OAH 60-1100-36063

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level Determination of Taylor Escobar Lopez	**ORDER GRANTING MOTION FOR SUMMARY DISPOSITION**

This matter came before Administrative Law Judge James E. LaFave upon the End-of-Confinement Review Committee's Motion for Summary Disposition.

Noah Cashman, Assistant Attorney General, appeared on behalf of the End-of-Confinement Review Committee (ECRC). Taylor Escobar Lopez, the Petitioner, appeared on his own behalf, without legal counsel.

On May 1, 2019, the ECRC filed a Motion for Summary Disposition. It was personally served on Mr. Lopez with a copy of this motion two days later, on May 3, 2019. Mr. Lopez did not file a response to the motion. The hearing record on the motion closed on Friday, May 17, 2019, the due date for Mr. Lopez's response.

Based upon the hearing 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. Petitioner's appeal is **DISMISSED.**

3. Petitioner's assignment to Risk Level 2 is **AFFIRMED**.

Dated: June 17, 2019

JAMES E. LAFAVE
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. Petitioner's Background

Mr. Lopez is a 23-year-old man.[1] During 2013 and 2014, Mr. Lopez struggled with chemical dependency and engaged in a number of crimes involving drugs and alcohol; including underage drinking, misdemeanor-level, Driving While Intoxicated, and possession of controlled substance crimes.[2]

In 2014, when he was 18 years old, Mr. Lopez was romantically and sexually involved with a 15-year-old female. The female was impregnated by Mr. Lopez as a result of this relationship.[3]

On September 12, 2014, the Jackson County Attorney charged Mr. Lopez with one count of Criminal Sexual Conduct in the Third Degree.[4] While this charge was pending, Mr. Lopez was also charged with felony theft of a motor vehicle.[5]

On May 13, 2015, Mr. Lopez pleaded guilty to the charge of Criminal Sexual Conduct in the Third Degree.[6] At the sentencing on this charge, the Jackson County District Court stayed the imposition of a prison sentence for that crime and instead placed Mr. Lopez on probation for a period of five years.[7]

The period of probation included a number of Court-ordered conditions. Specifically, Mr. Lopez was obliged to: follow the rules of probation; remain law abiding; supply a DNA sample, follow the recommendations of a sex offender assessment; have no contact with the victim unless this contact was approved by both the sex offender treatment provider and his probation agent; have no unsupervised contact with minor females (including the infant child who resulted from the offense); obtain a chemical use assessment and follow all recommendations; abstain from the use of mood-altering substances and submit to random testing for these substances; pay for, and successfully complete, the cornerstone adult drug court program.[8]

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[1] Exhibit (Ex.) 1 at 2.
[2] *Id.* at 17-18.
[3] *Id.* at 5, 124-125.
[4] *Id.* at 99, 123-129.
[5] *Id.* at 100.
[6] *Id.* at 99, 123-129.
[7] *Id.* at 97.
[8] *Id.* at 97-99.

In May of 2015, Mr. Lopez was discharged from the Agape Counseling Center's chemical dependency treatment program. He was discharged from the program following three unexcused absences from treatment-related sessions.[9]

In early July of 2015, Mr. Lopez was returned to custody for a series of violations of the conditions of his probation – including contact with the victim of his offense, possession of pornography and unauthorized access to the Internet. The District Court imposed a sanction of 180-days of "accountability time" in custody for this misconduct.[10]

On November 25, 2015, Mr. Lopez's probation agent notified the District Court that Mr. Lopez had again violated the conditions of his probation – including, unauthorized contact with minor females, use of mood-altering chemicals and failing to follow the recommendations of his sex offender treatment program. For this misconduct, Mr. Lopez was returned to jail.[11]

After his release from jail, Mr. Lopez did not remain law-abiding. In a June 21, 2016 report to the District Court, Mr. Lopez's probation agent noted that Mr. Lopez failed to: register his current address with the predatory offender registry; maintain contact with his probation officer; apprise his probation officer of contacts with law enforcement officers; receive authorization to travel out of Minnesota; refrain from using alcohol; attend sober support meetings; follow the recommendations of treatment professionals or progress in treatment; refrain from unauthorized use of the Internet.[12] As a sanction for this misconduct, the district court removed the stay of imposition of the sentence on Mr. Lopez's criminal sexual conduct conviction and Mr. Lopez was remanded to state prison.[13]

While he was incarcerated, Mr. Lopez was disciplined for having contraband in his cell – specifically, a homemade still for making alcohol.[14]

On December 14, 2016, Mr. Lopez was returned to the community on supervised release. The ECRC assigned Mr. Lopez to Risk Level 1 but cautioned him that "any type of future high-risk behavior resulting in a new incarceration" would likely result in a reappraisal of that determination at a later ECRC meeting.[15]

On November 10, 2017, following his release to the community, Mr. Lopez was terminated from outpatient sex offender treatment. CORE Professional Services terminated Mr. Lopez's participation in its treatment program for unexcused absences and for failing to submit himself for a polygraph examination.[16]

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[9] *Id.* at 94.
[10] *Id.* at 74.
[11] *Id.* at 23, 75.
[12] *Id.* at 74.
[13] *Id.* at 17, 72-81.
[14] *Id.* at 68-68.
[15] *Id.* at 45.
[16] *Id.* at 36.

On October 12, 2018, Mr. Lopez was charged with Assault in the Second Degree for an attack upon his employer with a dangerous weapon. Mr. Lopez was also charged with misdemeanor Assault in the Second Degree arising out of the same incident. Following a search of the area around the employer's home, Cottonwood County Deputies were unable to locate Mr. Lopez and petitioned the court for a warrant for his arrest.[17]

During this period, Mr. Lopez had not been in contact with his probation agent for approximately an entire calendar year.[18] Moreover, he continued to use alcohol and methamphetamine during the time that he was evading law enforcement.[19]

In the autumn of 2018, Mr. Lopez, having grown weary of being a fugitive, turned himself into authorities. On January 19, 2019, he pleaded guilty to Gross Misdemeanor Domestic Assault, and was re-committed to state prison on March 6, 2019.[20]

II. Legal Background

This case involves Mr. Lopez's appeal of the risk level assigned to him by the ECRC pursuant to the Minnesota Community Notification Act (Act).[21] 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."[22] 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."[23]

The scope of community notification required by the Act is determined by assignment of one of the three different risk levels defined by statute.[24] Each risk level is associated with a different degree of community notification.[25] If an offender is assigned to 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.[26] Risk Level 2 permits additional notice to groups such as schools, child care facilities and individuals likely to be victimized by the offender.[27] Risk Level 3 permits notice to be given to any community member whom the offender is likely to

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[17] *Id.* at 30-32.
[18] *Id.* at 14.
[19] *Id.* at 18-21.
[20] *Id.* at 14.
[21] Minn. Stat. § 244.052 (2018).
[22] Minn. Stat. §§ 243.166, subd. 1b; 244.052, subd. 4(a) (2018).
[23] Minn. Stat. §§ 243.166, subd. 1b; 244.052, subd. 4(a).
[24] Minn. Stat. § 244.052, subd. 4(b) (2018).
[25] *Id.*
[26] *Id.*, subd. 4(b)(1).
[27] *Id.*, subd. 4(b)(2).

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).[28]

Every predatory offender confined in a Minnesota state correctional or treatment facility must be assessed by the ECRC at the facility prior to release.[29] The ECRC is responsible for assessing the public risk posed by each predatory offender upon release and determining the appropriate risk level assignment.[30]

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.[31] This list is not exclusive.[32]

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.[33] 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.[34]

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."[35]

A predatory offender assigned to 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.[36] The administrative review is conducted by an Administrative Law Judge at the Office of Administrative Hearings and is subject to the

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[28] *Id.*, subd. 4(b)(3).
[29] *Id.*, subd. 3 (2018).
[30] *Id.*
[31] *Id.*, subd. 3(g).
[32] *Id.*
[33] *Id.*, subd. 2 (2018).
[34] 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).
[35] Minn. Stat. § 244.052, subd. 3(f).
[36] *Id.*, subd. 6(a) (2018).

contested case rules.[37] 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."[38] The decision of the Administrative Law Judge is final and subject to appellate judicial review.[39]

Assignment of a risk level to a predatory offender is applicable for a minimum of ten years.[40] During that time, the appropriate level of notice must be given every time the predatory offender changes residence.[41] 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.[42]

III. Procedural History

In preparation for Mr. Lopez's scheduled release to the community on May 20, 2019, Shelley Leutschaft, Ph.D., L.P., a licensed psychologist with the Department of Corrections (DOC) completed Sex Offender Risk Assessment Recommendation for the ECRC.[43]

As part of the risk assessment, Dr. Leutschaft scored the MnSOST-3.1.2 for Mr. Lopez.[44] According to the risk assessment tool, Mr. Lopez's predicted probability of sexual recidivism is 2.35 percent, which presumptively places Mr. Lopez into Risk Level 1.[45] To that presumptive score, Dr. Leutschaft also urged application of Special Concern No. 4, which relates to offenders with a history of prior supervision failures or a pronounced unwillingness to cooperate with prison authorities.[46]

Based upon Mr. Lopez's score on the risk assessment tool, consideration of the statutory risk factors, and application of Special Concern No. 4, Dr. Leutschaft recommended assigning Mr. Lopez to Risk Level 2. Specifically, Dr. Leutschaft noted that "[w]hile on supervision, Mr. Lopez engaged in high risk behaviors (i.e., substance use, contact with minors, victim contact, accessing pornography and accessing the internet)."[47]

The ECRC convened on April 8, 2019, to assign Mr. Lopez to a risk level.[48] Mr. Lopez attended the meeting and was given an opportunity to be heard by the

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[37] *Id.*, subd. 6(d) (2018). The contested case rules are found at Minn. R. 1400.5010-.8401 (2017).
[38] *Id.*, subd. 6(c) (2018).
[39] Minn. Stat. §§ 14.63, 244.052, subd. 6(c) (2018).
[40] Minn. Stat. § 243.166, subd. 6(a) (2018).
[41] *Id.*, subd 3 (2018).
[42] *Id*.
[43] *Id.* at 5-8.
[44] *Id.* at 9.
[45] *Id.*
[46] *Id.* at 8.
[47] *Id*.
[48] *Id.* at 2.

committee prior to their vote.[49] While Mr. Lopez acknowledged that during the period when he had absconded from supervised release, he was drinking with teenagers, but maintains that this misconduct is in the past and that he has changed.[50]

At the conclusion of the meeting, a unanimous ECRC voted to assign Mr. Lopez to Risk Level 2.[51] On April 11, 2019, Mr. Lopez requested an appeal of the ECRC's risk level determination.[52]

IV. Motion for Summary Disposition

Summary disposition is the administrative law equivalent of summary judgment.[53] 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.[54] 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.[55] 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.[56]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[57] A fact is material if its resolution will affect the outcome of the case.[58] 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.[59] A genuine issue is not a "sham or frivolous" one, and it cannot rely on mere allegations or denials.[60] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[61]

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[49] *Id.* at 3.
[50] *Id*.
[51] *Id.* at 2.
[52] *Id.* at 1.
[53] *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2017).
[54] *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).
[55] *See e.g., DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[56] *See Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[57] *See Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[58] *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)).
[59] *See Thiele,* 425 N.W.2d at 583.
[60] *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)).
[61] *See* Minn. R. Civ. P. 56.05.

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[62] Thus, summary disposition is only proper when no fact issues need to be resolved.[63]

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

The hearing record demonstrates that the ECRC followed the requirements of Minn. Stat. § 244.052 and DOC Policy 205.220 when making its determination. Importantly, Mr. Lopez does not point to any error in the scoring of the MnSOST-3.1.2. Instead, Mr. Lopez maintains that ECRC members did not credit his claims that he is a changed man and that his use of alcohol and drugs is part of his past.[64]

The key question in this case is whether a reasonable ECRC member could have arrived at the decision to assign Mr. Lopez to Risk Level 2. An agency's decision is arbitrary or capricious if it:

> (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency's expertise.[65]

A reasonable ECRC member could conclude that because Mr. Lopez has had a series of treatment failures, was a fugitive, and has engaged in high-risk behavior during recent periods of supervision in the community, that broader notification would fulfill the purposes of the Act.[66] The ECRC's unwillingness to assign Mr. Lopez to a lower risk level did not follow from reasoning that was unlawful, incomplete, unsupported or implausible.

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[62] *See Sauter*, 70 N.W.2d at 353.
[63] *See id*.
[64] Ex. 1 at 1 (Notice of Appeal).
[65] *See Markwardt v. State,* 254 N.W.2d 371, 374 (Minn. 1977); *Citizen's Advocating Responsible Dev. v. Kandiyohi County Bd.*, 713 N.W.2d 817, 832 (Minn. 2006).
[66] DOC Policy No. 205.220, *supra*.

V. Conclusion

Because Mr. Lopez has failed to raise a genuine issue of material fact that requires an evidentiary hearing to resolve, the ECRC is entitled to Summary Disposition. Mr. Lopez's appeal of his risk level determination is dismissed, and the assignment of Risk Level 2 is affirmed.

J. E. L.