OAH 8-1100-35190

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level Determination of Robert M. Moreno, Jr.

ORDER ON MOTION FOR SUMMARY DISPOSITION

This matter came before Administrative Law Judge Eric L. Lipman upon the End-of-Confinement Review Committee's Motion for Summary Disposition.

Edwin W. Stockmeyer, Assistant Attorney General, appeared on behalf of the End-of-Confinement Review Committee of the Minnesota Department of Corrections (ECRC). Robert M. Moreno, Jr., the Petitioner, appeared on his own behalf and without counsel.

On April 30, 2018, the ECRC filed a Motion for Summary Disposition. Mr. Moreno was personally served with the motion on May 4, 2018. Mr. Moreno did not file a response to the motion. The record closed on May 18, 2018, the due date for Mr. Moreno's response to the motion.

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

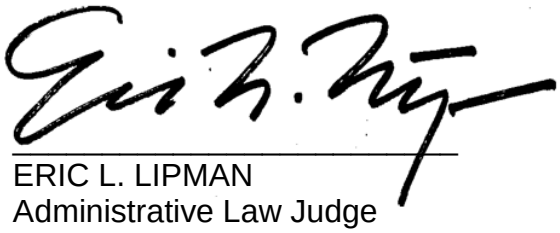
ORDER

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

2. The appeal is **DISMISSED**.

3. Mr. Moreno's assignment to Risk Level 3 is **AFFIRMED**.

Dated: June 15, 2018



ERIC L. LIPMAN
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. Petitioner's Background

Mr. Moreno is a 53-year-old male.[1]

Mr. Moreno was born in Bowling Green, Ohio and is the oldest of six children in his family.[2] When Mr. Moreno was ten years old, his family moved to Elmore, Minnesota before settling in Mankato, Minnesota a few years later.[3]

In Mankato, Mr. Moreno became associated with the Latin Kings criminal gang.[4] He was expelled from Mankato East High School in his senior year due to a violent fight with another student.[5] Mr. Moreno obtained his General Equivalency Degree a year later through the Elmore Public School.[6]

Mr. Moreno has had significant issues with chemical dependency as an adult and the abuse of alcohol has been a factor in his criminal behavior.[7]

Mr. Moreno was married twice and both of those of marriages ended in divorce. He acknowledges that those relationships dissolved, in part, due to his abuse of alcohol and violent misconduct towards family members.[8]

On September 16, 1983, police responded to a report of an assault in the parking lot adjacent to the Windmill Bar in Mapleton, Minnesota. Mr. Moreno was a passenger in a vehicle that struck the automobile of another bar patron. When the owner of the damaged automobile attempted to prevent Mr. Moreno and his companion from leaving the scene of the collision, Mr. Moreno exited the vehicle, brandished a knife and threatened to stick it through the throat of the man whose car was damaged.[9] For this misconduct, Mr. Moreno was convicted of Assault in the Second Degree.[10]

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1 Exhibit 1 at 2.
2 *Id*. at 96.
3 *Id*.
4 *Id*. at 95-96.
5 *Id*. at 95.
6 *Id*.
7 *Id.* at 97, 104, 137, 168-70.
8 *Id*. at 96-97.
9 *Id.* at 198.
10 *Id.* at 94.

On October 7, 1983, Mr. Moreno was convicted of Driving While Intoxicated and was fined by the court for this offense.[11] He later reported that during this time period he was drinking a 24-pack of beer each day.[12]

A week later, on October 14, 1983, officers of the Winnebago Police Department responded to a call from a laundromat in Winnebago, Minnesota. Upon their arrival, officers discovered a 17-year-old girl and a then 19-year-old Mr. Moreno, on the ground. The girl yelled to the officers that Mr. Moreno was attempting to rape her. Mr. Moreno tried to leave the scene, and, as an officer moved to stop him, Mr. Moreno pushed the officer. Mr. Moreno was wrestled to the ground by police and restrained.[13]

The victim later reported to officers that Mr. Moreno purchased beer for her and wanted to engage in sex. She maintained that when she refused, Mr. Moreno violently pulled her to the ground and threatened to kill her.[14]

Mr. Moreno was originally charged with one count of Criminal Sexual Conduct in the Fourth Degree, one count of Obstructing Arrest, and one count of Furnishing [Alcohol] to a Person under Nineteen. However, because the victim refused to assist the prosecution with her testimony, Mr. Moreno was later recharged with Contributing to the Delinquency of a Minor and Resisting Arrest.[15] He was convicted of these crimes.[16]

In 1986, Mr. Moreno was convicted of Disorderly Conduct, a violation of an Order for Protection, Escape from Custody and Assault in the Fifth Degree.[17]

Mr. Moreno completed the Johnson Hall Chemical Dependency Treatment program in 1984, 1988 and 1991.[18] Notwithstanding his completion of these programs, Mr. Moreno continued to abuse alcohol and, while intoxicated, committed a number of serious crimes. Notably, in both 1987 and 1989, Mr. Moreno was convicted of Driving While Intoxicated.[19]

In November of 1987, Mr. Moreno was investigated for possible sexual assault after he and two other males engaged in sexual intercourse with a 19-year-old female who had some cognitive impairments. After an evening of drinking, the female's boyfriend ordered her to engage in intercourse with all three men.[20] The records do not indicate that criminal charges followed this incident.[21]

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[11] *Id.* at 170.
[12] *Id.* at 97.
[13] *Id*. at 201-02.
[14] *Id*.
[15] *Id.* at 42.
[16] *Id*. at 109, 193, 201-02.
[17] *Id.* at 169.
[18] *Id.* at 97.
[19] *Id.* at 95, 97.
[20] *Id.* at 7, 92.
[21] *Id.*

In April of 1993, social service personnel removed Moreno's minor daughter from his care because Mr. Moreno became intoxicated in a bar and, after exiting, passed out on the sidewalk in front of the tavern.[22] Mr. Moreno's daughter was under his care at the time the two were in the tavern when he lost consciousness.[23]

On September 24, 1993, a seven-year-old family member of Mr. Moreno, identified here as Girl Number 1, reported to a Blue Earth County social worker that Mr. Moreno had removed her clothing and touched her vaginal area. She further reported that Mr. Moreno removed his pants and went "up and down while he laid on top of her."[24]

On November 15, 1993, Mr. Moreno was charged with Criminal Sexual Conduct in the Second Degree, Assault in the Second Degree, Furnishing Alcohol to a Minor and Obstructing Legal Process with Force. As part of a plea agreement, Mr. Moreno pleaded guilty to Criminal Sexual Conduct and Assault in the Second Degree and the state agreed to dismiss remaining charges.[25]

During his incarceration in state prison, Mr. Moreno was enrolled in, and completed, the TRIAD chemical dependency treatment program.[26] While in treatment, Mr. Moreno acknowledged that alcohol abuse was part of his cycle of offending, noting that he had "blacked out" from consuming alcohol on the evening that he sexually assaulted Girl Number 1.[27]

Following his incarceration in state prison, Mr. Moreno was released to the community on September 2, 1997.[28] Prior to his release, the ECRC assessed his risk of re-offense and he was assigned to Risk Level 2.[29]

On December 20, 1997, police responded to a residence in Wells, Minnesota following a report of a sexual assault. The female victim of his 1993 offense, reported that Mr. Moreno had again assaulted her. She maintained that Mr. Moreno had entered the bedroom where she was sleeping during the early morning hours and told her to come out into the living room. There, Mr. Moreno removed her jeans and underwear before sexually assaulting her. Mr. Moreno licked and bit the child's buttocks and vaginal area. When the child screamed for him to stop, Mr. Moreno choked and threatened to kill her if she told her mother or anyone else about the sexual assault. Mr. Moreno then forcefully had sexual intercourse with the child.[30]

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[22] *Id.* at 176.
[23] *Id*.
[24] *Id.* at 170, 176-178.
[25] *Id.* at 170.
[26] *Id.* at 97, 170.
[27] *Id.* at 141, 144, 170, 175, 177.
[28] *Id.* at 5, 12, 132.
[29] *Id*.
[30] *Id.* at 5, 46, 132, 140-41.

On May 20, 1998, Mr. Moreno was convicted of one count of Criminal Sexual Conduct in the First Degree.[31]

Mr. Moreno entered the pre-treatment phase of the Minnesota Sex Offender Program (MSOP) at the Minnesota Correctional Facility – Moose Lake on December 10, 2015, and he progressed to Phase II of the three-phased program.[32] However, in May of 2017, following a significant altercation with another offender in the program, the MSOP clinical team terminated Mr. Moreno's participation in the program.[33]

Mr. Moreno entered the Paradigm chemical dependency treatment program in September of 2017 and is likely to complete the program modules prior to his projected release date.[34] Mr. Moreno is due to be released to the community on July 9, 2018.[35]

II. The Minnesota Community Notification Act

Persons who commit certain criminal offenses defined by statute as "predatory offenses" are considered "predatory offenders" subject to registration with local law enforcement.[36] Predatory offenses include, but are not limited to, kidnapping, false imprisonment, criminal sexual conduct, and indecent exposure.[37]

Predatory offenders are subject to the Minnesota Community Notification Act (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 that is "relevant and necessary to protect the public and to counteract the offender's dangerousness."[38] The extent of the information that is disclosed, and the persons to whom disclosures are 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."[39]

The scope of community notification required by the Act is determined by the assignment of the offender to one of the three different risk levels that are defined in statute. Each risk level is associated with a different degree of community notification and imposes different restrictions on the predatory offender.[40] If an offender is assigned to Risk Level 1, notification of the offender's residence may be made by law enforcement to the victims and witnesses of the offender's earlier crimes.[41] If an

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[31] *Id*. at 130.
[32] *Id*. at 10.
[33] *Id*.
[34] *Id*.
[35] *Id.* at 2.
[36] Minn. Stat. § 243.166 (2016).
[37] Minn. Stat. § 243.166, subd. 1b.
[38] Minn. Stat. § 244.052, subd. 4(a) (2016).
[39] *Id.*
[40] Minn. Stat. § 244.052, subd. 4(b) (2016).
[41] Minn. Stat. § 244.052, subd. 4(b)(1).

offender is assigned to Risk Level 2, law enforcement may also make disclosures to agencies and groups, such as schools and day care facilities, "that the offender is likely to encounter. . . ." The purpose of this broader notification is to secure "those institutions and protecting individuals in their care while they are on or near the premises of the institution. . . ."[42] If an offender is assigned to Risk Level 3, the same groups and persons that are notified following an assignment to Risk Level 1 or 2 may be made. Additionally, law enforcement may notify any member of the community whom the offender is likely to encounter, unless law enforcement further determines that public safety would be compromised by the disclosure or a more limited disclosure is necessary to protect the identity of the victim.[43]

The Commissioner of the Department of Corrections (Commissioner) has established individual committees at each state correctional facility where predatory offenders are confined.[44]

Every offender that is required by statute to register as a predatory offender, and who is confined in a Minnesota state prison, must be assessed by the facility's ECRC prior to release from prison.[45] Because Mr. Moreno was scheduled for release from state prison, the ECRC was obliged to assess the risk he posed following release and make the appropriate risk level assignment.[46]

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.[47] This list is not exclusive.[48]

In addition to the statutory risk factors, the ECRC is also required to apply a risk assessment scale when assigning a risk level to a predatory offender.[49] The risk assessment scale includes the score from an actuarial instrument that is approved for use with particular groups of offenders and a set of special concerns and mitigating factors that are set forth in Minnesota Department of Corrections (DOC) Policy 205.220.[50] Each feature of the "risk assessment scale" is described below.

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[42] Minn. Stat. § 244.052, subd. 4(b)(2).
[43] Minn. Stat. § 244.052, subd. 4(b)(3).
[44] Minn. Stat. § 244.052, subd. 3(a) (2016).
[45] Minn. Stat. § 244.052, subd. 3 (2016).
[46] *Id.*
[47] Minn. Stat. § 244.052, subd. 3(g).
[48] *Id.*
[49] *Id.*, subd. 2 (2016).
[50] Minnesota Department of Corrections Policy No. 205.220 (April 16, 2013) (available at http://www.doc.state.mn.us/DocPolicy2/Document/205.220.htm).

The Minnesota Sex Offender Screening Tool-3.1.2 (MnSOST-3.1.2) is an actuarial tool used by the Department to make predictions about likelihood of future sexual offending by certain male offenders. The MnSOST-3.1.2 was developed following detailed file reviews of a large population of adult male offenders who were incarcerated in Minnesota. These offenders were all convicted of either a sex or sex-related offense.

The MnSOST-3.1.2 scores nine (9) items to determine a probability of recidivism: (1) the number of "predatory offense sentences" for which the offender has been sentenced; (2) the number of "felony offense sentences" that the offender has received; (3) the number of sentences the offender has received for violations of orders for protection, stalking, or harassment; (4) the number of disorderly conduct convictions in the last three years; (5) the current age and date of release for the offender; (6) the offender's unsupervised release date; (7) whether the offender completed both sex offender and chemical dependency treatment while incarcerated; (8) the number of sexual predatory offense sentences in which the victim was a male; and (9) whether the offender was charged or convicted of any sex or sex-related offense that occurred in a public place.[51] The MnSOST-3.1.2 utilizes a multiple logistic regression model to compare features of a particular offender's history of criminal offenses against the case histories of the population group. The test produces a "presumptive" probability score by assuming that a particular offender will tend to re-offend at the same rate as other, earlier-assessed offenders with similar criminal histories.[52]

Using materials from the offender's "base file" at the Department, the professional who completes the MnSOST-3.1.2 tabulates a score for each of the nine MnSOST-3.1.2 items. The scoring data is then inserted into the MnSOST-3.1.2 computerized matrix of actuarial data which generates a statistical probability rating for recidivism for that offender. The predicted probability of recidivism (stated in a percentage format and percentile ranking) is then translated into a presumptive risk level.

The score from the MnSOST-3.1.2, and the resulting presumptive risk level, is a starting point for the ECRC's deliberations.[53] In its discretion, the ECRC, can deviate from the presumptive risk level by applying one or more mitigation factors set forth in Department policy (for a downward departure in the risk level) or one or more special concerns (for an upward departure in the risk level).[54]

DOC Policy 205.220 identifies 15 special concerns that an ECRC may use to upwardly adjust an offender's risk level beyond the presumptive risk level indicated by the offender's MnSOST-3.1.2 score. The policy also identifies five mitigating factors that an ECRC may use to downwardly adjust an offender's risk level below that which

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[51] *Id*.

[52] DOC Policy No. 205.220, *supra*; *see generally In the Matter of the Risk Level Determination of Kevin Strong*, No. 8-1100-23024, 2015 WL 3372460 (Minn. Office Admin. Hearings May 4, 2015).

[53] *See* Ex. 1 at 2-3.

[54] DOC Policy No. 205.220, *supra*; *see also In the Matter of the Risk Level Determination of R.B.P.*, 640 N.W.2d 351, 354 (Minn. Ct. App. 2002).

was presumptively indicated by offender's MnSOST-3.1.2 score.[55] The mitigating circumstances listed in DOC Policy 205.220, are:

> (1) The documented victim pool does not merit the broadest level of community notification;
>
> (2) A documented intervention followed by a period of six years where the offender does not reoffend or engage in high risk behavior and had access to a potential victim pool;
>
> (3) The offender has developed an incapacitating illness or physical condition decreasing motivation or ability to sexually re-offend (e.g., later stages of a terminal illness);
>
> (4) The offender was not directed to or recommended for chemical dependency treatment and he/she completed sex offender treatment with no evidence of re-offense or high-risk behaviors since the completion (this is only to be used in conjunction with the MnSOST-3.1.2); and
>
> (5) The offender is subject to a lengthy period of supervision at the time of release and his/her prior history suggests that supervision will likely serve as a deterrent to committing future person offenses (this is only to be used in conjunction with the LSI-R or LS/CMI).[56]

As part of its determination, 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."[57]

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.[58] The administrative review is conducted by an administrative law judge at the Office of Administrative Hearings and is subject to the contested case rules.[59] 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."[60] The decision of the administrative law judge is a final agency order that is subject to appellate judicial review.[61]

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[55] Department of Corrections Policy No. 205.220, *supra*.
[56] *Id*.
[57] Minn. Stat. § 244.052, subd. 3(f).
[58] *Id.*, subd. 6(a) (2016).
[59] *Id.*, subd. 6(d) (2016).
[60] *Id.*, subd. 6(c) (2016).
[61] Minn. Stat. §§ 14.63, 244.052, subd. 6(c).

Assignment of a risk level to a predatory offender is applicable for a minimum of ten years.[62] During that time, the appropriate level of notice must be given every time the predatory offender changes residence.[63] The predatory offender may ask the ECRC to reassess the assigned risk level three years after the initial risk assessment, and may renew such a request once every two years following a denial.[64]

III. Procedural History in this Case

Prior to the ECRC hearing in this matter, Terrel Backes, Psy.D., L.P., a licensed psychiatrist, prepared a risk assessment recommendation for Mr. Moreno.[65] The memorandum, dated March 8, 2018, was provided to the ECRC.[66]

As part of the reassessment of his risk level, Dr. Backes scored the MnSOST-3.1.2 for Mr. Moreno.[67] According to the risk assessment tool, Mr. Moreno's score is 3.18 percent, which presumptively places Mr. Moreno in the lowest risk category for sexual re-offense.[68]

Dr. Backes applied three special concerns to Mr. Moreno's risk level assessment.[69] Dr. Backes noted application of Special Concerns Numbers 2, 4 and 9. These factors relate to prior history of treatment program failures, misconduct during periods of supervision in the community and offenses against a broad range of victims.[70]

Based upon Mr. Moreno's score on the MnSOST-3.1.2, consideration of the statutory risk factors, and application of three special concerns, Dr. Backes recommended assigning Mr. Moreno to Risk Level 3.[71] Dr. Backes observed that Mr. Moreno has "yet to demonstrate a sustained pattern of sobriety and lawful behavior in the community."[72]

The ECRC convened on March 19, 2018, to reassess Mr. Moreno's risk level assignment.[73] Mr. Moreno attended the meeting and responded to questions posed by members of the committee.[74] At the conclusion of the meeting, the ECRC unanimously voted to assign Mr. Moreno to Risk Level 3.[75]

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[62] Minn. Stat. § 243.166, subd. 6(a) (2016).
[63] *Id.*, subd 3 (2016).
[64] *Id*.
[65] Ex. 1 at 5-13.
[66] *Id*.
[67] *Id*. at 14.
[68] *See id.,* at 7; Department of Corrections Policy No. 205.220, *supra*.
[69] Ex. 1 at 12-13.
[70] *Id.* at 13.
[71] *Id.* at 12.
[72] *Id.* at 13.
[73] *Id*. at 2.
[74] *Id.* at 3; Ex. 5.
[75] Ex. 1 at 3.

On April 3, 2018, Mr. Moreno appealed the ECRC's risk level determination.[76]

On April 20, 2018, the ECRC filed a Notice and Order for Review of Risk Level Assignment with the Office of Administrative Hearings.

The ECRC seeks summary disposition in this case claiming Mr. Moreno "has not presented this Court with any factual allegations or claims" that the ECRC made an error when assigning him to Risk Level 3.[77] Specifically, the ECRC argues that the application of Special Concerns to raise the Risk Level assignment was undoubtedly appropriate where the "undisputed history reveals that Moreno's victim pool involves victims of multiple age ranges, an intellectually disabled victim, and victims of uncharged offenses."[78] The ECRC asks that the assignment of Mr. Moreno to Risk Level 3 be affirmed as a matter of law.[79]

In opposing his risk level assignment, Mr. Moreno argues that the ECRC's decision is erroneous because it does not reflect the progress that he has made in sex offender treatment, chemical dependency treatment or following facility rules while in prison.[80] He likewise maintains that the assignment to Risk Level 3 breaks an agreement with investigators that, in return for his testimony about a prison murder, his whereabouts after his release from prison will not be published on the Internet.[81]

IV. Legal Standards for Summary Disposition

Summary disposition is the administrative law equivalent of summary judgment.[82] 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.[83] The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition.

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.[84] 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.[85]

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[76] *Id*. at 1.
[77] ECRC's Motion for Summary Disposition, at 7 (April 30, 2018).
[78] *Id.*
[79] *Id.* at 1.
[80] Ex. 1 at 1.
[81] *Id.*
[82] *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2017).
[83] *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).
[84] *See, e.g., DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[85] *See Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[86] A fact is material if its resolution will affect the outcome of the case.[87] If the moving party meets this initial burden, the non-moving party must show the existence of any genuine issue of any material fact.[88] A genuine issue is not a "sham or frivolous" one and it cannot rest upon mere allegations or denials.[89] Instead, a genuine issue requires identification of specific facts that require a hearing to resolve.[90] Summary disposition is only proper when there are no fact issues which require a hearing to resolve.[91]

V. Analysis

Following a careful review of the ECRC's motion and Mr. Moreno's claims, the Administrative Law Judge concludes that the ECRC's Motion for Summary Disposition should be granted.

The hearing record demonstrates that the ECRC followed the requirements of Minn. Stat. § 244.052 (2016) and DOC Policy 205.220 when making its determination. Importantly, Mr. Moreno does not point to any error in the scoring of the MnSOST-3.1.2.

Instead, Mr. Moreno maintains that ECRC members did not sufficiently credit the progress that he has made in sex offender treatment, chemical dependency treatment and following facility rules while in prison.[92] Accordingly, because no procedural error has been alleged, the key question is whether a reasonable ECRC member could have reached the decision to assign Mr. Moreno to Risk Level 3 from the record in this case. An agency's decision is arbitrary or capricious if it:

> (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency's expertise.[93]

A reasonable ECRC member could conclude that because Mr. Moreno was terminated from sex offender treatment for misconduct, and he continued to abuse alcohol after successive rounds of chemical dependency treatment, that completion of treatment coursework has not resulted in significant changes in Mr. Moreno's behavior. Special Concern Number 2 applies when there are "two or more unsuccessful [chemical

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[86] *See Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[87] *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)).
[88] *See Thiele,* 425 N.W.2d at 583.
[89] *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)).
[90] *See* Minn. R. Civ. P. 56.05.
[91] *See Sauter*, 70 N.W.2d at 353.
[92] Ex. 1 at 1.
[93] *See Markwardt v. State,* 254 N.W.2d 371, 374 (Minn. 1977); *Citizen's Advocating Responsible Dev. v. Kandiyohi County Bd.*, 713 N.W.2d 817, 832 (Minn. 2006).

dependency] treatment interventions because the offender . . . [has a] history of relapse following treatment completion."[94] This concern applies with particular force when "the use of intoxicants is part of the offender's sexual assault behavior pattern."[95]

Moreover, because Mr. Moreno engaged in a predatory misconduct when he was in the community, some of this behavior occurred after chemical dependency treatment, and involved a wide age range of potential victims, a reasonable ECRC member could conclude that the nine factors of the MnSOST-3.1.2 alone do not adequately describe Mr. Moreno's risk of re-offense.[96]

The ECRC's unwillingness to assign Mr. Moreno to a lower risk level did not follow from reasoning that was unlawful, incomplete, unsupported or implausible.

With respect to Mr. Moreno's claim that investigators pledged to keep details of his whereabouts off of the Internet, a few points are worth noting. First, the requirements on posting details about offenders who are assigned to Risk Level 3 are subject to the public safety judgment of local law enforcement. The Department of Corrections only posts data about an offender to the Internet after materials about the offender is forwarded to it by the local law enforcement agency.[97] While, undoubtedly, the Department has a lot of data about Minnesota offenders in its files, this back-and-forth permits local police departments to tailor disclosures to particular situations. The statute gives discretion to local police departments to limit the range of information that is disclosed if "the law enforcement agency determines that public safety would be compromised by the disclosure. . . ."[98]

Accordingly, Mr. Moreno may have a compelling public safety reason not to have his street and community disclosed on the Internet, but that is a matter for local police to decide, not the ECRC. As the statute makes clear, the assignment to a particular risk level, and the range of information that is later disclosed to the public about an offender, are two different decisions, made by two different sets of government officials.

It was not an error for the ECRC to confine itself to the one decision that it had the authority to make.[99]

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[94] Department of Corrections Policy No. 205.220, *supra*.
[95] *Id*.
[96] *See In re Risk Level Determination of S.S.*, 726 N.W.2d 121, 126 (Minn. Ct. App. 2007) ("The psychologist testified that MnSOST–R does not capture the nature and quality of the events it measures, and the special concerns and statutory factors therefore allow the committee to consider the presence of aggravating or mitigating factors").
[97] Minn. Stat. § 244.052, subd. 4b (2016).
[98] *Id.*, subds. 4(b)(3), 4(g) (2016).
[99] *Compare id.*, subd. 3(a) (the ECRC "shall assess on a case-by-case basis the public risk posed by predatory offenders who are about to be released from confinement") with subd. 6(c) ("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").

VI. Conclusion

Because Mr. Moreno failed to raise a genuine issue of material fact that required an evidentiary hearing to resolve, the ECRC is entitled to Summary Disposition. Mr. Moreno's appeal of his risk level determination is dismissed and his assignment to Risk Level 3 is affirmed.

E. L. L.