OAH 71-1100-36339

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level Determination of Erik D. Solorio

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter came before Administrative Law Judge Jessica A. Palmer-Denig for an evidentiary hearing on November 19, 2019, at the Office of Administrative Hearings. The record closed at the conclusion of the hearing.

Peter Magnuson, Assistant Attorney General, appeared on behalf of the End-of-Confinement Review Committee (ECRC). Erik D. Solorio (Petitioner) appeared on his own behalf and without counsel, via interactive television.

STATEMENT OF THE ISSUE

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

SUMMARY OF CONCLUSION

Petitioner failed to establish by a preponderance of the evidence that the ECRC erred by assigning him a Risk Level 2. Therefore, Petitioner's risk-level assignment is **AFFIRMED**.

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

FINDINGS OF FACT

I. Petitioner's Offense History

1. Petitioner is subject to the Minnesota Community Notification Act (Act) based on his 2009 conviction for first-degree criminal sexual conduct.[1]

2. In 2002 and 2003, Petitioner had sexual contact with a ten-year-old male family member, D.S.[2] D.S. reported that, on more than one occasion, Petitioner directed D.S. to perform oral sex on Petitioner, and Petitioner also performed oral sex

[1] Exhibit (Ex.) 1 at 83 (presentence investigation); Minn. Stat. § 243.166, subd. 1b (2018).
[2] Ex. 1 at 89-90 (complaint).

on D.S.[3] Petitioner admitted to the exchange of oral sex, and also admitted fondling D.S.'s penis and scrotum and to inserting his finger into D.S.'s buttocks.[4]

3. On October 29, 2008, Petitioner was charged with one count of first-degree criminal sexual conduct.[5] On January 28, 2009, Petitioner entered a guilty plea and was convicted of that offense.[6]

4. Petitioner received a sentence of 144 months, but the sentence was stayed and Petitioner was placed on probation for ten years.[7] Petitioner violated the terms of his probation in 2011, when he was discharged from sex offender treatment for violating treatment rules.[8]

5. In 2013, Petitioner violated his probation conditions when he was again discharged from sex offender treatment.[9] Petitioner's sentence was executed and he entered prison in June 2013.[10]

6. Petitioner was incarcerated at the Minnesota Correctional Facility – Faribault (MCF-Faribault).[11] Petitioner was scheduled to be released on December 9, 2019.[12]

II. The ECRC Process

7. In preparation for Petitioner's release, Shelley Leutschaft, a licensed psychologist with the Department of Corrections (DOC),[13] prepared a risk assessment recommendation for Petitioner to be considered by the ECRC.[14]

8. As part of the risk assessment, Dr. Leutschaft scored the Minnesota Sex Offender Screening Tool-4 (MnSOST-4) for Petitioner on July 19, 2019.[15] The scoring predicted Petitioner's probability of sexual recidivism as 3.08 percent, placing Petitioner in the presumptive Risk Level 2 category.[16]

---

[3] *Id.* at 89.
[4] *Id.*
[5] *Id.* at 89-90.
[6] Ex. 1 at 83 (presentence investigation).
[7] Ex. 1 at 73 (sentencing worksheet); Ex. 1 at 94 (Amended Order Warrant of Commitment); Ex. 1 at 97 (Report of Adult Corrections Department and Order of the Court for Defendant's Arrest, Detention and Hearing, Jan. 6, 2011).
[8] Ex. 1 at 97 (Report of Adult Corrections Department and Order of the Court for Defendant's Arrest, Detention and Hearing, Jan. 6, 2011).
[9] Ex. 1 at 96 (Report of Adult Corrections Department and Order of the Court for Defendant's Arrest, Detention and Hearing, Apr. 23, 2013).
[10] Ex. 1 at 21 (Initial PRT Report); Ex. 1 at 92 (Warrant of Commitment); Ex. 1 at 93-94 (Amended Order Warrant of Commitment).
[11] Ex. 1 at 2 (ECRC Risk Assessment Report).
[12] *Id.*
[13] Ex. 5 (curriculum vitae).
[14] Ex. 1 at 4 (ECRC Risk Assessment Recommendation).
[15] Ex. 1 at 8 (MnSOST-4.0 Scoring Sheet).
[16] *Id.*; Ex. 1 at 6 (ECRC Risk Assessment Recommendation).

9. In scoring the instrument, Dr. Leutschaft scored the item for whether Petitioner is married with a zero.[17] Dr. Leutschaft scored Petitioner's marital status as a zero because the DOC electronic record-keeping system listed him as single.[18]

10. According to the Coding Rules for this instrument, an offender is scored with a zero if the offender is single, divorced, or separated, or if his marital status is "other," or unknown.[19] An offender receives a score of one if the offender is married, in a common law relationship, divorced and remarried, widowed, or widowed and remarried.[20]

11. In the risk assessment recommendation, Dr. Leutschaft applied the statutory factors to Petitioner.[21] In considering the availability of community support for Petitioner, Dr. Leutschaft stated that Petitioner "has never married."[22]

12. Dr. Leutschaft did not apply any special concerns or mitigating factors, and ultimately recommended that the ECRC assign Petitioner to Risk Level 2, consistent with the presumptive score indicated by the MnSOST-4.0.[23]

13. The ECRC convened on August 12, 2019, to address Petitioner's risk level assignment.[24] Petitioner attended the meeting; he spoke to the ECRC and answered questions committee members posed to him.[25] Petitioner's marital status was addressed repeatedly in the ECRC's meeting. Petitioner discussed the supports available to him in the community; he identified his wife as a support person and indicated he intended to live with his wife upon release.[26] Committee members asked questions about or involving Petitioner's wife, including when Petitioner married and whether, now that he was married, he maintained any sexual attraction to males in his victim's age range.[27]

14. At the conclusion of the meeting, the ECRC voted to assign Petitioner a Risk Level 2.[28] The ECRC prepared a report articulating the basis for its decision, including that it did not believe there was sufficient evidence to justify a higher risk level.[29] The risk assessment report noted Petitioner's statement that he intended to live with his wife upon release.[30]

---

[17] Ex. 1 at 8 (MnSOST-4.0 Scoring Sheet).
[18] Test. of Shelley Leutschaft.
[19] Ex. 2 at 29 (MnSOST-4.0 Coding Rules).
[20] *Id.*
[21] Ex. 1 at 4-6 (ECRC Risk Assessment Recommendation).
[22] *Id.* at 6.
[23] *Id.* at 6-7.
[24] Ex. 1 at 2 (ECRC Risk Assessment Report); Ex. 6 (audio recording of ECRC meeting).
[25] Ex. 1 at 2-3 (ECRC Risk Assessment Report); Ex. 6 (audio recording of ECRC meeting).
[26] Ex. 6 (audio recording of ECRC meeting).
[27] *Id.*
[28] Ex. 1 at 2-3 (ECRC Risk Assessment Report).
[29] *Id.*
[30] *Id.* at 3.

15. Petitioner appealed the ECRC's risk level determination on August 13, 2019.[31]

III. Contested Case

16. On April 20, 2018, the ECRC filed a Notice and Order for Review of Risk Level Assignment with the Office of Administrative Hearings.

17. On September 17, 2019, the ECRC moved for summary disposition. The Administrative Law Judge denied the ECRC's motion because the record contained numerous references to Petitioner as married. Viewing the facts in the light most favorable to Petitioner, the Administrative Law Judge concluded that "[a] hearing [was] required to definitively determine whether Dr. Leutschaft correctly scored the MnSOST-4.0 for Petitioner, and if not, whether the scoring error resulted in a higher presumptive risk level than should have been indicated."[32]

18. Dr. Leutschaft completed another MnSOST-4 scoring for Petitioner, with Petitioner's score regarding whether he is married moving from a zero to a one.[33] Petitioner's predicted probability of recidivism decreased from 3.08% to 2.65%.[34] This places Petitioner presumptively into Risk Level 2.[35]

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

CONCLUSIONS OF LAW

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."[36]

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."[37]

---

[31] Ex. 1 at 1 (Notice of Appeal).
[32] Order Denying Motion for Summary Disposition at 7 (Oct. 14, 2019).
[33] Ex. 7.
[34] *Id.*
[35] *Id.*; *see also* Ex. 2 at 4.
[36] Minn. Stat. §§ 243.166, subd. 1b, 244.052, subd. 4(a) (2018).
[37] Minn. Stat. §§ 243.166, subd. 1b, 244.052, subd. 4(a).

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.[38] Each risk level is associated with a different degree of community notification.[39]

4. An assignment of Risk Level 2 permits a law enforcement agency to notify agencies and groups that the offender is likely to encounter, including schools, day care facilities, and other organizations that serve individuals likely to be victimized by the offender.[40] The law enforcement agency also may disclose information to individuals the agency believes are likely to be victimized by the offender, based on the offender's pattern of offending or victim preference.[41]

5. Every predatory offender confined in a Minnesota state correctional or treatment facility must be assessed by the ECRC at the facility prior to release.[42] The ECRC is responsible for assessing the public risk posed by each predatory offender upon release and determining the appropriate risk level assignment.[43]

6. 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 the community; and (6) whether the offender demonstrates a physical condition that minimizes the risk of re-offense.[44] This list is not exclusive.[45]

7. In addition to the statutory risk factors, the ECRC is also required to apply a risk assessment scale when assigning a risk level to a predatory offender.[46] 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.[47]

---

[38] Minn. Stat. § 244.052, subd. 4(b) (2018).
[39] *Id.*
[40] *Id.*, subd. 4(b)(2).
[41] *Id.*
[42] *Id.*, subd. 3 (2018).
[43] *Id.*
[44] *Id.*, subd. 3(g).
[45] *Id.*
[46] *Id.*, subd. 2 (2018).
[47] Minnesota Department of Corrections Policy No. 205.220 (April 16, 2013); *see also In re the Risk Level Determination of R.B.P.*, 640 N.W.2d 351, 354 (Minn. Ct. App. 2002).

8. As part of the risk level 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."[48]

9. The Administrative Law Judge is authorized to review risk levels assigned by the ECRC.[49]

10. The ECRC has complied with all relevant substantive and procedural requirements of rule and law for this proceeding.

11. In a risk level appeal, the offender has the burden of proving by a preponderance of the evidence that the ECRC's risk assessment determination is erroneous.[50] If the offender meets his burden, the Administrative Law Judge has the authority to make a de novo determination of the appropriate risk level to be assigned to the offender.[51]

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

Based on the Conclusions of Law, and for the reasons set forth in the accompanying Memorandum, which is incorporated herein, the Administrative Law Judge makes the following:

ORDER

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

Dated: December 19, 2019

JESSICA A. PALMER-DENIG
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

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).

[48] Minn. Stat. § 244.052, subd. 3(f).
[49] Minn. Stat. §§ 14.50, 244.052, subd. 6 (2018).
[50] Minn. Stat. § 244.052, subd. 6(b).
[51] *Id.*, subd. 6(c).

MEMORANDUM

Petitioner challenges the ECRC's assignment of Risk Level 2. Petitioner argues that he has taken responsibility for his offense, has changed, and has taken steps to better himself and prepare for the outside world. Petitioner bears the burden of proof to show by a preponderance of the evidence that the ECRC erred in assigning him a Risk Level 2.[52] Petitioner has failed to meet that burden.

According to the record here, Petitioner is married. Documents in the record reference Petitioner as married.[53] Petitioner's marital status was addressed repeatedly during the ECRC's meeting. Petitioner identified his wife as a support person and indicated he intended to live with his wife upon release.[54] Committee members asked questions about or involving Petitioner's wife, including when Petitioner married and whether, now that he was married, he maintained any sexual attraction to males in his victim's age range.[55] Dr. Leutschaft testified that she initially scored Petitioner as a zero because the DOC's electronic record-keeping system listed him as single,[56] but the ECRC did not dispute that Petitioner is married.

In light of this evidence, Dr. Leutschaft initially scored the MnSOST-4 incorrectly. It does not automatically follow, however, that the assignment of Risk Level 2 was erroneous. First, Petitioner's presumptive risk level remained the same when Dr. Leutschaft scored the instrument considering Petitioner as married.[57] Dr. Leutschaft applied the required statutory factors, did not apply special concerns, and found "no reason to depart" from the presumptive risk level.[58] Therefore, to support a downward departure, Petitioner must demonstrate the existence of mitigating factors.[59] Petitioner argues that he has taken responsibility for his offense, has changed, and has taken steps to better himself and prepare for the outside world. These assertions are not mitigating factors.[60] Even assuming Petitioner's statements true, he has not established error in the ECRC's risk-level assignment.

The Administrative Law Judge concludes that Petitioner failed to show by a preponderance of the evidence that his assignment of Risk Level 2 by the ECRC is erroneous. The Administrative Law Judge reminds Petitioner that it may be possible to obtain a reduction of his risk level in the future if he complies with release conditions and demonstrates he can remain law abiding in the community. Petitioner may request the ECRC reassess his risk level assignment after three years have elapsed since the

---

[52] *See* Minn. Stat. § 244.052, subd. 6(b).
[53] Ex. 1 at 42, 46-48, 56 (Initial Assessment); Ex. 1 at 31-32 (Discharge Summary).
[54] *Id.*
[55] *Id.*
[56] Test. of S. Leutschaft. Dr. Leutschaft testified that Petitioner raised a concern at the ECRC meeting about the scoring of the MnSOST-4 based on his marriage, but the recording of the ECRC's meeting and its report do not reflect that he did so. *Id.*; Ex. 1 at 2-3 (ECRC Risk Assessment Report); Ex. 6 (audio recording of ECRC meeting).
[57] Test. of S. Leutschaft; Ex. 7; *see also* Ex. 2 at 4 (MnSOST-4 Coding Rules).
[58] *See* Ex. 1 at 3-7 (ECRC Risk Assessment Recommendation).
[59] *See* Minnesota Department of Corrections Policy No. 205.220; *see also R.B.P.*, 640 N.W.2d at 354.
[60] *See* Minnesota Department of Corrections Policy No. 205.220.

ECRC's meeting on August 12, 2019.[61] If the request is denied, the Petitioner may renew the request once every two years following subsequent denials.[62]

J. P. D.

[61] *See* Minn. Stat. § 244.052., subd. 3(i).
[62] *Id.*