OAH 82-1100-35498

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level Determination of Randall E. Miller

**ORDER GRANTING MOTION FOR SUMMARY DISPOSITION**

This matter is pending before Administrative Law Judge Barbara J. Case pursuant to a Notice and Order for Review of Risk Level Assignment filed with the Office of Administrative Hearings on August 27, 2018.

Edwin W. Stockmeyer, Assistant Attorney General, represents the End-of-Confinement Review Committee (ECRC). Randall E. Miller (Petitioner) represents himself without legal counsel.

On September 5, 2018, the ECRC filed a Motion for Summary Disposition. Petitioner was personally served with the motion on September 7, 2018. Petitioner did not file a response to the ECRC's motion and the record closed on September 21, 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**

**IT IS ORDERED THAT:**

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

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

3. Petitioner's assignment of Risk Level 3 is **AFFIRMED**.

Dated: October 18, 2018

BARBARA J. CASE
Administrative Law Judge

## NOTICE

Pursuant to Minn. Stat. § 244.052, subd. 6(c) (2018), 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 (2018).

## 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 individuals and groups, such as schools and daycares, 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

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[1] Minn. Stat. §§ 243.166, subd. 1b, 244.052, subd. 4(a) (2018).
[2] Minn. Stat. §§ 243.166, subd. 1b, 244.052, subd. 4(a).
[3] Minn. Stat. § 244.052, subd. 4(b) (2018).
[4] *Id.*
[5] *Id.*, subd. 4(b)(1).
[6] *Id.*, subd. 4(b)(2).
[7] *Id.*, subd. 4(b)(3).
[8] *Id.*, subd. 3 (2018).

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 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

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[9] *Id.*
[10] *Id.*, subd. 3(g).
[11] *Id.*
[12] *Id.*, subd. 2.
[13] Minnesota Department of Corrections Policy No. 205.220 (Apr. 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).
[16] *Id.*, subd. 6(d).

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 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

Petitioner is a 28-year-old male with a criminal history that includes several juvenile crimes, and adult crimes of possession of a weapon on school property, assault, and third-degree criminal sexual conduct.[22]

In 2011, Petitioner was charged with criminal sexual conduct in the first and second degrees for sexually assaulting his six-year-old niece multiple times.[23] Petitioner pleaded guilty to third-degree criminal sexual conduct on January 6, 2012, and was sentenced to 62 months in prison.[24] Petitioner was incarcerated on March 14, 2012, and released on December 2, 2015.[25] Petitioner's offense required him to register under the Act, and he was assigned a risk level designation of 2.[26]

Petitioner participated in sex offender treatment program, beginning in October of 2012.[27] He was terminated from the program on January 7, 2013, for lack of progress and rule-breaking behaviors.[28] During his initial incarceration, from July of 2012 to December of 2014, Petitioner received multiple notices of violation for abusive and harassing behavior, disorderly conduct, threatening others, and sexual inappropriate behavior, including exposing himself, masturbating, and being verbally inappropriate. Most of this behavior was directed at female staff.[29, 30]

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[17] *Id.*, subd. 6(c).
[18] Minn. Stat. §§ 14.63, 244.052, subd. 6(c).
[19] Minn. Stat. § 243.166, subd. 6(a) (2018).
[20] *Id.*, subd 3.
[21] *Id.*
[22] Ex. 1 at 5-6 (ECRC risk assessment recommendation, July 16, 2018).
[23] Ex. 1 at 402-404 (Mille Lacs County criminal complaint).
[24] Ex. 1 at 397(Sentencing Worksheet).
[25] Ex. 1 at 204 (ECRC risk assessment report, Sept. 10, 2015).
[26] Ex. 1 at 205-206 (ECRC risk assessment report, Sept. 10, 2015).
[27] Ex. 1 at 339 (DOC Discharge Summary, Jan. 22, 2013).
[28] *Id.*; Ex. 1 at 208 (ECRC risk assessment recommendation, Sept. 1, 2015).
[29] Ex. 1 at 256-374 (Discipline action forms and Notices of violations, multiple dates).
[30] Ex. 1 at 210-212 (Department Mental Health Unit discharge summary, Aug. 20, 2015).

Petitioner was admitted to the mental health unit of the Oak Park Heights correctional facility on December 11, 2014. On February 19, 2015, he was civilly committed as mentally ill with an accompanying order for medication compliance.[31] He demonstrated improvement in his behavior after being on neuroleptic medications.[32] Petitioner was discharged to a supportive living services program on August 24, 2015.[33]

Upon Petitioner's 2015 release, Jeff Olson, a licensed psychologist with the Department of Corrections (DOC), prepared a risk recommendation report to the ECRC. At that time, Petitioner's Minnesota Sex Offender Screening Tool (MnSOST)-3.1.2 score placed him in the presumptive level 2 range. Mr. Olson noted that Petitioner had a pattern of reoffending and of sexual misconduct while incarcerated, such that special concern 13 was applicable. However, Mr. Olson did not apply the special concern at that time, opining that Petitioner's "behaviors in prison appear to be symptomatic of his non-medicated mental illness."[34] Mr. Olson recommended the presumptive risk level 2 but noted that if Petitioner "returns to prison for continued sexual impulsivity his risk level should be reviewed."[35]

Following his release from incarceration in December of 2015, Petitioner resided at a group home, At Home Living Facility (AHL).[36] He was arrested for disorderly conduct on September 27, 2016, and admitted violating the conditions of his release by, among other things, "harassing staff" at AHL and "acting out aggressively toward them."[37] He was allowed to return to AHL after a restructure of his release.[38]

Petitioner underwent a second restructure in July of 2017. As part of that process, Petitioner admitted violating two special conditions of his release.[39] Petitioner admitted to using and accessing the internet and to possessing a laptop and two cell phones, a pornographic DVD, and sexually explicit pictures.[40] Petitioner later admitted that he viewed pornography during June 2017, including child pornography.[41]

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[31] Ex. 1 at 208 (ECRC risk assessment recommendation, Sept. 1, 2015); Ex. 1 at 211 (DOC Discharge Summary, Aug. 20, 2015).
[32] Ex. 1 at 211 (DOC Discharge Summary Aug. 20, 2015).
[33] *Id.*
[34] Ex. 1 at 209 (ECRC risk assessment recommendation, Sept. 1, 2015).
[35] *Id.*
[36] *Id.*
[37] Ex. 1 at 194 (DOC Restructure Report, Sept. 28, 2016).
[38] *Id.*
[39] Ex. 1 at 91 (DOC Second Restructure Report, July 10, 2017).
[40] *Id.*
[41] Ex. 1 at 86-87 (Sexual History Forensic Polygraph Examination report, Aug. 18, 2017); Ex 1 at 90 (Questionnaire, Aug. 18, 2017).

AHL suspended services for Petitioner on March 12, 2018, because of Petitioner's threatening behaviors directed at staff.[42] AHL alleged that Petitioner followed staff home, waited outside at shift changes to encounter female staff, forced hugs on female staff, and exhibited grooming behavior towards female staff.[43] AHL further alleged that it reassigned female staff from Petitioner's cottage to another cottage after female staff became uncomfortable in Petitioner's presence.[44] Petitioner's time in the community at AHL was described by his probation officer as "poor at best."[45]

Petitioner's suspension from AHL and the other violations of the conditions of release led to the revocation of his supervised release.[46] At the violation hearing, Petitioner admitted that he violated the conditions of his release by possessing sexually explicit materials.[47] Petitioner also admitted violating another condition of his release by having contact with KMP, a female staff member with whom he had been directed to have no contact.[48]

Petitioner was re-incarcerated on March 21, 2018.[49] During this period of incarceration, Petitioner admitted to four violations of the Offender Discipline Regulations that were sexual or abusive and harassing.[50] He sent an inappropriate message of a sexual nature to one of the female staff.[51] Petitioner sent a letter to staff at his treatment facility that was described as "threatening and sexual."[52] He messaged another staff member that he wanted to discuss his sexual fantasies with her.[53] During a meeting with his psychologist, Petitioner became upset, loud, and profane, referring to a therapist as "[t]hat dumb fucking bitch."[54] Petitioner's anticipated release date is November 19, 2018.[55]

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[42] Ex. 1 at 40 (AHL HealthCare Group, Inc. Service Suspension Letter, Mar. 12, 2018); Ex. 1 at 48 (Uniform Case Report, Mar. 11, 2018).
[43] Ex. 1 at 40 (AHL HealthCare Group, Inc. Service Suspension Letter, Mar. 12, 2018); Ex. 1 at 46-48 (Uniform Case Report, Mar. 11, 2018).
[44] Ex. 1 at 46 (Uniform Case Report, Mar. 11, 2018).
[45] Ex. 1 at 48 (Uniform Case Report, Mar. 11, 2018).
[46] Ex. 1 at 33-36 (DOC Hearings and Release Unit Revocation Hearing Report, Mar. 19, 2018).
[47] *Id.*
[48] *Id.*
[49] Ex. 1 at 7 (ECRC risk assessment recommendation, July 16, 2018).
[50] Ex. 1 at 23, 26, 29 (Notices of Violation, May 4, 2018) and 11 (Notice of Violation, June 5, 2018).
[51] Ex. 1 at 29 (Notice of Violation, May 4, 2018).
[52] Ex. 1 at 25-26 (Notice of Violation, May 4, 2018).
[53] Ex. 1 at 22-23 (Notice of Violation, May 4, 2018).
[54] Ex. 1 at 10-11 (Notice of Violation, June 5, 2018).
[55] Ex. 1 at 5 (ECRC risk assessment recommendation, July 16, 2018).

## III. Procedural History

In preparation for Petitioner's release from prison, Mr. Olson prepared a second risk assessment recommendation for Petitioner.[56] The memorandum was provided to the ECRC at Minnesota Correctional Facility-Rush City.[57]

On March 22, 2018, as part of his risk assessment recommendation, Mr. Olson scored the MnSOST-3.1.2 for Petitioner. On the MnSOST-3.1.2, Petitioner scored a Predicted Probability of Sexual Recidivism rate of 3.58% (95% Confidence Interval: 2.38% - 6.04%) and a Percentile Rank of 61.40%, which places Petitioner in the presumptive Risk Level 2 category.[58]

Based upon Petitioner's score on the risk assessment tool, the statutory risk factors, and application of three special concerns, Mr. Olson recommended assigning Risk Level 3 to Petitioner.[59] Mr. Olson noted that Petitioner's "inability to control his sexual urges is worrisome."[60] Mr. Olson also noted the presence of special concerns, specifically:

> Special Concern 3: History of disciplinary reports involving a significant pattern of escalating seriousness and/or sexual or assaultive behavior (Mr. Miller has had numerous sex-related disciplines during his incarcerations); Special Concern 11: Deviant orientation and/or sexual preoccupation or compulsivity (Mr. Miller appears to be sexually preoccupied and has expressed difficulty controlling his related urges); Special Concern 13: Offender states that he will reoffend or has displayed a pattern of sexual misconduct while incarcerated or in similarly structured settings (Mr. Miller has had numerous sex-related disciplines during his incarcerations and was allegedly sexually inappropriate in a structured foster home).[61]

Mr. Olson examined Petitioner's history and found his most recent transgressive behavior, which included towards female foster home staff, especially concerning. Mr. Olson also applied three special circumstances and recommend Petitioner be assigned a Risk Level 3.[62]

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[56] Ex. 1 at 5-8 (ECRC risk assessment recommendation, July 16, 2018).
[57] Ex. 1 at 5 (ECRC risk assessment recommendation, July 16, 2018).
[58] Ex. 1 at 5 (ECRC risk assessment recommendation, July 16, 2018) and 30 (MnSOST-3.1.2, Mar. 22, 2018).
[59] Ex. 1 at 5-8 (ECRC risk assessment recommendation, July 16, 2018).
[60] Ex. 1 at 8 (ECRC risk assessment recommendation, July 16, 2018).
[61] Ex. 1 at 8. (ECRC risk assessment recommendation, July 16, 2018)
[62] *Id.*

The ECRC met on August 2, 2018. Petitioner attended the hearing and offered information and argument to the committee before it voted.[63] Petitioner disputed the behaviors alleged at AHL. Specifically, Petitioner denied that hugs he gave to staff were forced.[64] Petitioner also denied following staff to their homes.[65] Petitioner stated that he is trying to change.[66] He also argued that he does not have more sexual urges than others.[67] At the conclusion of the meeting, the ECRC found that special concerns were present, and the ECRC assigned Petitioner a Risk Level 3 by a vote of 4 to 1, with one member voting to assign a Risk Level 2.[68]

On August 10, 2018, Petitioner requested an appeal of the ECRC's risk level determination.[69] On August 27, 2018, the ECRC filed a Notice and Order for Review of Risk Level Assignment with the Office of Administrative Hearings. On September 5, 2018, the ECRC filed a Motion for Summary Disposition. Petitioner was personally served with the motion on September 7, 2018. Petitioner did not file a response and the record closed on September 21, 2018.

## IV. Motion for Summary Disposition

Summary disposition is the administrative law equivalent of summary judgment.[70] 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.[71] 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.[72] 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.[73]

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[63] Ex. 1 at 2-4b (ECRC risk assessment report, Aug. 2, 2018).
[64] Ex. 1 at 3 (ECRC risk assessment report, Aug. 2, 2018).
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] Ex. 1 at 4a (ECRC risk assessment report, Aug. 2, 2018).
[69] Ex. 1 at 1 (Notice of Appeal).
[70] *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2017).
[71] *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).
[72] *See, e.g., DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[73] *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.[74] A fact is material if its resolution will affect the outcome of the case.[75] 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.[76] A genuine issue is not a "sham or frivolous" one and it cannot rely on mere allegations or denials.[77] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[78]

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[79] Thus, summary disposition is only proper when no fact issues need to be resolved.[80]

## V. Analysis

Upon a thorough review of the record, 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 ECRC argues that summary disposition should be granted because the Petitioner "does not allege any facts that could establish error by the ECRC."[81] Specifically, the ECRC contends that Petitioner "has not presented this Court with any allegations that would be material to determining whether the ECRC erred in assigning him a risk level three."[82] The ECRC maintains that it was appropriate to assign a Risk Level 3 to Petitioner despite a MnSOST-3.1.2 score placing him in the presumptive Risk Level 2 range, because of the applicability of special concerns three, eleven, and thirteen.[83]

Petitioner did not respond to the motion for summary disposition. In his Notice of Appeal, Petitioner identified the following as the facts supporting his claim:

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[74] *See Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[75] *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)).
[76] *See Thiele,* 425 N.W.2d at 583.
[77] *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)).
[78] *See* Minn. R. Civ. P. 56.05.
[79] *See Sauter*, 70 N.W.2d at 353.
[80] *See id*.
[81] ECRC Memorandum in Support of Summary Disposition (ECRC Mem.) at 1 (Sept. 5, 2018).
[82] *Id.* at 4.
[83] *Id.*; Ex. 3 (List of 15 Special Concerns); Minnesota Department of Corrections Policy No. 205.220, available at http://www.doc.state.mn.us/DocPolicy2/Document/205.220.htm (last accessed Oct. 17, 2018).

> 1. Kite from case worker and didn't understand words you used. 2. Didn't even listen to me or what I said and being honest to them. 3. Don't care about what people like me feel at all. You guys don't care and don't trust us.[84]

The Administrative Law Judge concludes that the ECRC has met its initial burden of establishing that there are no genuine issues of material fact. Considering Petitioner's appeal claims in the light most favorable to Petitioner, the facts he identifies in his Notice of Appeal do not raise a genuine issue of material fact. The facts admitted by Petitioner during the course of his incarceration and supervised release are sufficient to support the ECRC's application of special concerns three, eleven, and thirteen to assign Risk Level 3 to Petitioner.

The application of special concern three requires that there be a "history of disciplinary reports involving a significant pattern of escalating seriousness and/or sexual or assaultive behavior."[85] These occurrences must be frequent and recent.[86, 87] Frequent is defined as three or more incidents in a year, and recent is considered to be an incident within the past two years.[88]

During the two-year period preceding the ECRC's risk assessment determination, Petitioner admitted to many instances of sexual or assaultive behavior. Petitioner was arrested for disorderly conduct on September 27, 2016, and admitted to harassing staff at AHL and acting out aggressively toward them.[89] Petitioner admitted to using and accessing the internet and possessing a laptop, two cell phones, a pornographic DVD, and sexually explicit pictures in 2017.[90] Petitioner also admitted viewing child pornography during this period of time.[91] Petitioner admitted to probation violations in 2018, notably admitting to hugging a female with whom he was ordered to have no contact, and again possessing sexually explicit materials.[92] During his incarceration in 2018, Petitioner admitted four violations of the Offender Discipline

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[84] Ex. 1 at 1 (Notice of Appeal).
[85] Ex. 3 (List of 15 Special Concerns).
[86] *Id.*
[87] The Administrative Law Judge notes that in applying this factor to Petitioner, the ECRC appears to have considered the disciplinary reports from Petitioner's incarceration between 2012 and 2014, which is well outside of the policy that the reports have occurred within the last two years. Nevertheless, even without considering this information, the application of special concern three is appropriate because of the frequency of Petitioner's sexual and assaultive behavior between 2016 and 2018.
[88] Ex. 3 (List of 15 Special Concerns).
[89] Ex. 1 at 91 (DOC Second Restructure Report, July 10, 2017).
[90] *Id.*
[91] Ex. 1 at 86 (Sexual History Forensic Polygraph Examination report, Aug. 18, 2017) and 90 (Questionnaire, Aug. 18, 2017).
[92] Ex. 1 at 37-39 (Notice of Adult Violation Hearing and Right to Hearing, Mar. 12, 2018).

Regulations that were sexual or abusive and harassing.[93] Even taking as true Petitioner's arguments to the ECRC that the hugs he gave were not "forced" and that the kite sent to his therapist to discuss his sexual fantasies was offered for the purpose of getting help,[94] there are still more than enough undisputed facts to support the application of special concern three.

Special concern eleven may be applied if the offender exhibits "deviant orientation and/or sexual preoccupation or compulsivity."[95] Petitioner admittedly obtained access to the internet and a laptop, and viewed child pornography and other prohibited materials in 2017, despite the consequences attached to that conduct.[96] Petitioner's journal entries reveal preoccupation with sex and the tendency to sexualize the women with whom he has contact.[97] These undisputed facts are sufficient to establish the applicability of special concern 11 to Petitioner's risk determination.

Special concern thirteen is applicable where an offender "has displayed a pattern of sexual misconduct while incarcerated or in similarly structured settings."[98] Since first being incarcerated in 2012, Petitioner has admitted to numerous violations of prison rules, many of which were sexual in nature.[99] Petitioner exposed himself to and masturbated in front of a corrections officer.[100] In addition, all of the conduct of concern that supports the application of special concern three was committed while incarcerated or while on supervised release at AHL and is equally applicable to special concern thirteen. The undisputed facts establish a pattern of sexual misconduct while incarcerated that is adequate to apply special concern thirteen to Petitioner's risk level.

When assigning a risk level, the Act requires the ECRC to consider (1) the offender's score on a risk assessment tool, and (2) the six statutory risk factors. In this case, the evidence shows the ECRC considered both elements in assigning Petitioner a Risk Level 3. According to the MnSOST-3.1.2, Petitioner's predicted probability of sexual recidivism is 3.58 percent, which places Petitioner in the presumptive Risk Level 2 category. However, during its meeting, the ECRC decided three special concerns warranted raising Petitioner's risk level assignment. Minnesota courts have approved an upward departure from the presumptive risk level when special concerns

[93] Ex. 1 at 10-11 (Notice of Violation, June 5, 2018), 24 (Discipline Action Form, May 4, 2018), 27 (Discipline Action Form, May 4, 2018), 29 (Notice of Violation, May 4, 2018).
[94] Ex. 1 at 4 (ECRC risk assessment report, Aug. 2, 2018).
[95] Ex. 3 (List of 15 Special Concerns).
[96] Ex. 1 at 37-39 (Notice of Adult Violation Hearing and Right to Hearing, Mar. 12, 2018) and 90 (Questionnaire, Aug. 18, 2017).
[97] Ex. 1 at 94-161 (Petitioner's Handwritten Self-Reports, dated June 15, 2017 to Mar. 1, 2018).
[98] Minn. DOC Policy No. 205.220.
[99] Ex. 1.
[100] Ex. 1 at 306 (Notice of Violation, Nov. 19, 2013).

exist.[101] An assignment of Risk Level 3 to Petitioner is necessary to protect the public based upon the facts Petitioner has admitted and the applicability of special concerns three, eleven and thirteen.

## VI. Conclusion

Because there are no genuine issues of material fact in dispute, the ECRC's Motion for Summary Disposition is granted. Petitioner's appeal of his risk level determination is dismissed and assignment of Risk Level 3 is affirmed.

The Administrative Law Judge reminds Petitioner that he may request the ECRC reassess his risk level assignment after three years have elapsed since the ECRC's meeting on August 2, 2018.[102] If the request is denied, the Petitioner may renew the request once every two years following subsequent denials.[103]

**B. J .C.**

[101] *In the Matter of the Risk Level Determination of R.B.P.*, 640 N.W.2d 351, 354 (Minn. Ct. App. 2002).
[102] Minn. Stat. § 244.052, subd. 3(i).
[103] *Id.*