

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

In the Matter of the Risk Level
Determination of Timothy John Bakken

**ORDER GRANTING
MOTION FOR SUMMARY
DISPOSITION**

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

Ed Stockmeyer, Assistant Attorney General, represents the End-of-Confinement Review Committee (ECRC). Timothy Bakken (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 21, 2017. Petitioner did not file a response to the ECRC's motion. The record closed on January 8, 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 7, 2018



JAMES E. LAFAVE
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

Petitioner appealed 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. The Act 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

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.*

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 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 10 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).

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 October 2013, Petitioner was charged in Polk County with seven counts of possession of child pornography after a law enforcement investigation uncovered multiple child pornography images stored on Petitioner's personal computer.²² Petitioner pleaded guilty to all seven counts of possession of child pornography and received sentences ranging from 34 to 51 months for each count.²³ Possession of child pornography is a predatory offense requiring registration under the Act.²⁴

Petitioner's criminal history also includes felony convictions for second-degree assault, harassment, and terroristic threats.²⁵

Petitioner was incarcerated in September 2014.²⁶ 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 July 2016.²⁸

In September 2017, Petitioner was charged with violating the conditions of his supervised release by using alcohol, entering a bar, having contact with minors, engaging in assaultive behavior, and failing to complete a diagnostic assessment.²⁹ Petitioner's supervised release was revoked and he was sent back to prison.³⁰

III. Procedural History

In preparation for Petitioner's re-release from prison, Jack Rusinoff, a licensed psychologist with the Department of Corrections (DOC), prepared a risk assessment recommendation for Petitioner.³¹

As part of the risk assessment, Mr. Rusinoff scored the MnSOST-3.1.2 for Petitioner.³² According to the risk assessment tool, Petitioner's predicted probability of

²¹ *Id.*

²² Ex. 1 at 103-09 (Polk County criminal complaint).

²³ Ex. 1 at 80 (presentence investigation report); Ex. 1 at 58-62 (DOC initial PRT report).

²⁴ Minn. Stat. § 243.166, subd. 1b(a)(2).

²⁵ Ex. 1 at 63 (DOC initial PRT report).

²⁶ Ex. 1 at 55 (DOC initial PRT report).

²⁷ Ex. 1 at 34-35 (ECRC risk assessment report dated Apr. 25, 2016).

²⁸ *Id.* at 34.

²⁹ Ex. 1 at 17-21 (supervised release violation report).

³⁰ Ex. 1 at 10-13 (DOC revocation report).

³¹ Ex. 1 at 5-8 (ECRC risk assessment recommendation).

³² Ex. 1 at 9 (MnSOST score sheet).

sexual recidivism is 12.82 percent, which places Petitioner in the presumptive Risk Level 3 category.³³

Despite Petitioner's score on the risk assessment tool, Mr. Rusinoff recommended the ECRC assign a Risk Level 2 to Petitioner.³⁴ Mr. Rusinoff noted that Petitioner "was previously released [from prison] with a risk level of one" and engaged in "problematic" behavior while in the community.³⁵ However, because Petitioner's "file contains no substantial evidence that [he] has any contact sexual abuse victims," Mr. Rusinoff opined that decreasing Petitioner's risk level assignment from the presumptive Risk Level 3 suggested by Petitioner's MnSOST-3.1.2 score to a Risk Level 2 is appropriate.³⁶

The ECRC at MCF Lino Lakes convened on November 16, 2017, to address Petitioner's risk level assessment.³⁷ Petitioner attended the meeting and was given an opportunity to be heard by the committee prior to their vote.³⁸ Petitioner discussed his release violations with the ECRC, denying that he went into a bar and giving the reasons for his assault on his brother, not his mother as stated in the risk assessment recommendation.³⁹ Petitioner admitted to being alone in his garage with a six-year-old girl and giving her money, but denied touching her.⁴⁰ Petitioner believes he can be alone with minor children as long as an adult over the age of 18 is present in the vicinity.⁴¹ When asked by the ECRC whether children portrayed in pornographic images are harmed as victims, Petitioner agreed and said child pornography is "terrible."⁴² At the conclusion of the meeting, the ECRC voted to assign Petitioner a Risk Level 2.⁴³

On November 25, 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 21, 2017. Petitioner did not file a response to the ECRC's motion. The record closed on January 8, 2018, the due date for Petitioner's response.

³³ *Id.*; Ex. 1 at 6 (ECRC risk assessment recommendation).

³⁴ Ex. 1 at 7 (ECRC risk assessment recommendation).

³⁵ *Id.*

³⁶ *Id.*

³⁷ Ex. 1 at 2 (ECRC risk assessment report).

³⁸ *Id.* at 3; Ex. 5 (audio recording of ECRC meeting).

³⁹ Ex. 5 (audio recording of ECRC meeting).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Ex. 1 at 4 (ECRC risk assessment report).

⁴⁴ Ex. 1 at 1 (Notice of Appeal).

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 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 matter because Petitioner "does not allege any material facts or claims that could establish error" in his risk level assignment.⁵⁶ The ECRC highlights that Petitioner was previously assigned a Risk Level 1, engaged in supervised release violations, and the committee has "again granted [Petitioner] a

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).

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 1 (Dec. 19, 2017).

downward deviation, assigning him a risk level two even though his MnSOST-3.1.2 score continues to place him in the presumptive risk level three range.⁵⁷ The ECRC argues that it “acted within its discretion in assigning [Petitioner] a risk level two” and Petitioner “has failed to show any dispute of material fact that could support his claim” of error.⁵⁸ Thus, the ECRC requests disposition of this appeal as a matter of law.

In opposing his risk level assignment, Petitioner objects to the facts and circumstances surrounding his release violation and subsequent return to prison. Petitioner claims that he “didn’t enter a drinking establishment” and someone brought him “beer.”⁵⁹ Petitioner also claims that he “didn’t touch the girl’s hair” but instead “gave her a headband” and money “for buying things for school.”⁶⁰ According to Petitioner, he has a traumatic brain injury, and this injury caused him to not “understand some of the questions” posed to him. He also complains that “no one contacted [his] care giver” during the release violation investigation and revocation process.⁶¹ Petitioner asserts that he has been “keeping in contact with [his] parole agent” and should not be given a higher risk level.⁶²

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.

The sole basis for Petitioner’s challenge to his risk level assignment relates to his release violations in 2017. Petitioner claims that he “didn’t enter a drinking establishment” and someone bought him “beer.”⁶³ Petitioner also claims that he “didn’t touch the girl’s hair” but instead “gave her a headband” and money “for buying things for school.”⁶⁴ According to Petitioner, his traumatic brain injury caused him to not “understand some of the questions” posed to him and complains that “no one contacted [his] care giver” during the release violation investigation and revocation process.⁶⁵ Although the Administrative Law Judge appreciates and sympathizes with Petitioner’s frustration with his release violations and return to prison, none of the facts and circumstances alleged suggest error in the ECRC’s subsequent risk level assignment. Petitioner’s appeal of his risk level assignment is not an opportunity for Petitioner to collaterally attack the factual findings underlying his release violations.⁶⁶ Moreover, Petitioner made all the same claims to the

⁵⁷ *Id.* at 8.

⁵⁸ *Id.*

⁵⁹ Ex. 1 at 1 (Notice of Appeal).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See *In re Risk Level Determination of R.L.*, No. A09-1885, 2010 WL 2813451, at *3 (Minn. Ct. App. July 20, 2010) (the ECRC risk level assignment appeal process is not an opportunity to “test the state’s evidence” in underlying convictions or violations; the assessment is based on an offender’s documents taken at face value).

ECRC before they decided his risk level assignment.⁶⁷ Thus, Petitioner's challenge to his risk level assignment based on the facts and circumstances surrounding his release violations does not create a genuine issue of material fact suggesting error in the ECRC's 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 granted. Petitioner's appeal of his risk level determination is dismissed and assignment of Risk Level 2 is affirmed.

J. E. L.

⁶⁷ Ex. 5 (audio recording of ECRC meeting).