OAH 8-1100-36621

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level Determination of James D. Jacobs

ORDER ON MOTION FOR SUMMARY DISPOSITION (SECOND PREHEARING ORDER)

This matter came before Administrative Law Judge Eric L. Lipman upon the End-of-Confinement Review Committee's Motion for Summary Disposition.

Michael T. Everson, Assistant Attorney General, appeared on behalf of the Minnesota Department of Corrections End-of-Confinement Review Committee (ECRC). James D. Jacobs, Respondent, appeared on his own behalf and without counsel. The hearing record on the motions closed on March 6, 2020.

Based upon the submissions of the parties and the hearing record,

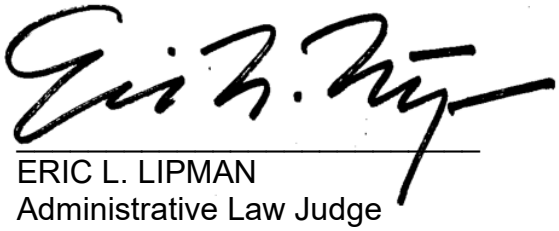
IT IS HEREBY ORDERED:

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

2. The parties shall confer on convenient dates after Mr. Jacobs' anticipated release date (now scheduled for April 13, 2020) for pre-filing of witness lists and any additional exhibits, and an evidentiary hearing.

3. By **4:30 p.m.** on **Friday, April 3, 2020**, the ECRC shall file at OAH, and serve on Mr. Jacobs, a status report detailing the parties' progress selecting the dates described above in Paragraph 2.

Dated: March 24, 2020



ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

Petitioner's Background

Mr. Jacobs is a 43-year-old man with three convictions for criminal sexual conduct crimes.[1]

In February of 2017, Mr. Jacobs pleaded guilty to third-degree criminal sexual conduct, received a stayed-sentence and was remitted to court-supervised probation.[2] Two years later, in October of 2018, Mr. Jacobs pleaded guilty to two charges of fifth-degree criminal sexual conduct, each involving a different minor victim.[3]

At his sentencing on these later crimes, the District Court revoked Mr. Jacobs' probation, executed the sentence on the 2017 third-degree criminal sexual conduct conviction, and remanded Mr. Jacobs to the custody of the Commissioner of Corrections (Commissioner).[4]

Mr. Jacobs is currently an inmate of the Minnesota Correctional Facility at Faribault[5] and has a projected supervised release date in mid-April of 2020.[6]

The Minnesota Community Notification Act

Persons who commit certain criminal offenses defined by statute as "predatory offenses" are considered "predatory offenders" subject to registration with local law enforcement.[7] Predatory offenses include, but are not limited to, kidnapping, false imprisonment, criminal sexual conduct, and indecent exposure.[8]

Predatory offenders are subject to the Minnesota Community Notification Act (Act). The Act requires law enforcement agencies in the area where a predatory offender resides, expects to reside, is employed, or is regularly found to disclose information that is "relevant and necessary to protect the public and to counteract the offender's dangerousness."[9] The extent of the information that is disclosed, and the persons to whom disclosures are 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."[10]

The scope of community notification required by the Act is determined by the assignment of the offender to one of the three different risk levels that are defined in statute. Each risk level is associated with a different degree of community notification

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[1] Exhibit (Ex.) at 13, 136, 143, 148.
[2] *Id.* at 5, 107-08, 131-135.
[3] *Id.* at 68-80.
[4] *Id.* at 13, 29-30, 138, 143, 148.
[5] *Id.* at 1-2.
[6] *Id.* at 2, 13.
[7] Minn. Stat. § 243.166 (2018).
[8] Minn. Stat. § 243.166, subd. 1b.
[9] Minn. Stat. § 244.052, subd. 4(a) (2018).
[10] *Id.*

and imposes different restrictions on the predatory offender.[11] If an offender is assigned to Risk Level 1, notification of the offender's residence may be made by law enforcement to the victims and witnesses of the offender's earlier crimes.[12] If an offender is assigned to Risk Level 2, law enforcement may also make disclosures to agencies and groups, such as schools and day care facilities, "that the offender is likely to encounter. . . ." The purpose of this broader notification is to secure "those institutions and protecting individuals in their care while they are on or near the premises of the institution. . . ."[13] If an offender is assigned to Risk Level 3, the same groups and persons that are notified following an assignment to Risk Level 1 or 2 may be notified. Additionally, law enforcement may notify any member of the community whom the offender is likely to encounter, unless law enforcement further determines that public safety would be compromised by the disclosure or a more limited disclosure is necessary to protect the identity of the victim.[14]

The Commissioner has established individual committees at each state correctional facility where predatory offenders are confined.[15] Every offender that is required by statute to register as a predatory offender, and who is confined in a Minnesota state prison, must be assessed by the facility's ECRC prior to release from prison.[16] Because Mr. Jacobs was scheduled for release from state prison, the ECRC was obliged to assess the risk he posed following release and make the appropriate risk level assignment.[17]

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 re-offend; (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 re-offend if released to the community; and (6) whether the offender demonstrates a physical condition that minimizes the risk of re-offense.[18] This list is not exclusive.[19]

In addition to the statutory risk factors, the ECRC is also required to apply a risk assessment scale, as part of its decision-making.[20] The ECRC is directed to use both the statutory factors and the risk assessment scale to "determine the offender's risk assessment score and risk level."[21]

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[11] Minn. Stat. § 244.052, subd. 4(b) (2018).
[12] Minn. Stat. § 244.052, subd. 4(b)(1).
[13] Minn. Stat. § 244.052, subd. 4(b)(2).
[14] Minn. Stat. § 244.052, subd. 4(b)(3).
[15] Minn. Stat. § 244.052, subd. 3(a) (2018).
[16] Minn. Stat. § 244.052, subd. 3 (2018).
[17] *Id.*
[18] *Id.*, at subd. 3(g).
[19] *Id.*
[20] *Id*, subd. 3(d)(1).
[21] *Id*.

The legislature gave the Commissioner the duty to develop, in consultation with knowledgeable experts, the risk assessment scale.[22] The assignment of this duty to the Commissioner, and not a subordinate officer, is significant. This is because four decades earlier the Legislature gave the Commissioner the power to direct the corrections-related roles of his subordinates. The Commissioner can:

> define the duties of such officers, employees, and agents and to delegate to them any of his powers, duties, and responsibilities, *subject to his control and under such conditions as he may prescribe* ….[23]

Importantly, the Commissioner has, in fact, expressed conditions on the use of the risk assessments. They appear in Department Policy No. 205.220. The express purposes of this policy are to guide the assignment of a "community notification risk level to qualified predatory offenders" and the application of the risk assessment scale "to assign weight to the risk factors listed in Minn. Stat. § 244.052."[24]

Policy No. 205.220 provides that the risk assessment scale consists, in part, of a score from specified actuarial instruments. Further, the policy further links the listed assessments with particular groups of offenders. For example, risk level determinations for male offenders are to be based on the score indicated on the Minnesota Sex Offender Screening Tool-3.1.2 (MnSOST-3.1.2), the Level of Service Inventory – Revised (LSI-R), or the Level of Service / Case Management Inventory (LS/CMI), "the totality of circumstances and articulable facts … and the information contained in the ECRC Risk Assessment Recommendation."[25] Additionally, for each of the listed actuarial instruments, the Commissioner has noted specific cutoff scores to guide the assignment of risk levels.[26]

Since July of 2019, the ECRCs have used an updated version of the MnSOST-3.1.2, now denominated as MnSOST-4.[27] While the MnSOST-4 includes many of the same factors that were assessed by the MnSOST-3.1.2, there are notable differences too. For example, the MnSOST-4 does not include an inquiry into whether the offender has had a recent history of violations of Orders for Protection, and instead assesses eight other factors that are not included in the MnSOST-3.1.2.[28] Some of these eight factors – such as whether an offender has a history of offending against victims in different age groups or has had a spotty employment history – reprise themselves in the

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[22] *Id*, at subd. 2 (2018).
[23] 1959 Minn. Laws. Ch. 263, § 1, at 353-54 (recodified at Minn. Stat. § 241.01, subd. 3a(h) (2018)).
[24] DOC Policy No. 205.220, at 1, 4 (April 16, 2013) (available at http://www.doc.state.mn.us/DocPolicy2/Document/205.220.htm).
[25] *Id*.
[26] *Id*.
[27] *Compare* Ex. 1 at 11 *with* Affidavit of Shelly Leutschaff, Attachment 1 (March 5, 2020) (Leutschaff Aff.); Affidavit of Mark Bliven (March 5, 2020) (Bliven Aff.).
[28] *Id*.

MnSOST-4 from still earlier versions of the screening tool.[29] Predicting recidivism is an evolving science.[30]

As Mark Bliven, Director of the Department's Risk Assessment and Community Notification Unit, explains, revisions to Policy No. 205.220 have lagged behind improvements to the risk assessment screening tool:

> An update of the risk assessment process in DOC policy 205.220, while not required by Minn. Stat. § 244.052, is in draft at this time to reference this new iteration of the MnSOST tool that reflects best practices in the field of sex offender recidivism prediction. The policy is also under review for a number of possible revisions that do not materially affect the ECRC process as outlined in Minnesota Statutes 244.052, including the change from MnSOST-3.1.2 to MnSOST-4. The DOC intends to have an updated policy enacted as soon as possible.
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> While DOC Policy 205.220 outlines the process for assignment of community notification risk levels to predatory offenders, Minn. Stat. § 244.052 actually governs the assignment of the risk levels. Because the MnSOST-4 is now the best iteration of the risk tool, it is appropriately used as part of the risk assessment scale coming before End-Of-Confinement Committees (ECRCs) since July I, 2019, when adopted for use.[31]

The score from the screening tool, and the resulting presumptive risk level, is a starting point for the ECRC's deliberations. In its discretion, the ECRC, can deviate from the presumptive risk level by applying one or more mitigation factors set forth in DOC policy (for a downward departure in the risk level) or one or more special concerns (for an upward departure in the risk level).[32]

Following the release of the MnSOST-4, the list of special concerns and mitigating factors was revised by Department staff to accompany the new screening tool.[33]

As part of its determination, 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."[34]

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[29] *Compare* Ex. 1 at 11 *with In Re Risk Level Determination of Ronald Conner,* 2006 WL 3804224, at *6 (Minn. Off. Admin. Hrgs, 2006) ("Item 7 of the MnSOST-R relates to the number of age groups in the Petitioner's victim pool"); *In Re Risk Level Determination of Bradley Lyver*, OAH No. 3-1100-16987-2, 2006 WL 1412821, at *3. (Minn. Off. Admin. Hrgs, 2006) ("Item No. 12 of the MnSOST-R relates to the employment history of the offender in the 12 months prior to the arrest for the offense ....").
[30] *See* Affidavit of Mark Bliven, ¶¶ 3-9.
[31] *Id.*, at ¶¶ 7-8.
[32] DOC Policy No. 205.220, *supra*; *see also In the Matter of the Risk Level Determination of R.B.P.*, 640 N.W.2d 351, 354 (Minn. Ct. App. 2002).
[33] *Compare* Ex. 3 *with* DOC Policy No. 205.220.
[34] Minn. Stat. § 244.052, subd. 3(f).

A predatory offender assigned Risk Level 2 or Risk Level 3 has the right to seek administrative review of the ECRC's determination within 14 days of receiving notice of the risk level assignment.[35] The administrative review is conducted by an administrative law judge at the Office of Administrative Hearings and is subject to the contested case rules.[36] 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."[37] The decision of the administrative law judge is a final agency order that is subject to appellate judicial review.[38]

Procedural History in this Case

As part of the risk assessment process for Mr. Jacobs, Shelley Leutschaff, Ph.D prepared a risk level assessment recommendation report.[39] In her report, Dr. Leutschaff noted that Mr. Jacobs' score on the MnSOST-4 indicated a predicted probability of sexual recidivism of 1.84 percent four years after his release. This score that presumptively placed Mr. Jacobs into Risk Level 1.[40] In Dr. Leutschaff's view, however, the MnSOST-4 score understated Mr. Jacobs' real risk of re-offense. She urged applying four special concerns to raise Mr. Jacobs' risk level beyond that suggested by the MnSOST-4. She pointed to Mr. Jacobs' history of sexually re-offending after initial detection of his sex crimes; engaging in high-risk behaviors during periods of supervision; predatory offense behavior during the commission of his crimes; and a deviant orientation in his crimes.[41]

On December 9, 2019, the ECRC convened to assign Mr. Jacobs to one of the three risk levels.[42] Mr. Jacobs attended the meeting and responded to questions posed by members of the committee.[43] At the conclusion of the meeting, the ECRC voted unanimously to assign Mr. Jacobs to Risk Level 3.[44]

Mr. Jacobs timely appealed the ECRC's risk level determination.[45]

The ECRC seeks summary disposition in this matter. It argues that Mr. Jacobs has failed to allege any material errors in the risk level determination.[46] Specifically, the ECRC notes that Mr. Jacobs agrees with the MnSOST-4 tabulation and only attacks the application of the four special concerns to raise his risk level beyond Risk Level 1.[47]

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[35] *Id.*, subd. 6(a) (2018).
[36] *Id.*, at subd. 6(d) (2018).
[37] *Id.*, at subd. 6(c).
[38] Minn. Stat. §§ 14.63, 244.052, subd. 6(c).
[39] Ex. 1 at 5-11.
[40] *Id.* at 10.
[41] *Id; see also* Ex. 3.
[42] Ex. 1 at 2.
[43] *Id.* at 3.
[44] *Id*.
[45] *Id.* at 1.
[46] Memorandum of Law in Support of the ECRC's Motion for Summary Disposition, at 1.
[47] *Id.* at 7-10.

Claiming that Mr. Jacobs has not pointed to a material error in its processes, however, the ECRC asks that its risk level assignment be affirmed as a matter of law.[48]

In his appeal of the risk level assignment made by the ECRC, Mr. Jacobs maintains that the risk level determination was in error because the factual bases for applying the special concerns are faulty.[49]

Legal Standards for Summary Disposition

Summary disposition is the administrative law equivalent of summary judgment.[50] 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.[51] The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition.

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.[52] 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.[53]

The moving party has the initial burden to show the absence of any genuine issue of material fact.[54] A fact is material if its resolution will affect the outcome of the case.[55] If the moving party meets this initial burden, the non-moving party must show the existence of a genuine issue of material fact.[56]

A genuine issue is not a "sham or frivolous" one and it cannot rest upon mere allegations or denials.[57] Instead, a genuine issue requires identification of specific facts that require a hearing to resolve.[58] Summary disposition is only proper when there are no fact issues which require a hearing to resolve.[59]

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[48] *Id*.
[49] Ex. 1 at 1.
[50] *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2019).
[51] *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).
[52] *See, e.g., DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[53] *See Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[54] *See Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[55] *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)).
[56] *See Thiele,* 425 N.W.2d at 583.
[57] *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)).
[58] *See* Minn. R. Civ. P. 56.05.
[59] *See Sauter*, 70 N.W.2d at 353.

Analysis

Following a careful review of the ECRC's motion, the Administrative Law Judge concludes that the ECRC's Motion for Summary Disposition must be denied. When one construes the claims of pro se offenders, summary disposition for failure to state a claim is appropriate only if it appears beyond doubt that the offender can prove no set of facts that would entitle him to relief.[60] This standard is not met here.

Of particular concern is the fact that the ECRC employed a screening tool, the MnSOST-4, that is not part of the "risk assessment scale" that was approved by the Commissioner. DOC Policy 205.220 simply makes no mention of the MnSOST-4, the types of offenders for which the use of that instrument use is appropriate, or the range of scores that are presumptively associated with particular risk levels.

There is no basis in the record to believe that the Risk Assessment and Community Notification unit within the Department, or the ECRC itself, are authorized to promulgate a new risk assessment scale on its own.[61] Neither body is the "Commissioner of Corrections,"[62] and their special technical expertise is not a substitute for the authority to adjust the risk assessment scale.[63]

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[60] *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976) ("The handwritten pro se document is to be liberally construed. As the Court unanimously held in *Haines v. Kerner*, a pro se complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'") (citation omitted).

[61] *Compare* Affidavit of Mark Bliven, ¶¶ 7-8 (DOC Policy 205.220 is "under review for a number of possible revisions ... including the change from MnSOST-3.1.2 to MnSOST-4.... Because the MnSOST-4 is now the best iteration of the risk tool, it is appropriately used as part of the risk assessment scale ... since July I, 2019, when adopted for use.") with *State ex rel. Marlowe v. Fabian*, 755 N.W.2d 792, 796 (Minn. Ct. App. 2008) (DOC was required to reconsider the supervision arrangements when the Department did not "fully follow" the agency's own policies); *see generally Swenson v. State, Dept. of Pub. Welfare*, 329 N.W.2d 320, 324 (Minn. 1983) ("The agency must either follow its own regulations or amend them in accordance with statutory rule-making procedures"); *Kobluk v. Allen*, C8-98-900, 1998 WL 865675, at *1 (Minn. Ct. App. 1998) (unpublished) ("When the University fails to follow its own regulations, the resulting decision may be arbitrary").

[62] Minn. Stat. § 244.052, subd. 2 (2018).

[63] *See generally* Minn. Stat. § 241.01, subd. 3a(h); *In re Risk Level Assignment of R.B.P.*, 640 N.W.2d 351, 355 (Minn. Ct. App. 2002) ("Because the statute states that risk levels are to be determined on a case-by-case basis in consideration of the risk the offender poses to the public, it is apparent the legislature intended that the committee have the authority *to exercise some discretion*") (emphasis added).

Nor is it a sufficient cure to have Dr. Leutschaff, as she did in early March, re-tabulate Mr. Jacobs' base file using the MnSOST-3.1.2.[64] She is but one member of the five-member ECRC, and the MnSOST-3.1.2 score that she offers into the record was calculated nearly three months after the ECRC meeting made its determination.[65]

In one respect, this case is similar to *In the Matter of the Risk Level Determination of S.S.*[66] In that case, the Minnesota Court of Appeals ordered a redetermination of S.S.'s risk level because no, properly promulgated risk assessment scale was used when appraising her risk of re-offense.[67] The appellate panel was not persuaded that the well-meaning use of an "informal policy" by the Department's staff was a substitute for adhering to the statute:

> In the absence of a version of the MnSOST–R for female offenders, the psychologist testified that the department has an unwritten informal policy of "apply[ing] the policy for males, as much as possible, as fairly and as accurately as possible, to females."
>
> . . .
>
> By all indications, the department took reasonable steps not only to comply with the statute but to improve its former assessment tool for greater, statistically based accuracy. This improved procedure may exceed the requirements of section 244.052 in the vast majority of cases, which involve men, but the department failed to implement a statutorily sound procedure for the comparably few female offenders it must also assess.[68]

Because use of the MnSOST-4 has never been approved by the Commissioner and substituted for MnSOST-3.1.2 in Department policy, the same pre-hearing notice and authority problems that were present *In the Matter of the Risk Level Determination of S.S,* are present here. A like result is also appropriate.

It is a material error for Department staff to use a risk assessment scale that is not authorized by the Commissioner. The best outcome in such a circumstance is the

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[64] Affidavit of Shelly Leutschaff, Attachment 1.

[65] *Compare id, with* Ex. 1 at 2; *see also Citizen's Advocating Responsible Dev. v. Kandiyohi County Bd.*, 713 N.W.2d 817, 832 (Minn. 2006) (An agency's decision is arbitrary or capricious if it offers an explanation that runs counter to the evidence); *Earthburners, Inc. v. County of Carlton,* 513 N.W.2d 460, 463 (Minn. 1994) ("As with the lower courts, we have been reluctant to allow local boards an opportunity after the fact to substantiate or justify earlier decisions .... [T]o prevent any unfairness to the applicant, *the board must confine its inquiry to those issues raised in earlier proceedings before the planning commission* and county board while allowing adequate opportunity for a meaningful discussion of those issues.") (emphasis added and citation omitted).

[66] *In the Matter of the Risk Level Determination of S.S.*, 726 N.W.2d 121 (Minn. Ct. App.) *review denied* (Minn. 2007).

[67] *Id*. at 126-27.

[68] *Id*. at 125-26.

one contemplated by the administrative review provisions of Minn. Stat. § 244.052 itself: A *de novo* review of the risk level determination after an evidentiary hearing.[69]

For all of these reasons, the ECRC's motion for summary disposition must be denied and this matter set on for an evidentiary hearing.

E. L. L.

[69] *See In Re Risk Level Determination of Philip Leibold*, OAH 65-1100-30922, 65-1100-30556, 2013 WL 6833252 at *13 (Minn. Off. Admin. Hrgs 2013) ("If the judge concludes that the ECRC decision was erroneous, then the judge shall proceed to the second step in the process and make a de novo determination of the risk level").