

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

In the Matter of the Risk Level
Determination of Daniel McMaster

**ORDER GRANTING
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 December 7, 2018.

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

On December 21, 2018, the ECRC filed a Motion for Summary Disposition. Mr. McMaster was personally served with the motion on December 31, 2018. Mr. McMaster filed no response to the ECRC's motion. The record closed on January 14, 2019.

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

ORDER

1. The ECRC's Motion for Summary Disposition is **GRANTED**.
2. Mr. McMaster's appeal is **DISMISSED**.
3. Mr. McMaster's assignment of Risk Level 2 is **AFFIRMED**.

Dated: January 25, 2019



KIMBERLY MIDDENDORF
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 Mr. McMaster'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 the 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 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

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).

⁵ *Id.*

⁶ *Id.*, subd. 4(b)(1).

⁷ *Id.*, subd. 4(b)(2).

⁸ *Id.*, subd. 4(b)(3).

⁹ *Id.*, subd. 3.

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). 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.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

¹⁰ *Id.*

¹¹ *Id.*, subd. 3(g).

¹² *Id.*

¹³ *Id.*, subd. 2.

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).

¹⁷ *Id.*, subd. 6(d). The contested case rules are found at Minn. R. 1400.5010-.8401 (2017).

¹⁸ *Id.*, subd. 6(c).

¹⁹ Minn. Stat. §§ 14.63, 244.052, subd. 6(c) (2018).

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

II. Petitioner's Background

Mr. McMaster pleaded guilty to a charge of third-degree criminal sexual conduct in 2015 for the sexual assault of an adult female.²³ He was given a sentence of 48 months.²⁴ The execution of his sentence was stayed, and he was placed on probation until 2025.²⁵ Mr. McMaster subsequently violated the terms of his probation three times.²⁶ His probation was revoked on June 17, 2017, and his sentence was executed.²⁷ His anticipated release date is March 13, 2019.²⁸

III. Procedural History

In preparation for Mr. McMaster's release, Jeff Olson, a licensed psychologist with the Department of Corrections (DOC), prepared a risk assessment recommendation of him for the ECRC.²⁹

As part of the risk assessment, Mr. Olson scored the Minnesota Sex Offender Screening Tool (MnSOST)-3.1.2.³⁰ According to the risk assessment tool, Mr. McMaster's predicted probability of sexual recidivism is 3.92 percent, which places him in the presumptive Risk Level 2 category.³¹

Based on Petitioner's score on the risk assessment tool and consideration of the statutory risk factors, Mr. Olson recommended assigning a Risk Level 2 to Mr. McMaster.³² Mr. McMaster's conviction was for the rape of a female he had just met.³³ He provided drugs and alcohol to her before he assaulted her in a public place.³⁴ Mr. Olson noted that Mr. McMaster "took advantage of the woman's vulnerabilities" to commit his crime.³⁵ Mr. Olson considered that Mr. McMaster had behavior problems in

²⁰ Minn. Stat. § 243.166, subd. 6(a) (2018).

²¹ *Id.*, subd 3 (2018).

²² *Id.*

²³ Exhibit (Ex.) 1 at 4 (Risk Assessment Recommendation).

²⁴ Ex. 1 at 100 (Sentencing Worksheet); Ex. 1 at 110 (Pre-plea Investigation).

²⁵ *Id.*

²⁶ Ex. 1 at 89-96 (Probation Violation Reports).

²⁷ Ex. 1 at 5 (Risk Assessment Recommendation).

²⁸ Ex. 1 at 2 (Risk Assessment Report).

²⁹ Ex. 1 at 4-5 (Risk Assessment Recommendation).

³⁰ Ex. 1 at 5a (MnSOST 3.1.2, September 24, 2018).

³¹ *Id.*

³² Ex. 1 at 5 (Risk Assessment Recommendation).

³³ Ex. 1 at 4 (Risk Assessment Recommendation); Ex. 1 at 101-110 (Pre-plea Investigation).

³⁴ Ex. 1 at 89 (Probation Violation Report).

³⁵ Ex. 1 at 4 (Risk Assessment Recommendation).

chemical dependency and sex offender treatments following his conviction, and periods of unaccountability.³⁶ He failed to complete chemical dependency treatment because of disruptive behaviors, and was terminated from sex offender treatment after physically assaulting another participant.³⁷

Mr. McMaster violated probation three times in 2016.³⁸ His first violation occurred in March of 2016, when he was terminated from sex offender treatment after hitting another resident in the face.³⁹ He was ordered to complete chemical dependency treatment at the Beacon.⁴⁰ He also admitted that he was using chemicals while in the Beacon Program.⁴¹ Mr. McMaster's next probation violation occurred in October of 2016, when he failed to re-enter sex offender treatment after completing chemical dependency treatment.⁴² He was referred to Twin Town inpatient chemical dependency treatment.⁴³ In December of 2016, he was terminated from the Twin Town program for "out of control" behavior, resulting in his third probation violation and the execution of his prison sentence.⁴⁴

Mr. Olson observed a number of problematic offender characteristics. Since entering prison at MCF-STW in July of 2017, Mr. McMaster has had 15 segregation disciplines, many for refusing placement.⁴⁵ Mr. Olson found Mr. McMaster's history of unaccountability, homelessness, and unstructured lifestyle to be "worrisome."⁴⁶ He observed no basis to apply special concerns or mitigating factors to Mr. McMaster's presumptive risk level.⁴⁷ Mr. Olson gave the risk assessment recommendation to the ECRC.⁴⁸

The ECRC convened on November 7, 2018, to address Mr. McMaster's risk level assignment.⁴⁹ He attended the meeting and was given an opportunity to be heard by the committee prior to their vote.⁵⁰ Mr. McMaster denied that he committed the offense to which he had pled guilty and argued that he should not be assigned a risk level while his appeal of his third-degree criminal sexual conduct conviction was pending.⁵¹ He admitted hitting a peer while in the Alpha residential sex offender treatment program, but contended that he was defending himself.⁵² Mr. McMaster admitted that he relapsed

³⁶ *Id.*

³⁷ *Id.* at 5.

³⁸ Ex. 1 at 89-96 (Probation Violation Reports).

³⁹ *Id.* at 93.

⁴⁰ *Id.* at 90.

⁴¹ *Id.* at 91.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Ex. 1 at 5 (Risk Assessment Recommendation).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Ex. 5 (audio recording of ECRC meeting).

⁴⁹ Ex. 1 at 2 (Risk Assessment Report).

⁵⁰ Ex. 1 at 2-3 (Risk Assessment Report); Ex. 5 (audio recording of ECRC meeting).

⁵¹ *Id.*

⁵² *Id.*

and used methamphetamines after he completed chemical dependency treatment at the Beacon.⁵³ He admitted that he failed to return to Alpha after completing the program at the Beacon.⁵⁴ He informed the ECRC that he does not need sex offender treatment, and should not have to be in the presence of other offenders.⁵⁵ He attributed his behavioral problems in the community and while incarcerated to a lack of medication to treat anxiety.⁵⁶ At the conclusion of the meeting, the ECRC unanimously voted to assign Petitioner a Risk Level 2.⁵⁷ On November 7, 2018, Mr. McMaster appealed the ECRC's risk level determination.⁵⁸

IV. Motion for Summary Disposition

Summary disposition is the administrative law equivalent of summary judgment.⁵⁹ 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.⁶⁰ 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.⁶¹ 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.⁶²

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.⁶³ A fact is material if its resolution will affect the outcome of the case.⁶⁴ 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.⁶⁵ A genuine issue is not a "sham or frivolous" one, and it cannot rely on mere allegations or denials.⁶⁶ Instead, a genuine issue requires presentation of specific facts

⁵³ Ex. 5 (audio recording of ECRC meeting).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Ex. 1 at 3 (Risk Assessment Report).

⁵⁸ Ex. 1 at 1 (Notice of Appeal).

⁵⁹ *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2015).

⁶⁰ 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).

⁶¹ See, e.g., *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

⁶² See *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

⁶³ See *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

⁶⁴ 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)).

⁶⁵ See *Thiele*, 425 N.W.2d at 583.

⁶⁶ 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)).

demonstrating a need for resolution in a hearing or trial.⁶⁷ A promise to produce evidence at a hearing is insufficient to defeat summary disposition.⁶⁸

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.⁶⁹ Thus, summary disposition is only proper when no fact issues need to be resolved.⁷⁰

V. Arguments

The ECRC seeks summary disposition of this case because there are no genuine issues of material fact in dispute.⁷¹ The ECRC maintains that the MnSOST-3.1.2 was correctly scored and the statutory factors were correctly applied to determine Mr. McMaster's risk level.⁷² The ECRC argues that the issues raised by Mr. McMaster do not defeat summary disposition.⁷³

In opposing his risk level assignment, Mr. McMaster asserts multiple errors.⁷⁴ First, Mr. McMaster argues that he is appealing his conviction. Second, he contends that he has no similar cases. Third, he states that he never "went for" his victim. Last, he attributes his behavioral problems during his incarceration to a lack of medication. Mr. McMaster argues that, for these reasons, he should be assigned a Risk Level 1.⁷⁵

VI. Analysis

The ECRC, as the moving party, bears the initial burden of establishing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. It must establish that there is no genuine dispute regarding the accuracy of the MnSOST-3.1.2 results, and that the statutory factors were correctly applied.

Upon review of the ECRC's motion and Mr. McMaster's claims, the Administrative Law Judge concludes that the ECRC's Motion for Summary Disposition should be granted. Mr. McMaster's objections to the ECRC's assignment of Risk Level 2 are grounded in his belief that he deserves to be in the lowest risk category.⁷⁶ As explained below, none of the arguments made by Mr. McMaster presents an issue for hearing.

Mr. McMaster does not allege any errors in the MnSOST-3.1.2 scoring or results. His MnSOST-3.1.2 was scored for one predatory and one felony offense sentence.⁷⁷ He

⁶⁷ See Minn. R. Civ. P. 56.05.

⁶⁸ See *Borom v. City of St. Paul*, 289 Minn. 371, 374–75, 184 N.W.2d 595, 597 (1971).

⁶⁹ See *Sauter*, 70 N.W.2d at 353.

⁷⁰ See *id.*

⁷¹ ECRC Memorandum in Support of Summary Disposition (ECRC Mem.) at 6 (December 21, 2018).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Ex. 1 at 1 (Notice of Appeal).

⁷⁵ *Id.*

⁷⁶ *Id.*; Ex. 5 (audio recording of ECRC meeting).

⁷⁷ Ex. 1 at 5a (MnSOST-3.1.2, September 24, 2018).

was not given credit for completion of sex offender and chemical dependency treatment. He had no known male victims, violations of orders for protection, or convictions for disorderly conduct in the past three years. His sexual offense occurred in a public place. The MnSOST-3.1.2 appears to have been scored correctly.⁷⁸

Mr. McMaster argues first that he should be assigned a Risk Level 1 while his criminal appeal of is pending. He indicates that he has an amended appellate brief that will support his claim.⁷⁹ It was not provided to the ECRC or in opposition to the motion for summary disposition.

Mr. McMaster's appeal of his conviction does not make the ECRC's risk level determination an erroneous one. Although there are various mitigating factors that would permit the ECRC to assign a risk level lower than the presumptive risk level, a pending appeal is not among them. Similarly, the Act contains no process to impose a higher risk level after a conviction is confirmed on appeal. Nothing in the Act can be interpreted to support a conclusion that an offender should be designated a Risk Level 1 until all appeals have been exhausted.

Mr. McMaster's pending appeal does not raise a genuine issue of material fact. An appeal, unlike a mitigating factor, does not tend to lower the risk posed by an offender. When considering that the purpose of community notification is to protect the public, it makes sense that an appeal of a criminal conviction does not constitute a mitigating factor. Moreover, although he denied to the ECRC that he had sexually assaulted his victim, he had earlier admitted that the victim "asked [him] to stop" and that he thought "she wanted to leave, but [he] just kept going."⁸⁰ He went on to add: "I'm a sex addict and I wasn't going to stop."⁸¹ He agreed that she was "probably not" a willing partner and that "she didn't deserve this."⁸² His later denials to the ECRC are bare allegations that do not create a genuine issue of material fact.⁸³ Likewise, his claim that his appellate brief will support his appeal of his risk level assignment does not defeat summary disposition because he did not provide it.⁸⁴

For his second issue, Mr. McMaster asserts that he has not committed a similar offense since his conviction. The MnSOST-3.1.2 factors the commission of any similar offenses into the calculation of an offender's presumptive risk level. Mr. Olson assigned a value of "1," which accounts only for his current offense.⁸⁵ Accordingly, the ECRC did not find that Mr. McMaster had committed additional similar offenses.

Nothing in the Act requires or directs the ECRC to grant a downward departure from the presumptive risk level because an offender has not committed a subsequent

⁷⁸ See Ex. 1 at 5a (MnSOST-3.1.2, September 24, 2018).

⁷⁹ Ex. 1 at 1 (Notice of Appeal).

⁸⁰ Ex. 1 at 103 (Pre-plea Investigation).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *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)).

⁸⁴ *Borom*, 289 Minn. at 374–75, 184 N.W.2d at 597.

⁸⁵ Ex. 1 at 5a (MnSOST-3.1.2, September 24, 2018).

similar offense. The record reflects that Mr. McMaster has spent much of the three years since his offense either in custody or in treatment, and has not had unfettered opportunity to reoffend in the interim. While it is true that Mr. McMaster was convicted for a single sexual offense, that offense was committed against a stranger by use of force, after rendering her vulnerable, in public. The number of victims an offender has harmed is not the only measure of risk to the public.

Further, all of the ingredients that led to Mr. McMaster's offense are still present. Mr. McMaster has at least eight failed attempts at chemical dependency treatment, and has admitted to daily use of heroin and methamphetamines.⁸⁶ He was under the influence of drugs and alcohol when he committed the offense.⁸⁷ He completed a chemical dependency treatment program, but immediately relapsed and resumed using methamphetamines.⁸⁸ He denies responsibility for his offense.⁸⁹ He has not completed sexual offender treatment and does not believe he needs it.⁹⁰ That the ECRC did not depart from the presumptive risk level is not error under these circumstances.

Mr. McMaster's third argument also does not establish error by the ECRC in designating him a Risk Level 2. Mr. McMaster alleges that he "never went for the victim."⁹¹ Taking this as true, it does not establish that the ECRC erred. Mr. McMaster was required to have "no direct/indirect contact with victim" as a condition of probation.⁹² In scoring the MnSOST-3.1.2, Mr. Olson correctly noted that there were no violations of a no contact order or order for protection.⁹³ Thus, Mr. McMaster's presumptive Risk Level 2 already accounted for the fact that Mr. McMaster did not harass his victim following the offense.

Finally, Mr. McMaster appears to challenge the ECRC's conclusion that his documented behavior problems support a Risk Level 2 designation. He states that he is waiting for his medical charts.⁹⁴ It appears that Mr. McMaster may be attributing his behavior issues while incarcerated to a lack of medication. The ECRC correctly noted that Mr. McMaster exhibited problematic behavior not only while incarcerated, but also while in the community.

Mr. McMaster's behavior was not used to support the application of "special concerns" to increase his risk level. There is no mitigating factor that would lower his risk level based on a finding that poor behavior is the result of not being medicated. The cause of Mr. McMaster's behavioral issues does not create an issue of fact that could alter the outcome of this case.

⁸⁶ Ex. 1 at 81 (Chemical Dependency Assessment, July 19, 2017).

⁸⁷ Ex. 1 at 101-110 (Pre-plea Investigation).

⁸⁸ Ex. 1 at 89-96 (Probation Violation Reports).

⁸⁹ Ex. 5 (audio recording of ECRC meeting).

⁹⁰ *Id.*

⁹¹ Ex. 1 at 1 (Notice of Appeal).

⁹² Ex. 1 at 109 (Pre-plea Investigation).

⁹³ Ex. 1 at 4-5 (Risk Assessment Recommendation).

⁹⁴ Ex. 1 at 1 (Notice of Appeal).

VII. Conclusion

Because Mr. McMaster 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. Mr. McMaster's appeal of his risk level determination is dismissed and assignment of Risk Level 2 is affirmed.

K.J.M.