52-CR-17-326).

³² Ex. 1 at 12-13 (DOC revocation report).

³³ Ex. 1 at 5-8 (ECRC risk assessment recommendation).

³⁴ Ex. 1 at 9 (MnSOST score sheet).

sexual recidivism is 6.75 percent, which places Petitioner in the presumptive Risk Level 2 category.³⁵

Based on Petitioner's score on the risk assessment tool and consideration of the statutory risk factors, Mr. Rusinoff recommended assigning a Risk Level 2 to Petitioner. Mr. Rusinoff noted in his recommendation that Petitioner has been referred for chemical dependency treatment and sex offender treatment, but has failed to complete either program.³⁶ Ultimately, Mr. Rusinoff concluded there is "no reason to depart from the presumptive" risk level suggested by Petitioner's MnSOST-3.1.2 score.³⁷

The ECRC convened on November 16, 2017, to address Petitioner's risk level assignment.³⁸ Petitioner attended the meeting and was given an opportunity to be heard by the committee prior to their vote.³⁹ Petitioner told the ECRC that he has been participating in group therapy and now understands how to deal with his distorted thoughts regarding women.⁴⁰ Petitioner explained that he has stable housing, a family, and plans to find a job once he is released into the community.⁴¹ Petitioner told the committee that he does not "pose a Level 2 risk" and asked for another chance to be assigned a Risk Level 1 because "it will be easier to help take care of his child along with his girlfriend's children."⁴² At the conclusion of the meeting, the ECRC voted to assign Petitioner a Risk Level 2.⁴³

On November 24, 2017, Petitioner requested an appeal of the ECRC's risk level determination.⁴⁴ On December 11, 2017, the ECRC filed a Notice and Order for Review of Risk Level Assignment with the Office of Administrative Hearings.

On December 20, 2017, the ECRC filed a Motion for Summary Disposition. Petitioner was personally served with the motion and exhibits on December 28, 2017. Petitioner did not file a response to the ECRC's motion. The record closed on January 12, 2018, the due date for Petitioner's response.

IV. Motion for Summary Disposition

Summary disposition is the administrative law equivalent of summary judgment.⁴⁵ A motion for summary disposition shall be granted when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of

³⁵ *Id.*; Ex. 1 at 8 (ECRC risk assessment recommendation).

³⁶ Ex. 1 at 8 (ECRC risk assessment recommendation).

³⁷ *Id.*

³⁸ Ex. 1 at 2 (ECRC risk assessment report).

³⁹ *Id.* at 3; Ex. 5 (audio recording of ECRC meeting).

⁴⁰ Ex. 5 (audio recording of ECRC meeting).

⁴¹ *Id.*

⁴² Ex. 1 at 3 (ECRC risk assessment report).

⁴³ *Id.* at 4.

⁴⁴ Ex. 1 at 1 (Notice of Appeal).

⁴⁵ *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); see also Minn. R. 1400.5500(K) (2017).

law.⁴⁶ 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.

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.⁴⁷ In other words, 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.⁴⁸

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.⁴⁹ A fact is material if its resolution will affect the outcome of the case.⁵⁰ 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.⁵¹ A genuine issue is not a "sham or frivolous" one and it cannot rely on mere allegations or denials.⁵² Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.⁵³

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.⁵⁴ Thus, summary disposition is only proper when no fact issues need to be resolved.⁵⁵

V. Arguments

The ECRC seeks summary disposition of this case because "Petitioner fails to allege facts indicating a material error by the ECRC."⁵⁶ More specifically, the committee argues that "Petitioner fails to point to any specific error in scoring the MnSOST-3.1.2," which placed him at a presumptive Risk Level 2.⁵⁷ The ECRC asserts that it "properly applied the established procedures, including use of an actuarial tool, to assign a Risk Level two."⁵⁸ Thus, the ECRC believes Petitioner's assignment of a Risk Level 2 should be affirmed as a matter of law.⁵⁹

⁴⁶ 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).

⁴⁷ See, e.g., *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

⁴⁸ See *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

⁴⁹ See *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

⁵⁰ 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)).

⁵¹ See *Thiele*, 425 N.W.2d at 583.

⁵² 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)).

⁵³ See Minn. R. Civ. P. 56.05.

⁵⁴ See *Sauter*, 70 N.W.2d at 353.

⁵⁵ See *id.*

⁵⁶ ECRC Memorandum in Support of Summary Disposition (ECRC Mem.) at 3 (Dec. 20, 2017).

⁵⁷ *Id.* at 4.

⁵⁸ *Id.*

⁵⁹ *Id.*

In opposing his risk level assignment, Petitioner claims that his current “MnSOST score is inaccurate from [his] first MnSOST score” that placed him at a presumptive Risk Level 1.⁶⁰ Petitioner points out that he has not committed a “new sexual offense” and objects to an increase in his risk level assignment.⁶¹

VI. Analysis

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

Petitioner’s sole objection to his risk level assignment is based on his belief that the scoring of the MnSOST-3.1.2 in 2017 by Mr. Rusinoff is “inaccurate” as compared to the scoring of the MnSOST-3.1.2 in 2014 by Dr. Rostberg.⁶² According to Petitioner, his risk level should not be increased because he has not committed a “new sexual offense.”⁶³

The MnSOST score sheet from 2014 shows that Dr. Halie Rostberg scored the actuarial tool for Petitioner on April 2, 2014.⁶⁴ Petitioner was scored for having one predatory (sexual) offense, among other scored items.⁶⁵ The 2014 MnSOST-3.1.2 gave Petitioner a predicted probability of sexual recidivism is 2.66 percent, which placed him in the presumptive Risk Level 1 category.⁶⁶

The MnSOST score sheet completed by Mr. Rusinoff on November 1, 2017, shows that Petitioner was again scored for having one predatory (sexual) offense.⁶⁷ However, the other scored items are different from Dr. Rostberg’s 2014 score sheet in three ways. First, the 2017 MnSOST score sheet has four felony offense sentences scored rather than the three felony offense sentences on the 2014 MnSOST score sheet.⁶⁸ Petitioner does not dispute that he pleaded guilty and was sentenced for fourth-degree assault on a peace officer in 2017, an additional felony.⁶⁹ Second, the 2017 MnSOST score sheet includes one disorderly conduct conviction in the last three years rather than the zero

⁶⁰ Ex. 1 at 1 (Notice of Appeal).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Ex. 1 at 158 (MnSOST score sheet dated Apr. 2, 2014).

⁶⁵ *Id.*

⁶⁶ *Id.*; Ex. 1 at 52-54 (ECRC risk assessment recommendation dated June 14, 2016). Although the MnSOST score sheet completed by Dr. Rostberg in 2014 was done two years prior to the risk assessment recommendation done by Dr. Leutschaft in 2016, it appears the 2016 recommendation incorporated the 2014 score based on the details incorporated into the recommendation memorandum. *Compare* Ex. 1 at 52 (ECRC risk assessment recommendation dated June 14, 2016) (reporting Petitioner’s predicted probability of sexual recidivism as 2.66% with a 95% confidence interval of 1.89% to 4.40% and a percentile rank of 51.10%), *with* Ex. 1 at 158 (MnSOST score sheet dated Apr. 2, 2014) (reporting Petitioner’s predicted probability of sexual recidivism as 2.66% with a 95% confidence interval of 1.89% to 4.40% and a percentile rank of 51.10%).

⁶⁷ Ex. 1 at 9 (MnSOST score sheet dated Nov. 1, 2017).

⁶⁸ *Compare* Ex. 1 at 9 (MnSOST score sheet dated Nov. 1, 2017), *with* Ex. 1 at 158 (MnSOST score sheet dated Apr. 2, 2014).

⁶⁹ Ex. 1 at 303 (register of actions for 52-CR-17-327).

score for disorderly conduct convictions in the last three years on the 2014 MnSOST score sheet.⁷⁰ Petitioner does not dispute that he pleaded guilty and was sentenced for disorderly conduct in 2017.⁷¹ Finally, the 2017 MnSOST score sheet has Petitioner's age as 25 rather than the age of 23 on the 2014 MnSOST score sheet.⁷² Petitioner's age is not disputed. Based on these three undisputed changes to the scoring between the 2014 MnSOST-3.1.2 score and the 2017 MnSOST-3.1.2 score, Petitioner's predicted probability of sexual recidivism increased along with his presumptive risk level assignment.⁷³ Accordingly, Petitioner's objection does not raise genuine issues of material fact for this appeal.

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

J. M. C.

⁷⁰ Compare Ex. 1 at 9 (MnSOST score sheet dated Nov. 1, 2017), with Ex. 1 at 158 (MnSOST score sheet dated Apr. 2, 2014).

⁷¹ Ex. 1 at 299 (register of actions for 52-CR-17-326).

⁷² Compare Ex. 1 at 9 (MnSOST score sheet dated Nov. 1, 2017), with Ex. 1 at 158 (MnSOST score sheet dated Apr. 2, 2014).

⁷³ *Id.*; compare Ex. 1 at 54 (ECRC risk assessment recommendation dated June 14, 2016), with Ex. 1 at 8 (ECRC risk assessment recommendation).