OAH 60-1100-36620

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level Determination of Michael P. Henson	**ORDER DENYING THE ECRC'S MOTION FOR SUMMARY DISPOSITION**

This matter is pending before Administrative Law Judge James E. LaFave.

Edwin W. Stockmeyer, Assistant Attorney General, represents the Minnesota Department of Corrections End-of-Confinement Review Committee (ECRC). Michael P. Henson (Petitioner) represents himself, without counsel.

On February 7, 2020, the ECRC served and filed a Motion for Summary Disposition (Motion). The Petitioner did not respond to the Motion. The record closed on February 18, 2020.

Based on the record and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY ORDERED:

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

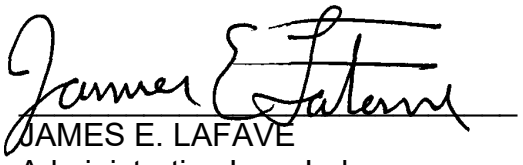
2. The parties shall confer on convenient dates a for pre-filing of witness lists and any additional exhibits, and an evidentiary hearing.

3. By **4:30 p.m.** on **Friday**, **May 29, 2020**, the ECRC shall file at the Office of Administrative Hearings (OAH), and serve on Mr. Henson, a status report detailing the parties' progress selecting the dates described above in Paragraph 2.

4. **Pursuant to Minn. R. 1400.6000 (2019), failure to appear at the hearing will result in the allegations contained in the Motion for Summary Disposition, including the supporting affidavits will be taken as true. This means that the action**

being appealed will be upheld and the proposed risk level affirmed.[1]

Dated: May 14, 2020



JAMES E. LAFAVE
Administrative Law Judge

MEMORANDUM

The ECRC seeks summary disposition claiming Petitioner failed to allege any material error and that it is entitled to an order in its favor affirming Petitioner's risk level.

I. Legal Background

Persons who are charged with certain "predatory offenses" delineated in Minn. Stat. § 243.166, subd. 1b (2018), and who are either: (1) convicted of a predatory offense; or (2) convicted of other offenses arising out of the same set of circumstances as a predatory offense, are considered "predatory offenders" subject to registration with law enforcement.[2] Predatory offenses include, but are not limited to, kidnapping, false imprisonment, criminal sexual conduct, indecent exposure, possession or dissemination of child pornography, and other specific sex-related offenses.[3] Registration seeks to ensure that law enforcement is able to locate predatory offenders living, working, or found within the state.

In addition to registration, predatory offenders in Minnesota are subject to the provisions of the Minnesota Community Notification Act (Act).[4] The Act provides that a law enforcement agency in the area where a predatory offender resides, expects to reside, is employed, or is regularly found shall disclose to the public any information about the offender that is "relevant and necessary to protect the public and to counteract the offender's dangerousness."[5] 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."[6]

The scope of community notification related to a predatory offender is determined by the "risk level" assigned to the offender. There are three risk levels under Minnesota

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[1] Minn. R. 1400.6000 ("Upon default, the allegation of or the issues set out in the notice and order for hearing **or other pleading** may be taken as true or deemed proved without further evidence.") (emphasis added).
[2] Minn. Stat. §§ 243.166, 244.052, subd. 1(5) (2018).
[3] Minn. Stat. § 243.166, subd. 1b.
[4] *See generally* Minn. Stat. § 244.052 (2018).
[5] Minn. Stat. § 244.052, subd. 4(a).
[6] *Id.*

law: Risk Level 1; Risk Level 2; and Risk Level 3.[7] Each risk level is associated with a different degree of community notification.[8] Risk Level 3 is the highest risk level and requires the broadest degree of community notification by law enforcement.[9] Risk Level 1 is the lowest risk level and requires the least extensive community notification.[10]

Every predatory offender confined in a Minnesota state prison or treatment facility is subject to an end-of-confinement review prior to release from incarceration.[11] Predatory offenders released from federal facilities or who move to Minnesota from other states may also be subject to an end-of-confinement review and risk level determination.[12]

Risk level assignments are made by ECRCs established at each facility and at the central office of the Department of Corrections (DOC).[13] ECRCs are composed of five individuals, including the head of the correctional or treatment facility where the offender is confined, a law enforcement officer, a treatment professional trained in the assessment of sex offenders, a caseworker experienced in supervising sex offenders, and a victim's services professional.[14] The ECRCs assess, on a case-by-case basis, the public risk posed by predatory offenders who are about to be released from confinement, and determine the risk level assignment for those offenders.[15]

When assessing risk and assigning a risk level, the ECRC is required to apply the risk factors set forth in Minn. Stat. § 244.052, subd. 3(g).[16] These risks factors include, but are not limited to, the following: (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 the offender will reoffend if released to the community; and (6) whether the offender demonstrates a physical condition that minimizes the risk of re-offense.[17]

In addition to the statutory risk factors, ECRCs are required to apply a risk assessment scale when assigning a risk level to a predatory offender.[18] In this case, the Department used the Minnesota Sex Offender Screening Tool-4 (MnSOST-4) to assess the Petitioner.[19] The MnSOST-4 is a computerized actuarial matrix or statistical tool that estimates or "predicts" the likelihood of recidivism for adult male sex offenders.[20] The predicted probability of recidivism—articulated in a percentage format and percentile

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[7] *Id.*, subd. 4(b).
[8] *Id.*, subd. 4.
[9] *Id.*, subd. 4(b)(3).
[10] *Id.*, subd. 4(b)(1).
[11] *Id.*, subd. 3(a).
[12] *Id.*, subd. 3a.
[13] *Id.*, subd. 3(a).
[14] *Id.*, subd. 3(b).
[15] *Id.*
[16] *Id.*, subd. 3(d)(i).
[17] *Id.*, subd. 3(g).
[18] *Id.*, subds. 2, 3(d)(i).
[19] *See* Exhibit (Ex.) 1 at 10 (scoring sheet); Ex. 2 (MnSOST-4 Coding Rules).
[20] *See* Ex. 2 (MnSOST-4 Coding Rules).

ranking—is then translated into a presumptive risk level and used as guidance for the ECRC in making its risk level assignment.[21] The ECRC, in its discretion, can deviate from the presumptive risk level identified by the offender's score on the MnSOST-4. The ECRC may apply mitigating factors for a downward departure, or special concerns, which are aggravating factors, for an upward departure.[22]

The MnSOST-4 inventory uses 16 items to determine a probability of recidivism: (1) the number of "violent offense sentences" that the offender has received; (2) the number of "felony sentences" that the offender has received; (3) the number of sentences the offender has received for stalking, harassment, and violations of orders for protection, no contact orders, or restraining orders; (4) the number of "predatory offense sentences" that the offender has received; (5) the number of "stranger victims" the offender has; (6) the number of sexual predatory offense sentences in which the victim was a male; (7) whether offender was charged or convicted of any sex or sex-related offense that occurred in a public place; (8) the age groups of the offender's victims; (9) whether there are any suicidal concerns pertaining to the offender; (10) the offender's employment status following release; (11) the offender's marital status; (12) the offender's education achievement; (13) whether the offender completed both sex offender and chemical dependency treatment while incarcerated; (14) whether the offender is incarcerated as a release violator; (15) the current age and date of release for the offender; and (16) whether the offender's release is supervised or unsupervised.[23]

Prior to an ECRC meeting, the professional who scored the MnSOST-4 prepares a report and recommendation for the ECRC.[24] The report generally contains: (1) a summary of the offense(s) for which the offender is currently incarcerated; (2) the offender's MnSOST-4 score and presumptive risk level; (3) an evaluation of the six statutory risk factors applied to the offender's specific circumstances; (4) an analysis of any mitigating factors or special circumstances applying to the offender; and (5) a recommended risk level assignment and the rationale therefor.[25]

The professional's report and recommendation are instructive for the ECRC but not dispositive. Using the information provided in the report and recommendation, the ECRC can either: (1) follow the professional's recommendation and assign the recommended risk level; or (2) use its own discretion and assign a different risk level based upon its application of the statutory risk factors and the offender's MnSOST-4 score.[26]

Based upon the report and recommendation, the offender's score on the risk assessment tool, the application of mitigating factors or special concerns, and the analysis of the statutory risk factors, the ECRC then assigns the predatory offender to a

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[21] *See id.*
[22] Minn. Stat. § 244.052, subds. 2, 3; *see also In re the Risk Level Determination of R.B.P.*, 640 N.W.2d 351 (Minn. Ct. App. 2002).
[23] Ex. 2 (MnSOST-4 Coding Rules).
[24] Ex. 1 at 6-9 (ECRC Risk Assessment Report and Recommendation).
[25] *Id.*
[26] *See* Minn. Stat. § 244.052.

risk level.[27] An offender who is assigned to Risk Level 2 or 3 may seek administrative review of the ECRC's risk assessment determination within 14 days of receiving notice of the ECRC's decision.[28] The hearing is subject to the contested case provisions of chapter 14 of the Minnesota Statutes.[29]

Offenders must register as predatory offenders and maintain their registrations for a minimum of ten years.[30] Throughout that time, the appropriate level of notice must be given every time the offender changes residences.[31] The offender may request that the ECRC reassess the offender's assigned risk level after three years have elapsed since the initial risk assessment, and may renew the request once every two years following subsequent denials.[32]

II. Background and Procedural History

A. Petitioner's Criminal History

The Petitioner has twice been convicted of criminal sexual conduct. In October 2013, the Petitioner was arrested and charged with gross misdemeanor criminal sexual conduct.[33] A police investigation into reports of a man who allegedly exposed his genitals to a girl under 13 years of age in a Walmart store led to Petitioner's arrest and charge.[34] On April 30, 2015, the Petitioner pleaded guilty to fifth-degree criminal sexual conduct as a result of a plea agreement.[35]

In 2015, the Petitioner was arrested and charged with criminal sexual conduct for a second time.[36] The 2015 arrest stemmed from the allegation that the Petitioner had approached and groped a girl under 13 years of age in a Walmart store.[37] On April 27, 2017, the Petitioner pleaded guilty to second-degree criminal sexual conduct as a result of a plea deal.[38]

The Petitioner's criminal record report shows non-predatory felony convictions in the 1990s for property fraud, second-degree theft, two counts of second-degree burglary, and one count of third-degree burglary.[39] In the 1990s, the Petitioner was also convicted of several non-predatory misdemeanors, including purchasing alcohol for minors, driving

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[27] *See id.*
[28] *Id.*, subd. 6(a).
[29] *Id.*, subd. 6(d).
[30] Minn. Stat. § 243.166, subds. 1b, 3, 5a.
[31] *Id.*, subd. 3.
[32] Minn. Stat. § 244.052, subd. 3(i).
[33] Ex. 1 at 121-22.
[34] *Id.*
[35] *Id.* at 87.
[36] *Id.* at 71.
[37] *Id.*
[38] *Id.* at 69.
[39] *Id.* at 26-29.

after revocation/without insurance, failing to stop for a property accident, and receiving stolen property/possessing burglary tools.[40]

B. MnSOST-4 and Recommendation to ECRC

In preparation for the Petitioner's release from prison, Dr. Shelley Leutschaft, a licensed psychologist and sex offender treatment professional with the DOC, prepared a Risk Assessment Recommendation for the Petitioner.[41] A memorandum dated November 22, 2019, was provided to the ECRC, detailing Dr. Leutschaft's assessment and recommendation.[42]

As part of the risk assessment, Dr. Leutschaft scored the MnSOST-4 for the Petitioner.[43] Dr. Leutschaft scored Petitioner's MnSOST-4 as follows:[44]

MnSOST-4 Inventory Item	Score
Total Violent Offenses	1
Felony Offenses	6
VOFP	0
Predatory Offenses	2
Stranger Victims	1
Male Victims	0
Public	1
Multiple Age Groups	1
Suicidal Concern	0
Employment	0
Married	0
Post-Secondary Degree	0
SO/CD Treatment	0

[40] *Id.*
[41] *Id.* at 6-9.
[42] *Id.*
[43] *Id.* at 10.
[44] *Id.*

MnSOST-4 Inventory Item	Score
Release Violator	0
Age at Release	48
Unsupervised Release	0

According to the Petitioner's score on the MnSOST-4, his predicted probability of sexual recidivism is 3.61% percent. This places him in the 80.60 percentile of registered sex offenders for risk of reoffense, and in the presumptive Risk Level 2 category.[45]

Dr. Leutschaft concluded that, after applying the statutory risk factors, special concerns one (history of sexual reoffense after initial detection) and five (nature of victim pool suggests the need for broader community notification) supported departing upward from the presumptive risk level of two indicated by Petitioner's score on the MnSOST-4 to a risk level of three.[46] As a result, Dr. Leutschaft recommended that the ECRC assign Petitioner to Risk Level 3.[47]

C. ECRC Meeting and Petitioner's Argument

The ECRC at Minnesota Correctional Facility (MCF)-Faribault convened on December 9, 2019, to determine the Petitioner's risk level.[48] The Petitioner attended the meeting and was given an opportunity to be heard by the ECRC prior to their vote.[49] The Petitioner stated that he had received his GED, completed alternatives to violence courses, and taken carpentry, manufacturing, and computer literacy classes, while in detention.[50] He stated that he would like to drive in commercial trucking, or use skills acquired in detention, for his employment upon reentry into the community.[51]

The Petitioner said that he did not elect to take sex offender treatment because he did not view himself as a predatory offender.[52] He said that, if directed to complete sex offender treatment, he would do so.[53] He characterized his actions in the Walmart stores by saying, "I didn't do anything wrong" and "I didn't do anything sexual to anybody."[54] On the occasion of his first offense, he said that he saw a crying child and pulled out a light-colored phone, but did not expose himself—and that it was impossible for him to have exposed himself due to having his shorts tied tightly.[55] On the second occasion, he said

[45] *Id.* at 7; Ex. 2 at 4 (MnSOST-4 Coding Rules).
[46] Ex. 1 at 8-9; Ex. 3 (special concerns memorandum).
[47] Ex. 1 at 8-9.
[48] *Id.* at 3-4.
[49] *Id.* at 3; Ex. 6 (audio recording of ECRC meeting).
[50] Ex. 6 (audio recording of ECRC meeting).
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*

he was in Walmart texting while walking around the store and bumped into a child but there was no sexual touching.[56]

The Petitioner said that he believed he should be assigned at Risk Level 1.[57] At the conclusion of the meeting, the ECRC voted by split decision to assign Petitioner to Risk Level 3.[58]

D. Petitioner's Appeal of the Risk Assessment

On December 18, 2019, Petitioner filed a Notice of Appeal of the ECRC's risk level determination.[59] As a result, on January 9, 2020, the ECRC filed a Notice and Order for Review of Risk Level Assignment with the Office of Administrative Hearings, thereby initiating this contested case proceeding.[60]

III. Standard of Review

Summary disposition is the administrative law equivalent of summary judgment.[61] 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.[62] The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition of contested case matters.[63]

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 factual issues exist.[64] In other words, 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.[65]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[66] A fact is material if its resolution will affect the outcome of the case.[67] If the moving party meets the initial burden, then the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.[68] A genuine

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[56] *Id.*
[57] *Id.*
[58] Ex. 1 at 3-4.
[59] *Id.* at 1-2.
[60] Notice and Order for Review of Risk Level Assignment (Jan. 9, 2020).
[61] *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2019).
[62] *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).
[63] Minn. R. 1400.6600 (2019).
[64] *See, e.g., DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[65] *See Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[66] *See Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[67] *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)).
[68] *See Thiele,* 425 N.W.2d at 583.

issue is not a "sham or frivolous" one and it cannot rely on mere allegations or denials.[69] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[70]

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[71] Thus, summary disposition is only proper when no fact issues need to be resolved.[72]

IV. Analysis

The ECRC is statutorily required to use an actuarial tool when determining an offender's risk level.[73] In developing the risk assessment scale, the DOC "shall consult with county attorneys, treatment professionals, law enforcement officials, and probation officers."[74]

The DOC adopted Policy 205.220 "to implement procedures to identify offenders subject to registration" and "to assign a community notification risk level to qualified predatory offenders."[75] The DOC Policy 205.220 in effect at all times relevant to this motion referenced the MnSOST 3.1.2 as the screening tool to be used by the ECRC.[76]

The DOC, however, recently discontinued its use of the MnSOST-3.1.2 and started using the MnSOST-4.0, a new and different risk assessment tool. That change was not reflected in the Policy. There are significant differences between the two actuarial tools. For instance, the MnSOST-3.1.2 used 9 items to determine the predicted probability of recidivism, whereas the MnSOST-4.0 uses 16 items.

In its Motion, the ECRC provides no foundation for the use of the MnSOST-4.0 Specifically, the ECRC provides no affidavit explaining its adoption or development of the tool; it provides no testament as to its acceptance or accuracy; and it provides no certification that the individual administering the test received the necessary training to accurately score the assessment. In addition, while the ECRC attaches the Coding Rules of the MnSOST-4.0 to its Motion as a freestanding exhibit, it provides no affidavit introducing, supporting, or laying foundation for this document. Because both the MnSOST-4.0 and its Coding Rules lack any foundation in the motion record, the ECRC's Motion is without evidentiary support and must be denied.

The Administrative Law Judge now turns to the Petitioner's arguments to narrow the scope of the evidentiary hearing. The Petitioner states the basis of his appeal as: "My

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[69] *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)).
[70] *See* Minn. R. Civ. P. 56.05.
[71] *See Sauter*, 70 N.W.2d at 353.
[72] *See id*.
[73] Minn. Stat. § 244.052, subd. 2.
[74] *Id.*
[75] DOC Policy No. 205.220, at 1 (April 16, 2013)
[76] *Id.* at 2. Effective April 28, 2020, the DOC updated Policy 205.220 to replace the MnSOST-3.1.2 with the MnSOST-4 as the appropriate screening tool.

MnSOST-4 score was only a level 2. Although, I feel like it should be lower as I know that I am NOT a threat to anybody."[77] The Petitioner's Notice of Appeal raises three specific arguments. First, the Petitioner argues that the ECRC ignored his side of the story in favor of the Department's characterization of the events underlying his convictions.[78] Second, the Petitioner says that he was not convicted of predatory offenses, but merely pleaded guilty in a plea deal.[79] Third, the Petitioner argues that the ECRC is "punishing" him for failing to participate in sex offender treatment, and says that lifetime registration, extended incarceration, and ten years of correctional supervision are "plenty of incentive to NOT reoffend."[80]

In this proceeding, the Petitioner "bears the burden of proof to show, by a preponderance of the evidence, that the [ECRC's] risk assessment determination was erroneous."[81]

As to the Petitioner's first two arguments, the Petitioner does not allege facts that, if true, would warrant changing his risk level. There is no dispute that the Petitioner pleaded guilty to the two predatory offenses that underlie his offender registration and risk level assessment. Although the Petitioner draws a distinction between pleading guilty as a result of a plea deal, a guilty plea results in a conviction under Minnesota law.[82] As the Department points out, Minnesota courts have held that the risk level assessment process is, by statute, an administrative proceeding that does not allow an offender the opportunity to attack the underlying facts of established criminal convictions.[83] Therefore, the Petitioner's challenges to his underlying convictions are not within the scope of the upcoming evidentiary hearing.

As to the Petitioner's third argument, the ECRC's stated bases for departing upward from the presumptive Risk Level 2 include special concerns 1 and 3 and "concerns about [the Petitioner's] risk behavior and lack of understanding of that risk in relation to his victims and public safety."[84] The ECRC encouraged the Petitioner to "complete sex offender treatment to gain insight into his behaviors" and "abide by his conditions of release, maintain employment and use time wisely and constructively."[85] On this record, the Petitioner's failure to complete sex offender treatment appears to be a factor in the ECRC's upward departure to Risk Level 3, and arguments about treatment may be relevant at the evidentiary hearing.

More broadly, the Administrative Law Judge's concerns in this proceeding are the evidentiary basis for the Department's use of the MnSOST-4.0, and whether

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[77] Ex. 1 at 1.
[78] Ex. 1 at 2.
[79] *Id.*
[80] *Id.*
[81] Minn. Stat. § 244.052, subd. 6(b).
[82] *See* Ex. 1 at 26-39 (criminal history showing convictions).
[83] *See In re Risk Level Determination of R.L.*, A09-1885, 2010 WL 2813451, at *3 (Minn. Ct. App. July 20, 2010) ("[I]t is not the role of the ECRC to test the state's evidence; the notification act contemplates no such procedure.").
[84] Ex. 1 at 4.
[85] *Id.*

Dr. Leutschaft used the actuarial tool to score the Petitioner's risk level correctly. Liberally construed, the Petitioner's Notice of Appeal raises the issue of MnSOST-4.0 scoring by stating that the Petitioner feels his score should be lower. Although this is an unspecific allegation, because there is no foundation for the use of the MnSOST-4.0 in the motion record, a hearing is required to determine these issues.

A hearing is, therefore, required to: (1) establish the foundation for, and accurate use of, the MnSOST-4.0; and (2) determine whether Dr. Leutschaft correctly scored the MnSOST-4.0 for Petitioner. The ECRC's Motion is, thus, **DENIED**.

J. E. L.