OAH 71-1100-36068

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level Determination of Sherrod T. Means

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter came before Administrative Law Judge Jessica A. Palmer-Denig for an evidentiary hearing on August 28, 2019, at the Office of Administrative Hearings. The record closed on that date at the conclusion of the hearing.

John D. Gross, Assistant Attorney General, appeared on behalf of the End-of-Confinement Review Committee (ECRC). Sherrod T. Means (Petitioner) appeared on his own behalf and without counsel.

STATEMENT OF THE ISSUE

Did the ECRC err in assigning Petitioner a Risk Level 2?

SUMMARY OF CONCLUSION

Petitioner did not show by a preponderance of the evidence that the ECRC's assignment of Risk Level 2 to him is erroneous. Therefore, the ECRC's risk level assignment in this case is **AFFIRMED**.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Predatory Offense and Subsequent Incarceration

1. Petitioner is subject to the Minnesota Community Notification Act (Act) based on his conviction for second-degree criminal sexual conduct.[1]

2. On January 4, 2013, Petitioner was charged with two counts of first-degree criminal sexual conduct.[2] An amended complaint subsequently added a charge

[1] Minn. Stat. §§ 243.166, subd. 1b, 244.052 (2018); Exhibit (Ex.) 1 at 137 (sentencing worksheet).
[2] Ex. 1 at 150-153 (complaint).

of second-degree criminal sexual conduct.[3] The charges alleged that Petitioner had sexual contact with a minor victim between March 1, 2012 and December 1, 2012.[4]

3. The victim, a seven-year-old girl, reported that Petitioner had sexual contact with her.[5] Petitioner was friends with the victim's mother, and had a sexual relationship with the girl's mother at times.[6] The victim reported that Petitioner touched and licked her vaginal area using his fingers, tongue, and penis.[7] The victim stated that Petitioner sexually abused her on multiple occasions at her home and at Petitioner's residence.[8] The victim also reported that Petitioner told her that he would "whoop her" if she told anyone.[9]

4. On April 29, 2015, Petitioner entered a guilty plea to one count of second-degree criminal sexual conduct for engaging in sexual contact with a child under the age of 13, and the other charges were dismissed.[10] On July 16, 2015, Petitioner was sentenced to 60 months in prison.[11]

5. While in prison, Petitioner received a directive to undergo a sex offender assessment and comply with recommendations.[12] The assessment resulted in a recommendation that Petitioner participate in treatment.[13]

6. On March 23, 2016, Petitioner was interviewed by, and accepted into, the sex offender treatment program (SOTP) at the Minnesota Correctional Facility - Lino Lakes.[14] Petitioner refused to sign the treatment agreement, however, and he was removed from the SOTP on July 8, 2016.[15] On October 5, 2016, intake staff re-interviewed Petitioner to determine whether he was eligible to return to treatment.[16] At that time, Petitioner refused to participate into the SOTP and denied that he had committed any sexual offense, and staff removed him from the waitlist.[17] Petitioner indicated a willingness to participate in sex offender treatment at times, but treatment staff determined that Petitioner was "playing games" and had not attempted to meet

[3] Ex. 1 at 147-149 (amended complaint).
[4] *Id.* at 147.
[5] Ex. 1 at 151-152 (complaint).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 151.
[10] Ex. 1 at 137 (sentencing worksheet); Ex. 1 at 138, 141 (Presentence Investigation); *see also* Ex. 1 at 148 (amended complaint).
[11] Ex. 1 at 119 (Initial PRT Report), 137 (sentencing worksheet), 138 (Presentence Investigation).
[12] Ex. 1 at 129 (Initial PRT Report).
[13] Ex. 1 at 104 (Notice of Violation); Ex. 1 at 106 (Incident Report).
[14] Ex. 1 at 107 (SOTP Intake Interview Results).
[15] *Id.*
[16] *Id.*
[17] *Id.*

treatment expectations.[18] Petitioner received 15 days of extended incarceration for failing to comply with his treatment directive.[19]

7. Petitioner underwent an ECRC assessment while in prison, and he was assigned Risk Level 1.[20] The ECRC considered Petitioner's offense and that he was an untreated sex offender.[21] The ECRC did not apply any special concerns and determined that there was insufficient evidence to support deviating from the presumptive risk level.[22]

8. Petitioner was released from prison on September 24, 2018.[23]

II. Petitioner's Other Criminal History

9. Petitioner's criminal record includes other convictions.[24]

10. Petitioner committed felony offenses when he lived in Illinois, including theft of a motor vehicle in 1991, manufacturing and delivery of cocaine in 1992, and attempted robbery in 1995.[25] Petitioner also was convicted of felony possession of a pistol in 2001, in Minnesota.[26]

11. Petitioner has an extensive history of misdemeanor and gross misdemeanor convictions for multiple instances of driving after cancellation,[27] driving under the influence (DWI),[28] and driving after revocation/withdrawal,[29] as well as convictions for domestic assault, disorderly conduct, and other crimes.[30]

12. At times, Petitioner has committed criminal offenses while under correctional supervision. In 2006, Petitioner was subject to supervision related to his conviction for possession of a firearm.[31] On March 29, 2006, Petitioner's release conditions were restructured because he had two positive tests for marijuana and admitted using the drug.[32]

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[18] Ex. 1 at 97 (Hearing Findings); Ex. 1 at 98 (email from Samantha Ortman to Cris Beal (Oct. 24, 2016 8:37 a.m. CST).
[19] Ex. 1 at 91 (Office Memorandum – Discipline Appeal, Nov. 8, 2016).
[20] Ex. 1 at 158 (ECRC Report).
[21] *Id.* at 158-159.
[22] *Id.* at 159.
[23] *Id.* at 158.
[24] Ex. 1 at 65 (Criminal Record Report); Ex. 1 at 138 (Presentence Investigation).
[25] Ex. 1 at 138 (Presentence Investigation).
[26] *Id*.
[27] Ex. 1 at 52-53 (Criminal Record Report).
[28] *Id.* at 53-55; s*ee also* Ex. 1 at 138 (Presentence Investigation).
[29] Ex. 1 at 139 (Presentence Investigation).
[30] *Id.* at 138-139 (Presentence Investigation). Petitioner's additional convictions include the following: Resist/Obstruct an Officer; Criminal Damage; Possession of Marijuana in a Motor Vehicle; No Driver's License; and No Proof of Insurance.
[31] Ex. 1 at 157 (Restructure Report).
[32] *Id.*

13. In 2010 and 2011, Petitioner committed multiple DWI and driving after cancellation offenses, and the sentences imposed in each of these cases included a two-year term of probation.[33] Petitioner was on probation in 2012 when he committed sexual offenses leading to his second-degree criminal sexual conduct conviction.[34]

III. Revocation of Petitioner's Release

14. Following Petitioner's release from prison in September 2018, he was on supervised release.[35] While in the community, Petitioner had a job, was working full time, and had stable housing.[36] He maintained contact with his agent and was respectful in their interactions.[37]

15. Petitioner's conditions of release prohibited him from leaving Minnesota without written permission from his agent.[38] On November 24, 2018, however, Petitioner traveled to Illinois without obtaining permission from his supervising agent to attend a birthday party for his mother.[39] He advised the agent that he planned to make the trip and knew he was required to complete approval paperwork.[40] He attempted to meet with his agent to complete the paperwork, but was unsuccessful, and left the state anyway.[41]

16. While in Illinois, Petitioner had contact with his minor son and his son's mother, D.S.[42] Petitioner was not permitted to have contact with minors without prior documented approval from his supervising agent.[43] Petitioner did not have such permission when he saw his son.[44]

17. D.S. visited Petitioner in Minneapolis in December 2018, staying with him in a hotel.[45]

18. On January 10, 2019, D.S. reported to police in Illinois that Petitioner sexually assaulted her and she sought an order for protection prohibiting Petitioner from having contact with her.[46] D.S. alleged that Petitioner sexually assaulted her on

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[33] Ex. 1 at 62 (Criminal Record Report).
[34] *Id.;* Ex. 1 at 137 (sentencing worksheet); Ex. 1 at 147 (amended complaint).
[35] Ex. 1 at 20 (Violation Report).
[36] *Id.* at 22.
[37] *Id.*
[38] *Id.*
[39] Ex. 1 at 18-19 (Notice of Adult Revocation Hearing); Ex. 1 at 22 (Violation Report); Ex. 5 (audio recording of ECRC meeting); Testimony (Test.) of Sherrod Means.
[40] Test. of S. Means; Ex. 5 (audio recording of ECRC meeting).
[41] Test. of S. Means; Ex. 1 at 18-19 (Notice of Adult Violation Hearing); Ex. 1 at 22 (Violation Report); Ex. 5 (audio recording of ECRC meeting).
[42] Ex. 1 at 22 (Violation Report); Ex. 1 at 49 (Email from D.S. to Mike Bedard, Jan. 24, 2019 1:41 p.m. CST); Ex. 5 (audio recording of ECRC meeting); Test. of S. Means.
[43] Ex. 1 at 22 (Violation Report).
[44] *Id.*
[45] *Id.* at 21.
[46] Ex. 1 at 71-76 (Petition for Order for Protection); Ex. 1 at 82 (Incident/Offense Report).

November 24, 2018, while he was visiting Illinois, and again at the hotel in Minneapolis when she visited him in December 2018.[47]

19. An Emergency Order for Protection was issued on January 10, 2019, with a hearing to be held on January 31, 2019.[48] The Cook County Sheriff's Office in Illinois provided the order to Petitioner's agent for service upon Petitioner on January 24, 2019.[49] The hearing was subsequently postponed to February 7, 2019.[50]

20. On January 24, 2019, D.S. contacted Petitioner's agent to report her allegations of sexual assault by Petitioner, again alleging that Petitioner sexually assaulted her in Illinois in November 2018, and in Minneapolis in December 2018.[51]

21. On January 30, 2019, Petitioner and D.S. spoke by telephone regarding her allegations.[52] Petitioner recorded the telephone call in two segments on his phone.[53] During their conversation, D.S. admitted that she falsely reported that Petitioner sexually assaulted her.[54] She admitted that she made up the allegations because she was angry with Petitioner about child support issues, and she wanted to hurt him by ensuring that he returned to prison.[55]

22. On February 8, 2019, Petitioner's agent submitted a Violation Report seeking revocation of Petitioner's release, and indicating Petitioner violated the terms of his supervised release by allegedly sexually assaulting D.S., leaving Minnesota without authorization, having contact with his son without approval from his agent, and spending the night at a hotel with D.S. in December 2018.[56] The agent noted that Petitioner had engaged in "concerning and sneaky behavior," and stated that the alleged sexual assault against D.S. was "extremely concerning."[57]

23. Petitioner's revocation hearing was held on February 15, 2019.[58] Petitioner had admitted to his agent that he and D.S. engaged in sexual intercourse at the hotel in Minneapolis in December 2018.[59] Petitioner denied sexually assaulting D.S., however.[60] Petitioner sought to play the recordings of his telephone call with D.S. during his violation hearing, but he was unable to access the recordings on his phone.[61]

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[47] Ex. 1 at 73 (Petition for Order for Protection).
[48] Ex. 1 at 67-69 (Emergency Order for Protection).
[49] Ex. 1 at 50 (Email from Katharine Ortloff to Mike Bedard, Jan. 24, 2019 1:23 p.m. CST).
[50] Ex. 1 at 48 (Email from Katharine Ortloff to Mike Bedard, Jan. 30, 2019 10:55 a.m. CST).
[51] Ex. 1 at 21 (Violation Report).
[52] Test. of S. Means.
[53] *Id.*; Ex. 101 (Recording); Ex. 102 (Recording).
[54] Test. of S. Means; Ex. 101 (Recording); Ex. 102 (Recording).
[55] Test. of S. Means; Ex. 101 (Recording); Ex. 102 (Recording).
[56] Ex. 1 at 21-23 (Violation Report).
[57] *Id.* at 22-23.
[58] Ex. 18 (Notice of Adult Revocation Hearing).
[59] Ex. 1 at 22 (Violation Report).
[60] Test. of S. Means.
[61] *Id.*

24. Petitioner's release was revoked and he returned to custody within the Minnesota Department of Corrections (DOC) at the Minnesota Correctional Facility - Stillwater.[62]

IV. Most Recent ECRC Assessment and Assignment of Risk Level 2

25. Following his return to custody, Petitioner was referred for another ECRC assessment to take place prior to his release.[63]

26. Petitioner was scheduled for release on May 13, 2019.[64]

27. In preparation for Petitioner's release, Dr. Terrel Backes, a licensed psychologist with the DOC, prepared a risk assessment recommendation for Petitioner.[65]

28. Dr. Backes scored Petitioner using the MnSOST-3.1.2.[66] According to the risk assessment tool, Petitioner's predicted probability of sexual recidivism is 1.32%, placing Petitioner in the presumptive Risk Level 1 category.[67] Petitioner's presumptive risk level did not change between his first and second ECRC assessments.[68]

29. The recommendation discussed the statutory risk factors. The recommendation analyzed the potential dangerousness of another offense by Petitioner, noting that should Petitioner reoffend, his likely victim would be either a minor or adult female acquaintance.[69] The recommendation noted Petitioner's physical condition did not impair his ability to reoffend, but further noted that Petitioner had not expressed an intent to reoffend and did not have any formal disciplinary violations during his most recent confinement.[70] The recommendation also reviewed Petitioner's characteristics and the supports available in the community to Petitioner, including Petitioner's family, romantic, educational, and employment history.[71]

30. Dr. Backes applied two special concerns to Petitioner.[72]

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[62] Ex. 1 at 6-15 (Risk Assessment Recommendation).
[63] Test. of Dr. Terrel Backes. The record contains insufficient information to support findings regarding the person who made the decision that Petitioner should be reassessed by an ECRC or the basis for that determination.
[64] Ex. 1 at 3 (Risk Assessment Report).
[65] Ex. 1 at 6 (Risk Assessment Recommendation); *see also* Ex. 4 (Curriculum Vitae).
[66] *See* Ex. 1 at 16 (MnSOST-3.1.2 scoring sheet).
[67] *See id.*; Ex. 2 at 4 (MnSOST-3.1.2 Coding Rules).
[68] *See* Ex. 1 at 16 (MnSOST-3.1.2 scoring sheet); Ex. 1 at 87 (Risk Assessment Recommendation, May 30, 2018); Ex. 2 at 4 (MnSOST-3.1.2 Coding Rules).
[69] Ex. 1 at 9 (Risk Assessment Recommendation).
[70] *Id.* at 12.
[71] *Id.* at 10-12.
[72] *Id*. at 13-14.

31. First, Dr. Backes applied Special Concern 4.[73] Special Concern 4 applies when an offender has a history of prior supervision failures or a pronounced unwillingness to cooperate with release planning.[74] This special concern may be indicated when an offender "has committed any sex offense(s) while under correctional custody or supervision, or has multiple probation or supervised release failures involving revocations or new non-sex offense(s)."[75]

32. In discussing Special Concern 4, Dr. Backes wrote that Petitioner violated the conditions of his supervised release when he traveled to Illinois without permission from his agent.[76] While in Illinois, Petitioner had contact with his minor son and "allegedly assaulted and forced sexual contact with his son's mother."[77] Dr. Backes noted Petitioner's admission that he had sexual intercourse with D.S. in December 2018, stating that "this woman again alleged that Mr. Means physically and sexually assaulted her."[78] Dr. Backes also referenced Petitioner's refusal to participate in sex offender treatment programming while incarcerated and the lack of evidence of any treatment participation during his time in the community.[79]

33. Dr. Backes applied Special Concern 14.[80] This special concern applies when an offender engages in "high-risk, grooming type behavior," or other behavior suggesting an increased potential to reoffend, especially during periods of supervision, or after the most recent release from prison.[81] Special Concern 14 may be applied when an offender:

> puts himself in a position of authority over individuals within the age range of his victim pool, for time periods that do not involve incidental contact; and/or the offender befriends family members of potential victims and keeps his offense history private from them. This behavior suggests that a broader degree of community notification would be appropriate to warn potential victims and their families.[82]

34. Regarding Special Concern 14, Dr. Backes considered that Petitioner "was deceptive with his corrections agent, had unapproved contact with at least one minor child, and he involved himself in a risky sexual relationship; as noted previously, this woman alleged Mr. Means sexually assaulted her."[83]

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[73] *Id.* at 13-14.
[74] Ex. 3 at 1 (special concerns).
[75] *Id.*
[76] Ex. 1 at 13 (Risk Assessment Recommendation).
[77] *Id.*
[78] *Id.* at 14.
[79] *Id.*
[80] *Id.*
[81] Ex. 3 at 3 (special concerns).
[82] *Id.*
[83] Ex. 1 at 14 (Risk Assessment Recommendation).

35. Based on Petitioner's score on the risk assessment tool, consideration of the statutory risk factors, and application of two special concerns, Dr. Backes recommended assigning a Risk Level 2 to Petitioner.[84]

36. The ECRC convened on April 3, 2019, to address Petitioner's risk level recommendation.[85] Petitioner attended the meeting and had an opportunity to be heard prior to the committee's vote.[86]

37. Petitioner told the ECRC that he spoke to his agent about the trip he intended to take to Illinois for his mother's birthday.[87] Petitioner admitted that his agent advised him to finalize authorization paperwork prior to leaving Minnesota.[88] Petitioner explained that he went see his agent, but his agent was not in the office, and Petitioner did not sign the necessary documentation.[89] Petitioner then traveled to Illinois without permission.[90] Petitioner saw his son's mother during this trip and had contact with his son.[91] However, Petitioner stated that he did not know that his son would be present at the time of the visit.[92] Petitioner acknowledged that he had consensual sexual contact with his son's mother, D.S., but denied allegations that he sexually assaulted her.[93] He noted that he had recordings of D.S. in which she admitted falsifying her allegations.[94] Petitioner told the ECRC that he pled guilty to his predatory offense to take advantage of a plea deal.[95] He contended that the judge in his criminal case would not allow him to offer exonerating information.[96]

38. At the conclusion of the meeting, the ECRC voted to assign Petitioner a Risk Level 2.[97] Four members of the ECRC voted to assign Petitioner a Risk Level 2 and one member voted to assign a Risk Level 1.[98] The ECRC applied Special Concern 4 and Special Concern 14 in assessing Petitioner's risk level.[99]

39. On April 5, 2019, Petitioner submitted an appeal of the ECRC's risk level assignment.[100]

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[84] *Id.* at 13.
[85] Ex. 1 at 3 (Risk Assessment Report).
[86] *Id.* at 4; Ex. 5 (audio recording of ECRC meeting).
[87] Ex. 5 (audio recording of ECRC meeting).
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] Ex. 1 at 3 (Risk Assessment Report).
[98] *Id.* at 4.
[99] *Id.* at 5.
[100] Ex. 1 at 1 (Notice of Appeal).

V. Procedural History

40. On April 30, 2019, the ECRC filed a Notice and Order for Review of Risk Level Assignment with the Office of Administrative Hearings.

41. The ECRC filed a Motion for Summary Disposition on April 30, 2019, which the Administrative Law Judge denied on June 17, 2019.[101]

42. An evidentiary hearing was held on August 28, 2019, at the Office of Administrative Hearings in Saint Paul. The Administrative Law Judge heard testimony from Dr. Backes and Petitioner, and received exhibits from both parties into the record.

43. Any Conclusions of Law listed below that are more properly considered to be findings of fact are incorporated herein.

44. Any facts not specifically referenced in these Findings of Fact that are discussed in the Memorandum are incorporated herein.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. Individuals convicted of certain criminal offenses are considered "predatory offenders" and are 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."[102]

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."[103]

3. The scope and degree of community notification required by the Act is determined by assignment of one of three different risk levels defined by statute.[104]

4. The ECRC is responsible for assessing the public risk posed by each predatory offender upon release and determining the appropriate risk level assignment.[105] Offenders who return to prison following a release violation may

[101] *See* Order Denying Motion for Summary Disposition (June 17, 2019).
[102] Minn. Stat. §§ 243.166, subd. 1b, 244.052, subd. 4(a).
[103] Minn. Stat. §§ 243.166, subd. 1b, 244.052, subd. 4(a).
[104] Minn. Stat. § 244.052, subd. 4(b).
[105] *Id.*, subd. 3(a).

undergo a risk assessment if substantial evidence exists indicating that the offender's risk to the public has increased.[106]

5. The ECRC must apply six statutory risk factors: (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.[107] This list is not exclusive.[108]

6. In addition, the ECRC must apply a risk assessment scale to each offender.[109] The score from the risk assessment tool translates into a presumptive risk level.[110] 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.[111]

7. 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."[112]

8. The Administrative Law Judge is authorized to review risk levels assigned by the ECRC.[113]

9. The ECRC has complied with all relevant substantive and procedural requirements of rule and law. Petitioner received due and proper notice of this proceeding and participated in the hearing.

10. Petitioner must show by a preponderance of the evidence that the ECRC's risk assessment determination is erroneous.[114] If Petitioner meets that burden, the Administrative Law Judge may make a de novo determination of the appropriate risk level to be assigned.[115]

11. Petitioner failed to show by a preponderance of the evidence that his assignment of Risk Level 2 by the ECRC is erroneous.

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[106] *Id.*, subd. 3(j).
[107] *Id.*, subd. 3(g).
[108] *Id.*
[109] *Id.*, subd. 2.
[110] *Id.*
[111] Minnesota Department of Corrections Policy No. 205.220 (Apr. 16, 2013); *see also In the Matter of the Risk Level Determination of R.B.P.*, 640 N.W.2d 351, 354 (Minn. Ct. App. 2002).
[112] Minn. Stat. § 244.052, subd. 3(f).
[113] Minn. Stat. §§ 14.50, 244.052, subd. 6 (2018).
[114] Minn. Stat. § 244.052, subd. 6(b).
[115] *Id.*, subd. 6(c).

12. Any Findings of Fact more properly considered to be conclusions of law are adopted herein.

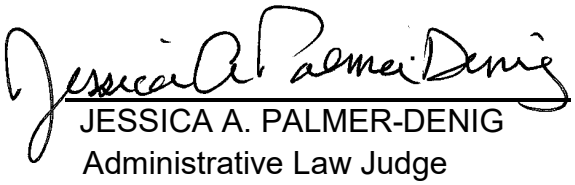
13. Any portions of the Memorandum below that are properly considered to be Conclusions of Law are adopted herein.

Based upon the Conclusions of Law, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

The ECRC's assignment of a Risk Level 2 to Petitioner is **AFFIRMED**.

Dated: September 27, 2019



JESSICA A. PALMER-DENIG
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

NOTICE

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

Under Minnesota law, Petitioner must show by a preponderance of the evidence that the ECRC's risk level assignment was erroneous.[116] To establish a fact by a preponderance of the evidence, "it must be more probable that the fact exists than that the contrary exists."[117] If the evidence is equally balanced, then that fact or issue has not been proven by a preponderance of the evidence.[118] If Petitioner meets his burden, the Administrative Law Judge may make a de novo determination of the appropriate risk level to be assigned.[119] The Administrative Law Judge determines that Petitioner did not meet his burden in this case.

At the outset, the Administrative Law Judge notes that Petitioner has produced evidence, in the form of a recorded admission by D.S., that he did not commit the

[116] Minn. Stat. § 244.052, subd. 6(b).
[117] *City of Lake Elmo v. Metropolitan Council*, 685 N.W.2d 1, 4 (Minn. 2004).
[118] *Id.*
[119] Minn. Stat. § 244.052, subd. 6(c).

sexual assaults she alleged occurred in November and December of 2018.[120] The Administrative Law Judge cannot determine the weight these allegations were given during Petitioner's revocation hearing and does not have jurisdiction to review that decision. After Petitioner returned to prison, a determination was made that reassessment by the ECRC was warranted.[121] Petitioner does not challenge that decision and the record is insufficient to permit a determination as to whether the allegations made by D.S. played a role in the decision to reassess Petitioner's risk.

The record shows that the ECRC also considered the allegations in assigning Petitioner's risk level, but the Administrative Law Judge concludes that this does not constitute an error on the facts presented here. At the time of the ECRC's meeting, the ECRC had access to a police report and an order for protection that had been entered by a court in Illinois. These are official law enforcement and court records, and are the type of records regularly considered by the ECRC.[122] The ECRC did not determine D.S.'s allegations were proven, and the committee also considered that no criminal charges had been filed.[123] The Administrative Law Judge cannot determine that the consideration given to the allegations at that time and under these specific circumstances was an error.[124]

Further, even without considering D.S.'s allegations, the ECRC's determination is supported by the record. Petitioner's score on the MnSOST-3.1.2 places him in the presumptive range for assignment of Risk Level 1, the same risk level he was originally assigned. The ECRC deviated from that presumptive risk level based upon the application of two special concerns. The Administrative Law Judge concludes that the ECRC did not err in applying either special concern to Petitioner.

Special Concern 4 applies when an offender has a history of prior supervision failures or a pronounced unwillingness to cooperate with release planning.[125] It applies when an offender "has committed any sex offense(s) while under correctional custody or supervision, or has multiple probation or supervised release failures involving revocations or new non-sex offense(s)."[126] Dr. Backes testified at the hearing that this special concern applies because Petitioner was on probation at the time he committed the criminal sexual conduct offense against his minor victim, and he also had a supervision failure and revocation only a few months after being released into the community.[127] The record supports this testimony and the ECRC's application of Special Concern 4.

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[120] Ex. 100, 101.
[121] *See* Minn. Stat. 244.052, subd. 3(j).
[122] *See id.*, subd. 3(c).
[123] Test. of T. Backes.
[124] The Administrative Law Judge cautions the ECRC that consideration of these allegations in a future risk assessment would constitute an error, as the DOC is now aware of D.S.'s admission that she falsified the allegations.
[125] Ex. 3 at 1 (special concerns).
[126] *Id*.
[127] Test. of T. Backes.

Special Concern 14 applies when an offender engages in high-risk, grooming type behavior or other behavior suggesting an increased potential to reoffend, especially during periods of supervision, or after the most recent release from prison.[128] Dr. Backes testified that the ECRC determined that Petitioner's conduct in the community just months after being released from prison justified application of this special concern because it was "other behavior suggesting an increased potential to reoffend."[129] There is no dispute that Petitioner left the state and saw his minor son without approval from his agent, both of which were violations of his release conditions. Petitioner's agent wrote that while some aspects of Petitioner's supervision were going well, Petitioner had engaged in "very concerning and sneaky behavior."[130] The ECRC also was particularly concerned that Petitioner was in the community such a short time before returning to prison, and had not engaged in sex offender treatment programming while on release.[131] On this record, application of Special Concern 14 was not error.

Petitioner argues that assignment of Risk Level 2 has serious consequences for his life. At the hearing, he expressed deep frustration regarding D.S.'s allegations and the challenges he has experienced in his effort to clear his name. The Administrative Law Judge agrees that assignment of a higher risk level is a significant matter and does not discount Petitioner's concerns about the consequences of D.S.'s actions. However, the law requires Petitioner to establish that the ECRC's determination was made in error and, on this record, Petitioner has not done so. Therefore, the Administrative Law Judge cannot conduct a de novo review or assign Petitioner a different risk level.

While on release in the past, Petitioner has been able to find stable housing and employment. These are positive factors in Petitioner's life. The Administrative Law Judge encourages Petitioner to remain law abiding in the community, and to carefully adhere to his release conditions. These requirements are not optional and additional violations may subject Petitioner to substantial consequences. Conversely, consistently demonstrating compliance with release conditions and stable, law-abiding conduct may allow Petitioner to show the ECRC that he can be successful in the community and may merit a reassessment as a Risk Level 1 in the future. The Administrative Law Judge reminds Petitioner that he may request that the ECRC reassess his risk level assignment three years after the ECRC's meeting on April 3, 2019.[132] If the request is denied, the Petitioner may renew the request once every two years following subsequent denials.[133]

J. P. D.

[128] Ex. 3 at 3 (special concerns).
[129] Test. of T. Backes.
[130] Ex. 1 at 22 (Violation Report).
[131] Test. of T. Backes.
[132] Minn. Stat. § 244.052, subd. 3(i).
[133] *Id.*