OAH 80-1100-35523

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level Determination of Jerome S. Coult	**ORDER GRANTING MOTION FOR SUMMARY DISPOSITION**

This matter is pending before Administrative Law Judge LauraSue Schlatter pursuant to a Notice and Order for Review of Risk Level Assignment filed with the Office of Administrative Hearings on September 7, 2018.

Peter Magnuson, Assistant Attorney General, represents the End-of-Confinement Review Committee (ECRC). Jerome S. Coult (Petitioner) represents himself without legal counsel.

On September 17, 2018, the ECRC filed a Motion for Summary Disposition. Petitioner was personally served with the motion on September 18, 2018. Petitioner failed to file a response. The record closed on October 2, 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 30, 2018

LAURASUE SCHLATTER
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 responsible for assessing the public risk posed by each predatory offender upon release and determining the appropriate risk level assignment.[9]

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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] Minn. Stat. § 244.052, subd. 3 (2018).
[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

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[10] Minn. Stat. § 244.052, subd. 3(g).
[11] *Id.*
[12] *Id.*, subd. 2 (2018).
[13] Minnesota Department of Corrections Policy No. 205.220 (April 16, 2013); *see also In re 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] Minn. Stat. § 244.052, subd. 6(a) (2018).
[16] *Id.*, subd. 6(d) (2018).
[17] *Id.*, subd. 6(c) (2018).
[18] Minn. Stat. §§ 14.63, 244.052, subd. 6(c).
[19] Minn. Stat. § 243.166, subd. 6(a) (2018).
[20] Minn. Stat. § 243.166, subd 3 (2018).

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

On September 27, 1997, at approximately 1:45 a.m., Blue Earth County Sheriff's Deputies responded to a local emergency room for a sexual assault report.[22] A.S., who was then 13 years old, indicated that she had been at Petitioner's home earlier that night.[23] Petitioner had pulled her by the hand to his bedroom.[24] A.S. stated that she had pulled back against him "enough so that he knew she didn't want to go back to his bedroom."[25] Petitioner then pulled harder.[26] They laid down on the bed, at which point A.S. started to say, "No."[27] He asked her, "What?" and she responded, "Never mind," because she "thought if she didn't do it he would force her like she knew he had done in the past to another girl."[28] A.S. stated that Petitioner "knew she didn't want to have intercourse, but he did it anyway."[29] She further indicated that Petitioner knew she was only 13 years old.[30] A.S.'s mother corroborated this fact, stating that she had told Petitioner to stay away from her daughters and informed him that A.S. was only 13 years old.[31] Petitioner was 23 years old at that time.[32]

Petitioner admitted to having sexual intercourse with A.S., but stated that it was consensual.[33] Petitioner indicated that he believed A.S. was "between 16 and 17 years of age."[34] Petitioner was charged with two counts of third-degree criminal sexual conduct.[35] Petitioner pleaded guilty to one count of third-degree criminal sexual conduct, and the other count was dismissed.[36] During the presentence investigation, Petitioner denied having sex with A.S. and instead claimed that he had rejected A.S.'s sexual advances, and she reported the assault to "set him up."[37] Petitioner received a stay of imposition.[38] Under Minnesota law, third-degree criminal sexual conduct is a predatory offense requiring registration.[39]

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[21] *Id*.
[22] Exhibit (Ex.) 1 at 225 (criminal complaint).
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at 226.
[34] *Id.*
[35] *Id.*
[36] Ex. 1 at 218 (presentence investigation report).
[37] *Id.*
[38] *See* Ex. 1 at 179 (presentence investigation report).
[39] Minn. Stat. § 243.166, subd. 1b (2018).

On August 13, 2008, 14-year-old M.R. informed law enforcement officials that Petitioner had touched her inappropriately.[40] M.R. stated that she considered Petitioner her stepfather, and he had lived with her for at least six years.[41] M.R. told officers that Petitioner had entered her bedroom at approximately 9 p.m. the night before, at which point he sat down on her bed.[42] M.R. was wearing a tank top and shorts and lying down on the bed.[43] Petitioner started to rub M.R.'s lower back and leg.[44] Petitioner then left the room and returned several minutes later.[45] At that point, Petitioner laid down on the bed with M.R.[46] Petitioner again began to stroke M.R.'s back.[47] M.R. tried to move away from Petitioner and his hand moved from her back to her butt to her shoulder and then to her breast area.[48] M.R. pushed his hand away, stood up, and tried to leave the room.[49] As she walked around the bed, Petitioner stuck his foot out, and his foot touched M.R. in the groin area.[50] M.R. continued around the bed, and Petitioner reached out with his hand and touched M.R.'s vaginal area over her shorts.[51]

M.R. further alleged that Petitioner had touched her inappropriately on numerous occasions, including touching her breast area while they were wrestling and rubbing his body up against hers in the kitchen.[52] Petitioner admitted to putting his hands down M.R.'s shirt and rubbing her crotch area on the outside of her clothes.[53] Petitioner was charged with three counts of second-degree criminal sexual conduct.[54] Petitioner pleaded guilty to one count of second-degree criminal sexual conduct, and the other two counts were dismissed.[55] Again, during the presentence investigation, Petitioner changed his story, denying that he had sexually touched M.R. and stating that he only pleaded guilty so that he could see his kids again.[56] Petitioner was sentenced to a stayed sentence of 48 months in prison and a 10-year conditional release term.[57]

Petitioner's prison sentence was executed in September 2011.[58] While in prison, Petitioner participated in an initial assessment for sex offender treatment.[59] At that time, Petitioner admitted having sexual intercourse with A.S.[60] He similarly admitted touching

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[40] Ex 1 at 202 (criminal complaint).
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at 203.
[54] *Id.* at 200-01.
[55] Ex. 1 at 179 (presentence investigation).
[56] *Id.* at 181.
[57] *See* Ex. 1 at 177 (sentencing worksheet).
[58] *See* Ex. 1 at 176 (Admission Mental Health Screening).
[59] Ex. 1 at 151-66 (Initial Assessment).
[60] *Id.* at 152.

M.R. inappropriately.[61] Petitioner also admitted sexually victimizing five other teen females by touching them, including penetration, in inappropriate ways.[62] Petitioner reported that he completed a sex offender treatment program in 1999.[63] He further indicated that he was in the CORE sex offender treatment program for 18 months in 2009 and 2010, but was terminated after he began dating without permission, and was then incarcerated.[64]

Petitioner was released from prison in 2013.[65] Prior to Petitioner's release, Jeff Olson prepared a Risk Assessment Recommendation.[66] Petitioner's Minnesota Sex Offender Screening Tool (MnSOST)-3.1.2 score placed him presumptively in Risk Level 1, but Mr. Olson applied Special Concern #9, wherein the nature of the offender's victim pool suggests a need for broader notification of the public.[67] Mr. Olson noted that Petitioner had "two sex offense convictions separated by eleven years against juvenile female acquaintances, and has acknowledged similar uncharged victims," and therefore recommended assignment to Risk Level 2.[68] The ECRC unanimously agreed with Mr. Olson's recommendation.[69]

Petitioner was successfully discharged from the sex offender treatment program upon his release from prison.[70] Petitioner's treatment discharge summary recommended that Petitioner "[p]articipate in follow-up with sex offender aftercare treatment."[71] On September 5, 2014, Petitioner's supervised release was restructured after Petitioner was terminated from sex offender treatment for an overdue treatment bill and three unexcused absences.[72]

On February 24, 2015, Petitioner was charged with knowingly violating the predatory offender registration requirement after failing to update his registered address.[73] Shortly thereafter, Petitioner was charged with theft.[74] On July 24, 2015, Petitioner was again charged with knowingly violating the predatory offender registration requirement after failing to update his registered address.[75] On August 11, 2015, Petitioner's supervised release was revoked for 120 days.[76] Petitioner was most recently released from prison in April 2016.[77]

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[61] *Id.*
[62] *Id.*
[63] *Id.* at 158.
[64] *Id.*
[65] *See* Ex. 1 at 128 (Risk Assessment Recommendation).
[66] *Id.*
[67] *Id.* at 129-30.
[68] *Id.* at 130.
[69] Ex. 1 at 126 (Risk Assessment Report).
[70] Ex. 1 at 111-16 (Treatment Discharge Summary).
[71] *Id.* at 116.
[72] Ex. 1 at 110 (Restructure Report).
[73] Ex. 1 at 99-100 (criminal complaint).
[74] *See* Ex. 1 at 89 (Violation Report).
[75] Ex. 1 at 78-79 (criminal complaint).
[76] Ex. 1 at 62 (hearing officer findings and recommendation).
[77] *See* Ex. 1 at 37 (Notice of Violation).

On March 23, 2018, Petitioner's supervised release was restructured based on allegations that Petitioner had failed to cooperate with sex offender treatment, viewed pornography on his smart phone, lived in a home with access to minors, and had unauthorized contact with minors.[78] The restructure report stated: "Offender Coult has struggled with honesty. He has failed 2 polygraphs in the past 2 months. He has recently discussed pornography use, unauthorized contact with minors, and to masturbating to thoughts of his girlfriend's 13 year old niece."[79] Petitioner agreed to move out of the residence that provided him access to the 13-year-old niece and to continue sex offender treatment.[80]

On June 11, 2018, Petitioner was terminated from sex-offender treatment.[81] The notice stated:

> Mr. Coult was found deceptive in three polygraphs over the last six months . . . acknowledging his masturbation to teenage females and general dishonesty with both his probation and treatment staff. He reports having contact with his girlfriend's niece "over 30 times," has given her multiple hugs in the last year, and has masturbated to fantasies of her over "100 times." Mr. Coult also stated that he masturbated to sexual fantasies of two minor females who were children of acquaintances, and added most recently that he watched one of the girls dance while having sexual thoughts. He acknowledged this behavior being a violation of his probation. He has had sex with multiple partners, and often does not disclose . . . these relationships until asked specifically.
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> . . .
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> Mr. Coult is highly sexually preoccupied and requires a high level of treatment and monitoring for both his and community safety. Our outpatient programming is not equipped at this time to meet his individual treatment needs. It is recommended that Mr. Coult participate in residential or inpatient treatment with high levels of monitoring and behavioral programming to address his deviance, sexual preoccupation, and criminal thought process.[82]

Thereafter, on June 25, 2018, Petitioner's release was revoked for 150 days.[83] Petitioner is scheduled for release on November 13, 2018.[84]

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[78] Ex. 1 at 44 (Restructure Report).
[79] *Id.*
[80] *Id.*
[81] Ex. 1 at 43 (letter terminating Petitioner from sex offender treatment).
[82] *Id.*
[83] Ex. 1 at 30 (hearing officer findings and recommendation).
[84] Ex. 1 at 5 (Risk Assessment Report).

III. Procedural History

In preparation for Petitioner's release, Dr. Shelley Leutschaft, a licensed psychologist with the Department of Corrections (DOC), prepared a Risk Assessment Recommendation memorandum for Petitioner.[85] The memorandum, dated August 3, 2018, was provided to the ECRC at Minnesota Correctional Facility Faribault (MCF-Faribault).[86]

As part of the risk assessment, Dr. Leutschaft scored the MnSOST-3.1.2 for Petitioner.[87] According to the risk assessment tool, Petitioner's predicted probability of sexual recidivism is 1.55 percent, which places Petitioner in the presumptive Risk Level 1 category.[88]

Dr. Leutschaft noted the applicability of four special concerns to Petitioner's risk level assignment.[89] First, Dr. Leutschaft applied Special Concern #1, which pertains to two or more unsuccessful sex offender treatment experiences because the offender quit, was terminated, or refused sex offender treatment, and/or reoffended after sex offender treatment.[90] Dr. Leutschaft next applied Special Concern #4, which involves a history of prior supervision failures or pronounced unwillingness to cooperate with release planning and/or prison authorities.[91] Dr. Leutschaft also applied Special Concern #11, i.e., deviant orientation and/or sexual preoccupation or compulsivity, and noted that Petitioner "admitted masturbating to thoughts of his 13-year-old niece over 100 times; admitted he masturbated to sexual fantasies of two minor females (ages 15 or 16) who were children of acquaintances; [and] masturbated to sexual thoughts of one of the children who had danced in front of him."[92] Lastly, Dr. Leutschaft applied Special Concern #14, in which an offender engages in high risk grooming type behavior, or other behavior suggesting increased potential to reoffend, especially during periods of supervision, or after most recent release from prison.[93] Dr. Leutschaft stated that Petitioner has admitted to:

> intentional contact with his 13-year-old niece and acknowledged on several occasions giving the 13-year-old niece hugs and admitted it was for sexual purposes; admitted contact with two minor-aged females ages 15 and 16 who were acquaintances; [and] admitted to an incident where he watched one of the aforementioned minor-aged females dance in front of him, had sexual thoughts while this occurred, and later masturbated to those thoughts.[94]

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[85] Ex. 1 at 8-13 (Risk Assessment Recommendation).
[86] *See id.*
[87] Ex. 1 at 4 (MnSOST-3.1.2 scoring sheet).
[88] *Id.*; Ex. 2 at 4 (MnSOST-3.1.2 coding rules).
[89] Ex. 1 at 12-13 (Risk Assessment Recommendation).
[90] *Id.* at 12.
[91] *Id.*
[92] *Id.* at 12-13.
[93] *Id.* at 13.
[94] *Id.*

Based on Petitioner's score on the risk assessment tool, consideration of the statutory risk factors, and the application of special concerns, Dr. Leutschaft recommended assigning a Risk Level 3 to Petitioner.[95]

The ECRC at MCF-Faribault convened on August 13, 2018, to address Petitioner's risk level recommendation.[96] Petitioner did not attend the meeting, but signed a waiver of non-appearance to document his decision in advance of the meeting.[97] At the conclusion of the meeting, the ECRC unanimously voted to assign Petitioner a Risk Level 3.[98] The ECRC filed a Risk Assessment Report after the meeting.[99]

On August 15, 2018, Petitioner requested an appeal of the ECRC's risk level determination.[100] On September 7, 2018, the ECRC filed a Notice and Order for Review of Risk Level Assignment with the Office of Administrative Hearings. On September 17, 2018, the ECRC filed a Motion for Summary Disposition. Petitioner was personally served with the motion on September 18, 2018. The record closed on October 2, 2018, the due date for Petitioner's response.

IV. Motion for Summary Disposition

Summary disposition is the administrative law equivalent of summary judgment.[101] 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.[102] 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.[103] 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.[104]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[105] A fact is material if its resolution will affect the outcome of

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[95] *Id.* at 12.
[96] Ex. 1 at 5 (Risk Assessment Report).
[97] *Id.* at 6.
[98] *Id.*
[99] *Id.* at 5-7.
[100] Ex. 1 at 1 (Notice of Appeal).
[101] *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2017).
[102] *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).
[103] *See, e.g., DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[104] *See Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[105] *See Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

the case.[106] 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.[107] A genuine issue is not a "sham or frivolous" one and it cannot rely on mere allegations or denials.[108] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[109]

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[110] Thus, summary disposition is only proper when no fact issues need to be resolved.[111]

V. Arguments

The ECRC seeks summary disposition of this case because "Petitioner fails to allege any material error in the ECRC's decision, and the record otherwise demonstrates the ECRC acted within its discretion in assigning a Risk Level 3."[112] In opposing his risk level assignment, Petitioner asserts that he has not reoffended in 10 years, has not received any discipline while in prison, and his risk of recidivism is low.[113]

VI. Analysis

Upon careful 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.

According to the MnSOST-3.1.2, Petitioner's presumptive risk level is 1.[114] However, Dr. Leutschaft noted as follows:

> Mr. Coult has participated in sexual offender treatment, completed sexual offender treatment, has sexually reoffended following participation in sexual offender treatment, and has reinforced sexually deviant thoughts and fantasies while participating in treatment. He has been terminated from sexual offender treatment at least four times, has intentionally withheld offense cycle behavior from treatment providers and his agent, and intentionally engaged in contact with minor-aged females to include his admission of hugging his [girlfriend's] 13-year-old niece approximately 30 times over for sexual purposes (i.e., frotteurism).

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[106] *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)).
[107] *See Thiele,* 425 N.W.2d at 583.
[108] *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)).
[109] *See* Minn. R. Civ. P. 56.05.
[110] *See Sauter*, 70 N.W.2d at 353.
[111] *See id*.
[112] Mem. in Support of the ECRC's Motion for Summary Disposition of Risk Level Administrative Review (ECRC Mem.) at 11 (Sept. 17, 2018).
[113] Ex. 1 at 1 (Notice of Appeal).
[114] Ex. 1 at 4 (MnSOST-3.1.2 scoring sheet); Ex. 2 at 4 (MnSOST-3.1.2 coding rules).

> Records indicate Mr. Coult reported five additional victims for which he was never charged. Mr. Coult's agent indicated his pattern is to withhold information from his treatment providers and his agent. The Adult Services letter dated June 11, 2018, indicates Mr. Coult is highly sexually preoccupied and requires a high level of treatment and monitoring for his and community safety. His violation behavior is gravely concerning given Mr. Coult's history of sexual offending, adjustment to supervision, seeming lack of honesty with disclosures while participating in sexual offender treatment, engaging in high-risk behaviors while on supervision and while participating in sexual offender treatment, unauthorized contact with minor-aged females, and reinforcing deviant sexual fantasies by masturbating-per his own admission-over 100 times to sexual thoughts about his [girlfriend's] 13-year-old niece, and masturbation to sexual thoughts/fantasies about a 15/16 year old female acquaintance.[115]

The ECRC agreed with Dr. Leutschaft's recommendation and assigned Petitioner a Risk Level 3.[116]

Petitioner objects to assignment of Risk Level 3 for several reasons. First, Petitioner asserts that he has not reoffended in 10 years. This fact is undisputed, at least as it pertains to convictions, and a hearing would not develop it further. Moreover, Petitioner has admitted that he sexually offended against five additional victims, crimes for which he was never charged. And Petitioner, again admittedly, has recently engaged in concerning behavior, including masturbating to thoughts of underage females hundreds of times. The mere undisputed fact that Petitioner has not been convicted of a sexual offense in over 10 years does not provide a basis by which he can avoid summary disposition.

Petitioner next argues that he has not been disciplined while in prison. Dr. Leutschaft noted, in her recommendation, that Petitioner "has no disciplinary reports during his current incarceration that resulted in a segregation sentence."[117] Therefore, this fact is similarly undisputed and would not be further developed at a hearing.

Last, Petitioner argues that his risk of "recidivism is low." It is undisputed that Petitioner is presumptively assigned to Risk Level 1 per Petitioner's MnSOST-3.1.2 score. However, the ECRC has the discretion to increase a risk level by applying special concerns.[118] Consistent with Dr. Leutschaft's recommendation, the ECRC applied four special concerns here. Petitioner does not challenge the special concerns and their application is amply supported by the record. First, the record clearly establishes that

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[115] Ex. 1 at 12 (Risk Assessment Recommendation).
[116] Ex. 1 at 6 (Risk Assessment Report).
[117] Ex. 1 at 11 (Risk Assessment Recommendation).
[118] Minnesota Department of Corrections Policy No. 205.220 (April 16, 2013); *see also R.B.P.*, 640 N.W.2d at 354.

Petitioner has had two or more unsuccessful treatment experiences.[119] In addition, Petitioner completed sex offender treatment and reoffended afterward.[120] Second, Petitioner has had several supervision failures. He is currently in prison following the revocation of a supervised release.[121] Third, Petitioner has demonstrated sexual preoccupation, and this special concern similarly applies to an "offender who has disclosed a history (especially recent) of deviant sexual fantasies or arousal reinforced by masturbation."[122] A recent letter dismissing him from sex-offender treatment stated:

> [Petitioner] reports having contact with his girlfriend's [13-year-old] niece "over 30 times," has given her multiple hugs in the last year, and has masturbated to fantasies of her over "100 times." [Petitioner] also stated that he masturbated to sexual fantasies of two minor females who were children of acquaintances, and added most recently that he watched one of the girls dance while having sexual thoughts.[123]

Finally, Petitioner has engaged in high risk, grooming behavior or other behavior suggesting increased potential to reoffend, especially during periods of supervision. Most notable here, Petitioner admitted to giving his girlfriend's 13-year-old niece multiple hugs, as well as watching a young girl dance while he had sexual thoughts about her.[124] These behaviors occurred during a period of supervised release – raising concerns that, even while under supervision, Petitioner has not succeeded in avoiding dangerous, triggering behaviors. Petitioner not only does not challenge the facts underlying the aforementioned special concerns, but rather has admitted to them.

Petitioner's conduct underlying all of the special concerns cited by the ECRC has escalated in the years since 2013 when the first ECRC assigned Petitioner as Risk Level 2. This ECRC did not err when it concluded that Risk Level 3 notification is appropriate, despite Petitioner's lower MnSOST-3.1.2 score.

In his Notice of Appeal, Petitioner pleaded "for another chance to be a part of the community[;] to give back to it rather [than] take of it."[125] He stated that he wants to be a productive member of society, and it will be easier to accomplish that goal if he is assigned a level 1 or 2, rather than a 3.[126] The Administrative Law Judge commends Petitioner's desire to better himself and avoid the mistakes he has made in the past. But the effect of

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[119] *See* Ex. 1 at 110 (Restructure Report); Ex. 1 at 158 (Initial Assessment); Ex. 1 at 43 (letter terminating Petitioner from sex-offender treatment). Dr. Leutschaft stated Petitioner was terminated from sex offender treatment "at least four" times. *Id.* at 12. It is not clear from the record how Dr. Leutschaft is counting the terminations from sex offender treatment. Nonetheless, the record is clear that Petitioner was terminated from sex offender treatment at least three times, which exceeds the two failures required to apply Special Concern #1.

[120] *See* Ex. 1 at 158 (Initial Assessment); Ex 1 at 202 (criminal complaint).

[121] *See* Ex. 1 at 62 (hearing officer findings and recommendation); Ex. 1 at 30 (hearing officer findings and recommendation).

[122] *See* Ex. 1 at 2 (Risk Assessment Report).

[123] Ex. 1 at 43 (letter terminating Petitioner from sex-offender treatment).

[124] *See id.*

[125] Ex. 1 at 1 (Notice of Appeal).

[126] *Id.*

Petitioner's risk level assignment on his subsequent life conditions is not a relevant factor in the ECRC's risk level assignment process. Nonetheless, the Administrative Law Judge is hopeful that Petitioner will be able to accomplish these important goals and reminds Petitioner that he can ask the ECRC to reassess his risk level in three years.

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 3 is affirmed.

L. S.