OAH 21-1100-35627

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level Determination of Daniel Edwards Tompkins

ORDER DENYING MOTION FOR SUMMARY DISPOSITION

This matter is pending before Administrative Law Judge Kimberly Middendorf pursuant to a Notice and Order for Review of Risk Level Assignment filed with the Office of Administrative Hearings on October 15, 2018.

John D. Gross, Assistant Attorney General, represents the End-of-Confinement Review Committee (ECRC). Daniel Edward Tompkins (Petitioner) represents himself without legal counsel.

On October 16, 2018, the ECRC filed and served a Motion for Summary Disposition. Petitioner filed no response to the ECRC's motion. The record closed on November 2, 2018.

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

ORDER

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

2. This matter shall proceed to an evidentiary hearing on the issue of whether the ECRC's risk level assignment is erroneous.

Dated: November 15, 2018

KIMBERLY MIDDENDORF
Administrative Law Judge

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).[1] 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."[2] 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."[3]

The scope of community notification required by the Act is determined by assignment of one of three different risk levels defined by statute.[4] Each risk level is associated with a different degree of community notification.[5] 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.[6] Risk Level 2 permits additional notice to groups such as schools, child care facilities and individuals likely to be victimized by the offender.[7] Risk Level 3 permits notice to be given to any community member of the community whom the offender is likely to encounter unless law enforcement determines public safety might be compromised by the disclosure or more limited disclosure is necessary to protect the identity of the offender's victim(s).[8]

Every predatory offender confined in a Minnesota state correctional or treatment facility must be assessed by the ECRC at the facility prior to release.[9] The ECRC is responsible for assessing the public risk posed by each predatory offender upon release and determining the appropriate risk level assignment.[10]

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) (2018). 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

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

the community; and (6) whether the offender demonstrates a physical condition that minimizes the risk of re-offense.[11] This list is not exclusive.[12]

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.[13] 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.[14]

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."[15]

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.[16] The administrative review is conducted by an Administrative Law Judge at the Office of Administrative Hearings and is subject to the contested case rules.[17] 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."[18] The decision of the Administrative Law Judge is final and subject to appellate judicial review.[19]

Assignment of a risk level to a predatory offender is applicable for a minimum of 10 years.[20] During that time, the appropriate level of notice must be given every time the predatory offender changes residence.[21] 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.[22]

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[11] *Id.*, subd. 3(g).
[12] *Id.*
[13] *Id.*, subd. 2 (2018).
[14] Minnesota Department of Corrections Policy No. 205.220 (April 16, 2013); *see also In the Matter of the Risk Level Determination of R.B.P.*, 640 N.W.2d 351, 354 (Minn. Ct. App. 2002).
[15] Minn. Stat. § 244.052, subd. 3(f).
[16] *Id.*, subd. 6(a) (2018).
[17] *Id.*, subd. 6(d) (2018). The contested case rules are found at Minn. R. 1400.5010-.8401 (2017).
[18] *Id.*, subd. 6(c) (2018).
[19] Minn. Stat. §§ 14.63, 244.052, subd. 6(c) (2018).
[20] Minn. Stat. § 243.166, subd. 6(a) (2018).
[21] *Id.*, subd 3 (2018).
[22] *Id.*

II. Petitioner's Background

Petitioner was first required to register as a predatory offender because of his conviction for Second-Degree Criminal Sexual Conduct in 1996.[23] In 2014, Petitioner pled guilty to Violating a No Contact Order, Terroristic Threats – Reckless Disregard Risk, and Domestic Assault – Felony.[24] Petitioner is also required to register because he was charged with Kidnapping and False Imprisonment[25] arising out of the same set of circumstances supporting the 2014 convictions.[26]

Petitioner has appeared before the ECRC on three occasions prior to the risk level determination that is the subject of his appeal. Petitioner first appeared before the ECRC on May 20, 1997.[27] The ECRC designated Petitioner a Risk Level 1, commended him "on his effort to return to the sex offender program," and encouraged him to complete chemical dependency programming.[28] Petitioner appeared before the ECRC a second time, on August 19, 1998, and was again assigned Risk Level 1.[29] The ECRC rejected the Department of Corrections' (DOC's) psychologist's recommendation of Risk Level 2, finding that there was no evidence to support allegations that Petitioner sexually assaulted his ex-girlfriend in 1996.[30] At his ECRC hearing in October of 2012, Petitioner was designated a Risk Level 1 for the third time.[31] The ECRC noted at that time that despite a Minnesota Sex Offender Screening Tool (MnSOST-3.1) score that placed him in the 92.1 percentile of sex offenders, a Risk Level 1 designation was most appropriate based upon the circumstances.[32] The ECRC reasoned that Petitioner had one sexual offense conviction for a 1994 offense that did not involve the use of force, had been in the community without evidence of sexual re-offense, and had a limited victim pool.[33]

Petitioner is currently incarcerated based upon his 2014 guilty plea to Domestic Assault - Felony, Terroristic Threats, and four counts of Violation of an Order for Protection.[34] Petitioner's anticipated release date is December 26, 2018.[35]

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[23] Exhibit (Ex.) 1 at 347-9 (Anoka County Presentence Investigation Report).
[24] Ex. 1 at 72-82 (Olmsted County Presentence Investigation Report).
[25] Petitioner states that he was initially charged with sexual assault against his ex-wife, but that the complaint was amended to dismiss that count when no forensic evidence was recovered to support her claims, and counts of kidnapping and false imprisonment were substituted instead. The factual bases for the kidnapping and false imprisonment charges are not clear in the record. *See* Ex. 1 at 95-104 (Olmsted County Amended Complaint).
[26] Ex. 1 at 95-104 (Amended Olmsted County Complaint.
[27] Ex. 1 at 328 (1997 Risk Level Determination).
[28] Ex. 1 at 328-9 (1997 Risk Level Determination).
[29] Ex. 1 at 307 (1998 Risk Level Determination).
[30] *Id.*
[31] Ex. 1 at 117-123 (2012 Risk Level Determination).
[32] Ex. 1 at 118 (2012 Risk Level Determination).
[33] *Id.*
[34] Ex. 1 at 6 (2018 Risk Assessment Recommendation).
[35] Ex. 1 at 2 (2018 Risk Level Determination).

III. Procedural History

In preparation for Petitioner's release, Dr. Shelley Leutschaft, a licensed psychologist with the DOC, prepared a risk assessment recommendation for Petitioner.[36]

As part of the risk assessment, Dr. Leutschaft scored the MnSOST-3.1.2 for Petitioner.[37] According to the risk assessment tool, Petitioner's predicted probability of sexual recidivism is 39.63 percent within four years of release, which places Petitioner in the presumptive Risk Level 3 category and in the 98.10 percentile of sexual offenders.[38] Dr. Leutschaft also provided some assessment of the statutory risk factors, stressing the potential dangerousness of re-offense, Petitioner's prior history, and offender characteristics.[39]

With respect to the potential dangerousness of re-offense, Dr. Leutschaft noted that Petitioner was convicted of second-degree criminal sexual conduct for sexually assaulting the 10-year-old sister of a girlfriend in 1994. Dr. Leutschaft reiterated and relied upon the allegations of Petitioner's ex-girlfriend that had been rejected by the ECRC in 1998 due to a lack of evidence.[40] She also pointed out his convictions for Domestic Assault - Felony, Terroristic Threats, and four counts of Violation of an Order for Protection arising out of his assault of his ex-wife.[41] Her assessment included Petitioner's charges for Kidnapping and False Imprisonment, and his "significant history of criminal behavior" and "violence within domestic partnership to include partner report of forced sexual contact."[42] Petitioner's 21 felony convictions were also included as apparent factors supporting the potential dangerousness of re-offense, as well as his failing sexual offender treatment twice by 1997 and declining an opportunity to participate in treatment during his current incarceration.[43]

Dr. Leutschaft's Risk Assessment Recommendation includes consideration of the prior history of an offender. In Petitioner's risk assessment, his extensive criminal convictions are listed, most of which are for property crimes that do not appear to involve the use of force.[44] There is no analysis of the various convictions or the risk(s) posed.[45] As part of her assessment of Petitioner's offender characteristics, Dr. Leutschaft noted again that Petitioner had refused to participate in sexual offender treatment.[46] She commented on a lack of verification for some of Petitioner's historical information, and observed that there were "discrepant reports of historical information

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[36] Ex. 1 at 5-9a (2018 Risk Assessment Recommendation).
[37] Ex. 1 at 9a. (2018 Risk Assessment Recommendation).
[38] *Id.*
[39] Ex. 1 at 6-8 (2018 Risk Assessment Recommendation).
[40] Ex. 1 at 6 (2018 Risk Assessment Recommendation); *see also* Ex. 1 at 307 (1998 Risk Level Determination).
[41] Ex. 1 at 6 (2018 Risk Assessment Recommendation).
[42] *Id.*
[43] *Id.*
[44] Ex. 1 at 7 (2018 Risk Assessment Recommendation).
[45] *Id.*
[46] Ex. 1 at 7-8 (2018 Risk Assessment Recommendation).

from Mr. Tompkins to include parentage (father), work history, military service, mental health, and substance abuse."[47] At the time she made her recommendation, Dr. Leutschaft did not have Petitioner's post-release plans available to her.[48]

Based on Petitioner's score on the risk assessment tool, and her consideration of the statutory risk factors, Dr. Leutschaft recommended assigning a Risk Level 2 to Petitioner. She highlighted Petitioner's 1996 conviction for Second-degree Criminal Sexual Conduct, allegations of forced sexual contact made by his ex-girlfriend in 1996, failures to complete or participate in sexual offender treatment, criminal history, and violence within domestic partnerships including allegations of forced sexual contact by his ex-wife in 2014.[49] Dr. Leutschaft concluded that "there appears to be reason to depart from the presumptive risk level at this time, as the broadest level of community notification does not appear warranted in this case. Therefore, a risk level of two is recommended."[50] Dr. Leutschaft gave the risk assessment recommendation to the ECRC.

The ECRC convened on September 10, 2018, to address Petitioner's risk level assignment.[51] Petitioner attended the meeting and was given an opportunity to be heard by the committee prior to their vote.[52] Petitioner offered several arguments in favor of a Risk Level 1 designation.[53] He argued that the allegations made by his ex-girlfriend in 1996 were untrue, explaining that he was incarcerated at the time of the alleged conduct.[54] Petitioner asserted that his criminal history was inaccurate, and explained that he had never been the subject of an Order for Protection in New York.[55] He disputed that he had refused to participate in sexual offender treatment, explaining that he was terminated from sexual offender treatment during his first period of incarceration after he was disciplined for refusing to stand for count.[56] He stated that he was not allowed to participate in treatment during his current incarceration because he refused to admit that he sexually assaulted his wife.[57] He informed the ECRC of the work he had done while incarcerated, including treatment for substance abuse, and completion of the Domestic Violence Program, the Wounded Men Program, and Thinking for a Change.[58] He completed multiple college courses.[59] Petitioner informed the ECRC of his plans for his release, including enrollment in a year-long residential program at Next Chapter

[47] Ex. 1 at 8 (2018 Risk Assessment Recommendation).
[48] *Id*.
[49] Ex. 1 at 8-9 (2018 Risk Assessment Recommendation).
[50] Ex. 1 at 9 (2018 Risk Assessment Recommendation).
[51] Ex. 1 at 2 (2018 Risk Assessment Report).
[52] Ex. 1 at 3 (2018 Risk Assessment Report); Ex. 5 (audio recording of ECRC meeting).
[53] Petitioner also referenced documents he had at the hearing that would establish some of his claims. *See* Ex. 5 (audio recording of ECRC meeting). These documents do not appear to be included in this record.
[54] Ex. 5 (audio recording of ECRC meeting, September 10, 2018).
[55] *Id*.
[56] *Id*.
[57] *Id.*
[58] *Id*.
[59] *Id.*

Ministries, a six-month domestic violence class, individual therapy, and parenting class.[60]

At the conclusion of the meeting, the ECRC voted to assign a Risk Level 2 to Petitioner, by a split decision of three members in favor of Risk Level 2 and two in favor of Risk Level 1.[61] The ECRC explained its decision stating that it "did not feel these was not (sic) sufficient evidence to deviate from the recommended Risk Level."[62]

On September 10, 2018, Petitioner requested an appeal of the ECRC's risk level determination.[63] On October 15, 2018, the ECRC filed a Notice and Order for Review of Risk Level Assignment with the Office of Administrative Hearings.

On October 16, 2018, the ECRC filed a Motion for Summary Disposition. Petitioner was served by mail with the motion on October 16, 2018. Petitioner did not file a response to the ECRC's motion. The record closed on November 2, 2018, the due date for Petitioner's response.

IV. Motion for Summary Disposition

Summary disposition is the administrative law equivalent of summary judgment.[64] 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.[65] The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition in 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, material factual issues exist.[66] The Administrative Law Judge does not weigh the evidence; instead, she views the facts and evidence in a light most favorable to the non-moving party.[67] The facts asserted by the nonmoving party must be taken as true.[68]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[69] A fact is material if its resolution will affect the

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[60] *Id.*
[61] Ex. 1 at 4 (2018 Risk Assessment Report).
[62] *Id*.
[63] Ex. 1 at 1 (Notice of Appeal).
[64] *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2017).
[65] *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).
[66] *See, e.g., DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[67] *See Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[68] *Electric Fetus Co., Inc. v. City of Duluth,* 547 N.W.2d 448, 451 (Minn. Ct. App. 1996) (citing *Hauser v. Mealey*, 263 N.W.2d 803, 805 n. 1 (Minn.1978)).
[69] *See Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

outcome of the case.[70] If the moving party meets the initial burden, the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.[71] A genuine issue is not a "sham or frivolous" one and it cannot rely on mere allegations or denials.[72] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[73]

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[74] Thus, summary disposition is only proper when no fact issues need to be resolved.[75]

V. Arguments

The ECRC seeks summary disposition of this case, arguing that the challenges made by Petitioner to his risk level determination do not constitute material errors on the scoring of the MnSOST-3.1.2 or application of the statutory risk factors.[76] The ECRC contends that Petitioner's appeal should be dismissed.

In opposing his risk level assignment, Petitioner asserts several errors in the ECRC risk level determination.[77] First, Petitioner contends that the criminal history relied upon by the ECRC is inaccurate.[78] Next, he states that he has had no re-offense of a sexual nature since the 1994 criminal sexual conduct, and has been designated a Risk Level 1 since 1997.[79] Last, Petitioner denies refusing treatment.[80]

VI. Analysis

Upon review of the ECRC's motion and Petitioner's claims, the Administrative Law Judge concludes that the ECRC's Motion for Summary Disposition should be denied. The ECRC has not met its initial burden of establishing the absence of material facts in dispute, and the Petitioner has established that there are genuine disputes of material fact.

The ECRC argues that it is entitled to summary judgment because none of the challenges Petitioner raised in his Notice of Appeal "are material error on the scoring of

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[70] *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)).
[71] *See Thiele,* 425 N.W.2d at 583.
[72] *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)).
[73] *See* Minn. R. Civ. P. 56.05.
[74] *See Sauter*, 70 N.W.2d at 353.
[75] *See id*.
[76] ECRC Memorandum in Support of Summary Disposition (ECRC Mem.) at 2 (October 16, 2018).
[77] Ex. 1 at 1 (Notice of Appeal).
[78] *Id*.
[79] *Id*.
[80] *Id*.

the MnSOST-3.1.2 or application of the statutory risk factors."[81] A careful review of the record does not support these contentions.

There is insufficient information in the record to conclude that the ECRC did not err in applying the statutory risk factors. As one example, the Community Notification Act requires the ECRC to consider an offender's history of substance abuse and the availability and likelihood that an offender will be involved in therapeutic treatment.[82] It is undisputed that Petitioner's history of substance abuse has been a significant factor in his criminal history, and that Petitioner was expected to complete chemical dependency treatment by early October. It is impossible to determine what weight, if any, was given to the treatment and education Petitioner gained while incarcerated, or to his plans to continue that progress upon his release. As another example, the Act requires the ECRC to consider factors like the number of victims, the degree of likely force or harm, and the length of time since the offender's last prior offense. The Risk Assessment Report lacks adequate detail to determine whether or how these factors were considered by the ECRC in assigning Risk Level 2. Accordingly, the ECRC decision cannot be affirmed by summary disposition.

Further, even if the ECRC had established its initial burden to show it is entitled to summary disposition, Petitioner has established that there are genuine issues of material fact in dispute that prevent a grant of summary disposition. Petitioner objects to assignment of Risk Level 2 for three reasons. In the first of his challenges to the current risk assessment, Petitioner maintains that the ECRC relied upon an inaccurate criminal history to assign a Risk Level 2.[83] Petitioner denies that an order for protection was issued in New York, and he denies the allegations reportedly made by his ex-girlfriend. He reported that he was incarcerated during the timeframe in which the ex-girlfriend allegedly alleged that she sought numerous orders for protection and that Petitioner threatened to kill her.[84] He asserts that he has "notarized letters and statements from alleged victim and past girlfriend" that would establish he has not committed a sexual offense since the 1994 assault of a girlfriend's younger sister.

The allegations attributed to Petitioner's ex-girlfriend were a prominent part of Dr. Leutschaft's assessment of the potential dangerousness of re-offense by Petitioner and her recommendation to assign Risk Level 2. Those statements are material to the recommendation, which was adopted by the ECRC. These allegations were part of Petitioner's criminal history since 1996 but do not appear to have been relied upon in the three prior risk level determinations.[85] In the 1997 risk level determination, the ECRC did not mention concerns about the allegations pertaining to Cullen.[86] A year later, conducting Petitioner's second risk level determination, the ECRC specifically

[81] ECRC Mem. at 2.
[82] Minn. Stat. § 244.052, subd. 3(g).
[83] Ex. 1 at 1 (Notice of Appeal).
[84] Ex. 5 (audio recording of ECRC meeting, September 10, 2018).
[85] Ex. 1 at 347-55 (Anoka County Pre-Sentence Investigation Report, July 11, 2006); *see also* Ex. 1 at 328-9, 307, 117-123 (1997, 1998 and 2012 Risk Level Determinations).
[86] Ex. 1 at 328-9 (1997 Risk Level Determination)

found that "there is no evidence to support there is another victim [the ex-girlfriend]."[87] Whether the ECRC erred when it relied upon the ex-girlfriend's allegations in determining that Petitioner should be a Risk Level 2 is an issue for hearing.

Petitioner's second challenge to the risk level determination is that he has been designated a Risk Level 1 since 1997 without any re-offense of a sexual nature. In addition to denying the allegations of sexual offense allegedly made by his ex-girlfriend, Petitioner denies the truth of portions of his ex-wife's statement to police in 2014 and specifically denies that he sexually assaulted her.[88] Petitioner maintains that the county attorney dismissed the charge of sexual assault arising out of the 2014 incident after an examination of his ex-wife revealed no evidence of sexual assault or contact.[89] The allegations that Petitioner sexually assaulted an ex-girlfriend and an ex-wife were major components of the risk assessment recommendation, which a majority of ECRC members relied upon in assigning a Risk Level 2. If it were determined that these allegations were false, there would be little conduct to support a conclusion that Petitioner's level of risk has increased since his last risk assessment. Taking Petitioner's statements as true for purposes of summary disposition, there are disputes of material fact about his appropriate risk level that cannot be resolved without determining credibility.

Last, Petitioner denies that he refused sex offender treatment. The record supports this denial. It appears that Petitioner was not allowed to complete sexual offender treatment in 1996 because he committed a non-sexual violation of prison rules. Dr. Leutschaft, in her assessment of the potential dangerousness of re-offense, recounts that the September 1997 Risk Assessment Recommendation "noted [Petitioner] has failed sexual offender treatment twice."[90] This information was known to each of the previous ECRCs, which nevertheless assigned a Risk Level 1 to Petitioner. Petitioner also did not complete sexual offender treatment during his current incarceration, despite being identified as appropriate for such treatment. Petitioner maintains he was willing to undergo treatment but was not allowed to because he would not admit to sexually assaulting his wife.[91] Whether the ECRC should have considered this to be a factor pointing to increased risk is unclear, where, as here, Petitioner disputes the allegations of forced sexual contact and the charge of sexual assault against his ex-wife was dismissed by the prosecutor on his own initiative.

The ECRC's reliance upon *In the Matter of the Risk Level Determination of R. L.* is misplaced.[92] The issue is not whether the ECRC has an obligation to test the state's evidence, but rather whether it correctly evaluated that evidence in the context of the statutory risk assessment factors. The Minnesota Court of Appeals has considered

[87] Ex. 1 at 307 (1998 Risk Level Determination).
[88] Ex. 5 (audio recording of ECRC meeting, September 10, 2018).
[89] *Id.*
[90] Ex. 1 at 6 (2018 Risk Level Assessment).
[91] Ex. 5 (audio recording of ECRC meeting, September 10, 2018).
[92] No. A09-1885, 2010 WL 2813451, at *3 (Minn. Ct. App. July 20, 2010).

when summary disposition may be granted in the context of an appeal of a risk level determination.[93] The court concluded that:

> By setting the standard of proof as "preponderance of the evidence" and including a procedure that allows for witnesses, the statute cannot be fairly construed as limiting the offender's administrative challenge only to a committee's erroneous legal determinations. Nor can it be read to foreclose a hearing in which the offender might present evidence to demonstrate that the committee's determination (including its underlying assessment of the factors) was erroneous.[94]

In *L.R.O.*, the offender argued that summary disposition was incorrectly granted because he challenged the ECRC's application of the statutory factors in making its determination.[95] The offender asserted that the committee had failed to factor in his positive characteristics when making its determination of offender characteristics, and the Court of Appeals agreed that the offender had established a genuine issue of material fact in dispute.[96] Here, the Petitioner has presented specific facts demonstrating a need for resolution in a hearing, and challenges the subjective assessment of the statutory factors. The Committee cannot avoid an evidentiary hearing by simply contending that its decision is free of error.

VII. Conclusion

Because the ECRC has not met its initial burden of establishing it is entitled to summary disposition, and disputed issues of material fact exist regarding assignment of Risk Level 2 to Petitioner, the ECRC's Motion for Summary Disposition is denied. This matter will proceed to an evidentiary hearing in which Petitioner will have the burden of proof to show, by a preponderance of the evidence, that the ECRC erred.

K. J. M.

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[93] *In The Matter of the Risk Level Determination of L.R.O.,* No. A15–0652, 2016 WL 281158, at *3 (January 25, 2016).
[94] *Id*. at 4.
[95] *Id.* at 2.
[96] *Id.* at 4.