

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level
Determination of Larry Kenneth Hinton

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

This matter came before Administrative Law Judge James E. LaFave for an evidentiary hearing on November 24, 2020. The record closed that day at the conclusion of the hearing.

Angela Helseth Kiese, Assistant Attorney General, appeared on behalf of the Minnesota Department of Corrections (DOC or Department) End-of-Confinement Review Committee (ECRC). Larry K. Hinton (Petitioner) appeared on his own behalf, without counsel.

STATEMENT OF THE ISSUES

Did the ECRC err in assigning Petitioner to a Risk Level 3?

SUMMARY OF RECOMMENDATION

Petitioner has failed to prove by a preponderance of the evidence that the ECRC committed a material error in conducting its risk level determination. Accordingly, the ECRC's risk level assignment is **AFFIRMED**. Petitioner shall remain assigned to a Risk Level 3.

FINDINGS OF FACT

I. Petitioner's Background

1. Petitioner is 54 years old.¹ The basis for Petitioner's predatory offense registration are two convictions for First-Degree Criminal Sexual Conduct.²

2. The first conviction stemmed from an incident that occurred on May 23, 2000.³ That evening, Petitioner gave T.E., a longtime friend, a ride to Blue Earth, Minnesota.⁴ On a gravel road a short distance from Blue Earth, Petitioner informed T.E.

¹ Exhibit (Ex.) 1 at 6.

² *Id.* at 6-7, 59, 109-110, 120, 122.

³ *Id.* at 6-7.

⁴ *Id.* at 6.

that he had nothing to lose because he was going to prison.⁵ He tied T.E.'s arms behind her back with a leather strap and threatened her with a knife.⁶ For the next two-and-one-half hours, Petitioner forced T.E. to engage in a variety of sexual acts including vaginal intercourse and oral sex.⁷

3. The second conviction is based on his sexual assault of J.K.W., a 13-year-old girl.⁸ Petitioner convinced J.K.W. to go for a ride in his car.⁹ Petitioner told J.K.W. that he wanted to have sex with her.¹⁰ She refused, as she was only 13.¹¹ Petitioner did not believe her and continued to make advances.¹² J.K.W. fled the car and ran into a field.¹³ Petitioner forced her back into the car, made her take off her clothes, then licked her vagina, and made her perform oral sex on him.¹⁴ Petitioner then vaginally raped J.K.W.¹⁵ Petitioner drove her back to her apartment and told J.K.W. that if she told anyone about the assault, he would kill her.¹⁶

4. On November 22, 2000, Petitioner pleaded guilty to one count of First-Degree Criminal Sexual Conduct in each case and was sentenced to 360 months in prison.¹⁷

5. Petitioner also has the following adult felony convictions:

- September 1990, Controlled substance crime in the fifth degree;
- September 1990, Controlled substance crime in the fifth degree;
- August 1990, Conspiracy to commit controlled substance crime;
- July 1990, Controlled substance crime in the fifth degree; and
- May 1990, Assault in the third degree.¹⁸

6. Additionally, Petitioner has the following misdemeanors on his record:

- June 1994, Assault in the fifth degree;
- June 1994, Violation of protection order (four counts);
- June 1994, Open bottle;
- October 1990, Controlled substance crime;
- October 1990, Aggravated driving while intoxicated (DWI);
- August 1989, DWI; and

⁵ *Id.* at 6, 122.

⁶ *Id.* at 6, 122.

⁷ *Id.* at 6, 122-123.

⁸ *Id.* at 7, 122, 1551-155c.

⁹ *Id.* at 7, 122, 1551-155c.

¹⁰ *Id.* at 7, 122, 1551-155c.

¹¹ *Id.* at 7, 122, 1551-155c.

¹² *Id.* at 7, 122, 1551-155c.

¹³ *Id.* at 7, 122, 1551-155c.

¹⁴ *Id.* at 7, 122, 1551-155c.

¹⁵ *Id.* at 7, 122, 1551-155c.

¹⁶ *Id.* at 7, 122, 1551-155c.

¹⁷ *Id.* at 6-7, 59, 109-110, 120, 122.

¹⁸ *Id.* at 11.

- May 1989, Open bottle.¹⁹

7. In addition to the above convictions, Petitioner record includes the following juvenile offenses:

- November 1983, Consuming liquor;
- October 1981, Consuming liquor;
- September 1980, Theft;
- August 1980, Theft; and
- May 1980, Obscene and harassing phone calls.²⁰

II. MnSOST-4 and Procedural History

8. In preparation for Petitioner's release from prison, Terrel Backes, Psy.D., a licensed psychologist and sex offender treatment professional with the DOC, undertook a risk assessment of Petitioner and prepared a risk level recommendation for the Minnesota Correctional Facility-Moose Lake (MCF-Moose Lake) ECRC.²¹ A memorandum, dated December 20, 2019, was provided to the ECRC, detailing Dr. Backes's assessment and recommendation.²²

9. As part of the risk assessment, Dr. Backes conducted a Minnesota Sex Offender Screening Tool (MnSOST)-4 on Petitioner.²³ Dr. Backes has been specifically trained on the MnSOST-4 and its scoring rules.²⁴

10. Dr. Backes scored Petitioner's MnSOST-4.0 as follows:²⁵

MnSOST-4 Inventory Item	Score
Total Violent Offense Sentences	5
Total Felony Sentences	10
Harassment, Stalking, VOFP, Restraining Order Offenses	5
Predatory Offense Sentences	3
Stranger Victims (0 = no; 1 = yes)	1
# of Predatory Offense Sentences Involving Male Victims	0

¹⁹ *Id.* at 12.

²⁰ *Id.* at 11.

²¹ *Id.* at 6-22.

²² *Id.* at 6-22.

²³ *Id.* at 22.

²⁴ Testimony (Test.). of Terrel Backes.

²⁵ *Id.* at 21.

MnSOST-4 Inventory Item	Score
Public Place (0 = no; 1 = yes)	0
Multiple Victim Age Groups (0 = no; 1 = yes)	1
Suicidal Concerns (0 = no; 1 = yes)	1
History of Stable of Employment (0 = no; 1 = yes)	0
Marital Status (0 = unmarried; 1 = married)	0
Post-Secondary Educational Achievement (0 = no; 1 = yes)	0
Sex Offender and Chemical Dependency Treatment (0 = not completed; 1 = completed)	1
Release Violator (0 = no; 1 = yes)	0
Age at Release	54
Unsupervised Release (0 = no; 1 = yes)	0

11. Based upon Dr. Backes's scoring of Petitioner's MnSOST-4, Petitioner's predicted probability of sexual recidivism within four years of release from prison is 4.81 percent, which places him in the 91.00 percentile of registered sex offenders for risk of re-offense.²⁶ Pursuant to the MnSOST-4 Coding Rules, offenders who have a predicted probability of sexual recidivism of 4.3 percent or higher (88 percentile or higher) fall into the presumptive Risk Level 3 category.²⁷

12. Because Petitioner's score on the MnSOST-4 placed him into the Risk Level 3 category, Dr. Backes did not recommend the application of any special concerns, but he noted that Special Concerns #1 (a history of sexual reoffending after initial detection), #2 (a history of supervision failures), #3 (a history of severe or gratuitous violence), and #6 (deviant orientation and or sexual preoccupation or compulsivity) appeared to be applicable.²⁸ Dr. Backes did not find that any mitigating factors, as identified in DOC Policy 205.220, applied to Petitioner.²⁹

²⁶ *Id.* at 8, 21; Ex. 2 at 4.

²⁷ Ex. 2 at 4.

²⁸ Test. of T. Backes; Ex. 1 at 19.

²⁹ Test. of T. Backes; Ex. 1 at 19.

13. In addition to utilizing the MnSOST-4, Dr. Backes also applied the risk factors identified in Minn. Stat. § 244.052, subd. 3(g) (2018).³⁰ Dr. Backes determined that the statutory risk factors were consistent with an assignment to a Risk Level 3.³¹

14. In applying the statutory risk factors, Dr. Backes applied two other risk assessment tools: the Sexual Violence Risk-20, Version 2 (SVR-20, V2) and the Structured Assessment of Protective Factors (SAPROF).³² These assessment tools, while not adopted for use by the DOC, supported Dr. Backes' recommendation for a Risk Level 3 assignment.³³

15. Based upon his use of these assessment tools and an application of the statutory risk factors, Dr. Backes concluded that the presumptive risk level indicated by Petitioner's score on the MnSOST-4 was correct.³⁴ As a result, Dr. Backes recommended that the ECRC assign Petitioner to a Risk Level 3.³⁵

16. The ECRC convened on January 27, 2020, to determine Petitioner's risk level.³⁶ Petitioner attended the meeting and was given an opportunity to address the ECRC prior to their vote.³⁷

17. Petitioner agreed with Dr. Backes's report and confirmed the facts in the report are correct.³⁸ Petitioner also acknowledged there were other uncharged victims.³⁹

18. Petitioner went to on emphasize how he productively used his time in prison.⁴⁰ Petitioner completed sex offender treatment and chemical dependency treatment.⁴¹ He completed conflict resolution, and Power to the People classes among others.⁴² Petitioner became a mentor in the conflict resolution program and was a tutor at the Minnesota Sex Offender Program.⁴³ He maintains his chemical dependency issues are under control and that he has been sober for over 20 years.⁴⁴ Petitioner also notes that he is in a six-year relationship that will be a great source of support.⁴⁵ For all these reasons, Petitioner argued he should be assigned a Risk Level 2.⁴⁶

³⁰ Ex. 1 at 6-21.

³¹ Test. of T. Backes; Ex. 1 at 6-21.

³² Ex. 1 at 8-11.

³³ Test. of T. Backes.

³⁴ Ex. 1 at 20.

³⁵ Test. of T. Backes; Ex. 1 at 17-21.

³⁶ Ex. 1 at 2-5.

³⁷ Ex. 1 at 3; Ex. 6.

³⁸ Ex. 1 at 3; Ex. 6.

³⁹ Ex. 1 at 3; Ex. 6.

⁴⁰ Ex. 1 at 3; Ex. 6.

⁴¹ Ex. 1 at 3; Ex. 6.

⁴² Ex. 1 at 3; Ex. 6.

⁴³ Ex. 1 at 3; Ex. 6.

⁴⁴ Ex. 1 at 3; Ex. 6.

⁴⁵ Ex. 1 at 3; Ex. 6.

⁴⁶ Ex. 1 at 3; Ex. 6.

19. After hearing from the Petitioner, the ECRC conferred and unanimously assigned Petitioner to Risk Level 3.⁴⁷ The ECRC noted that while unnecessary because Petitioner fell within the presumptive Level 3 range, Special Concerns #1 (a history of sexual reoffending after initial detection), #2 (a history of supervision failures), #3 (a history of severe or gratuitous violence), and #6 (deviant orientation and or sexual preoccupation or compulsivity) could apply.⁴⁸

20. On January 27, 2020, Petitioner filed a Notice of Appeal of ECRC Risk Level Assignment.⁴⁹ As a result, the ECRC filed a Notice and Order for Review of Risk Level Assignment on February 12, 2020.⁵⁰

21. The ECRC filed a Motion for Summary Disposition on February 24, 2020.⁵¹ The motion was denied, and this case proceeded to hearing.⁵²

22. Any findings of fact contained in the following Memorandum are hereby adopted as such.

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

CONCLUSIONS OF LAW

1. The Administrative Law Judge is authorized to review the risk assessment of the ECRC pursuant to Minn. Stat. §§ 14.50 and 244.052, subd. 6 (2020).

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

3. Petitioner has two convictions for First-Degree Criminal Sexual Conduct. As a result, Petitioner is required to register as a predatory offender under Minn. Stat. § 243.166 (2020).

4. In an appeal of a risk level assignment, the offender has the burden of proving by a preponderance of the evidence that the ECRC's risk assessment determination is erroneous.⁵³ 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.⁵⁴

5. Dr. Backes properly utilized, and the ECRC properly considered, the results of the MnSOST-4.

⁴⁷ Ex. 1 at 2-5.

⁴⁸ Ex. 1 at 5.

⁴⁹ *Id.* at 1.

⁵⁰ Notice and Order for Review of Risk Level Assignment (Feb. 12, 2020).

⁵¹ Motion for Summary Disposition of Risk Level Administrative Review (Feb. 24, 2020).

⁵² Order on Motion for Summary Disposition (Jun. 1, 2020).

⁵³ Minn. Stat. § 244.052, subd. 6(b).

⁵⁴ *Id.* at subd. 6(c).

6. Petitioner failed to prove by a preponderance of the evidence that the ECRC made a material error in arriving at his risk level assignment.

7. Petitioner also failed to establish any other material or immaterial errors in the scoring of the MnSOST-4. The evidence establishes that the ECRC properly relied upon the MnSOST-4, and properly noted that Special Concerns #1, #2, #3, and #6 could apply. The record supports the ECRC's determination to assign Petitioner to a Risk Level 3.

8. The evidence further demonstrates that the ECRC properly considered and applied the statutory risk factors set forth in Minn. Stat. § 244.052, subd. 3(g) (2020), in rendering its Risk Level 3 assignment. Petitioner has failed to establish any error in the application of the statutory risk factors or the risk level assignment.

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

ORDER

IT IS HEREBY ORDERED THAT:

1. The risk assessment determination made by the ECRC is **AFFIRMED**.
2. Petitioner remains assigned to a Risk Level 3.

Dated: January 29, 2021


JAMES E. LAFAVE
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 (2020).

MEMORANDUM

I. Introduction

The Petitioner has the burden to establish by a preponderance of the evidence that the ECRC's risk level assessment was erroneous.⁵⁵ Two issues are presented in this case. First, did the ECRC err by using the MnSOST-4, prior to the test being adopted by the Commissioner of the Department of Human Services (Commissioner)? Second, did the ECRC err in assigning Petitioner a Risk Level 3? Those issues will be discussed after an overview of the predatory offender registration system in Minnesota.

II. The Minnesota Community Notification Act

Petitioner appealed the risk level assigned to him by the ECRC pursuant to the Minnesota Community Notification Act (Act).⁵⁶ 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."⁵⁷ 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."⁵⁸

The scope of community notification required by the Act is determined by assignment of one of the three different risk levels defined by statute.⁵⁹ Each risk level is associated with a different degree of community notification.⁶⁰ If an offender is assigned Risk Level 1, notification of the offender's residence may be given to local law enforcement agencies as well as victims and witnesses related to the offender's criminal history.⁶¹ Risk Level 2 permits additional notice to groups such as schools, child care facilities, and individuals likely to be victimized by the offender.⁶² Risk Level 3 permits notice to be given to any community member whom the offender is likely to encounter unless law enforcement determines public safety might be compromised by the disclosure or more limited disclosure is necessary to protect the identity of the offender's victims.⁶³

Every predatory offender confined in a Minnesota state correctional or treatment facility must be assessed by the ECRC at the facility before release.⁶⁴ The ECRC is

⁵⁵ Minn. Stat. § 244.052, subd. 6.

⁵⁶ Minn. Stat. § 244.052 (2020).

⁵⁷ Minn. Stat. §§ 243.166, subd. 1b; 244.052, subd. 4(a).

⁵⁸ Minn. Stat. §§ 243.166, subd. 1b; 244.052, subd. 4(a).

⁵⁹ Minn. Stat. § 244.052, subd. 4(b).

⁶⁰ *Id.*

⁶¹ *Id.* (b)(1).

⁶² *Id.* (b)(2).

⁶³ *Id.* (b)(3).

⁶⁴ *Id.* subd. 3.

responsible for assessing the public risk posed by each predatory offender upon release and determining the appropriate risk level assignment.⁶⁵

When assessing risk and assigning a risk level, the ECRC is required by law to apply the risk factors set forth in Minn. Stat. § 244.052, subd. 3(g). The six risk factors to be considered are: (1) the seriousness of the offense should the offender reoffend; (2) the offender's prior offense history; (3) the offender's characteristics; (4) the availability of community supports to the offender; (5) whether the offender has indicated or credible evidence in the record indicates that 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.⁶⁶ This list is not exclusive.⁶⁷

In addition to consideration of the statutory risk factors, the ECRC is also required to apply a risk assessment scale when assigning a risk level to a predatory offender.⁶⁸ 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.⁶⁹

Based upon the offender's score on the risk assessment tool, application of mitigating factors or special concerns, and analysis of the statutory risk factors, the ECRC must assign a final risk level to the predatory offender. As part of the assignment, the ECRC must prepare a report that "specifies the risk level to which the offender has been assigned and the reasons underlying the committee's risk assessment decision."⁷⁰

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.⁷¹ The administrative review is conducted by an Administrative Law Judge at the Office of Administrative Hearings and is subject to the contested case rules.⁷² 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."⁷³ The decision of the Administrative Law Judge is final and subject to appellate judicial review.⁷⁴

⁶⁵ *Id.*

⁶⁶ *Id.* at (g).

⁶⁷ *Id.*

⁶⁸ *Id.* at subd. 2.

⁶⁹ Minnesota Department of Corrections (DOC) Policy No. 205.220 (Apr. 20, 2020); see also *In the Matter of the Risk Level Determination of R.B.P.*, 640 N.W.2d 351, 354 (Minn. Ct. App. 2002).

⁷⁰ Minn. Stat. § 244.052, subd. 3(f).

⁷¹ *Id.*, subd. 6(a).

⁷² *Id.* at (d). The contested case rules are under Minn. R. 1400.5010-.8401 (2019).

⁷³ *Id.* at (c).

⁷⁴ Minn. Stat. §§ 14.63, 244.052, subd. 6(c).

Assignment of a risk level to a predatory offender is applicable for a minimum of ten years.⁷⁵ During that time, the appropriate level of notice must be given every time the predatory offender changes residence.⁷⁶ The predatory offender may ask the ECRC to reassess the assigned risk level three years after the initial risk assessment and may renew the request once every two years following subsequent denials.⁷⁷

III. The MnSOST – 4

The DOC has adopted the MnSOST-4 as a risk assessment tool to be utilized in making risk level assessments under Minn. Stat. § 244.052.⁷⁸ DOC Policy 205.220 was amended in April 2020 to specifically recognize and authorize the use of the MnSOST-4 for use in ECRC risk level determinations.

At the time of Petitioner's ECRC meeting in December 2019, the DOC had not yet updated DOC Policy 205.220 to recognize the MnSOST-4. It had, however, directed its sex offender treatment professionals to utilize the updated tool.⁷⁹ Since the DOC had formally accepted its use, and updated its policy prior to the contested case hearing, there was no material error by the ECRC using the MnSOST-4 in reaching its risk level determination in this case.

Because Dr. Backes properly utilized the MnSOST-4, and properly applied the statutory risk factors and special concerns in reaching his risk level recommendation, the ECRC did not err in relying on Dr. Backes's recommendation. Accordingly, the ECRC's risk level assignment is supported by the record.

IV. Petitioner's Arguments

Petitioner argues it is unfair that the ECRC has legal representation and that he has none.⁸⁰ Also, while he concedes that there were no errors in the scoring of the MnSOST-4 and that the special concerns noted by Dr. Backes and adopted by the ECRC apply to him, Petitioner believes that one who has taken full responsibility for his actions, has completed sex offender and chemical dependency treatment, and who has served as a counselor and tutor should be given a break in the assignment of his risk level.⁸¹

Although the Administrative Law Judge understands Petitioner's desire to have legal representation, Petitioner does not have a right to the appointment of an attorney in this case. The Minnesota Legislature specifically eliminated funding for the Minnesota Public Defender's Office to represent indigent offenders in ECRC appeals.⁸² An

⁷⁵ Minn. Stat. § 243.166, subd. 6(a).

⁷⁶ *Id.*, subd. 3 (2020).

⁷⁷ *Id.*

⁷⁸ *See id.* at subd. 2, subd. 3(d)(i).

⁷⁹ Test. of T. Backes.

⁸⁰ Test. of Larry Hinton.

⁸¹ *Id.*

⁸² 2012 Minn. Laws ch. 212, § 1 at 1.

offender seeking administrative Review of his risk level has no right to publicly-funded counsel.⁸³ This matter is simply an administrative review of whether the ECRC assigned Petitioner the appropriate risk level in order to safeguard the community upon his release. In a civil regulatory matter that does not impose a criminal penalty, there is no constitutional right of a court-appointed attorney.⁸⁴

Finally, Petitioner acknowledges there were no errors in scoring the MnSOST-4 and that the special concerns noted by the ECRC apply. Further, the fact Petitioner completed sex offender and chemical dependency treatment is reflected in his score because it was part of the MnSOST-4 and was considered by the ECRC. The fact Petitioner was a tutor and counselor during his confinement is commendable, but the ECRC did not err in failing to reduce Petitioner's risk level as a result.

V. Conclusion

The Petitioner failed to establish the ECRC risk level was erroneous. Therefore, Petitioner's assignment to a Risk Level 3 must therefore be affirmed.

It is important to note that the Petitioner has taken many positive steps to get his life back on track. He has taken responsibility for his actions and acknowledges that his actions have hurt people. As noted above, Petitioner has completed sex offender and chemical dependency treatment while he was in prison. He also used his time in prison profitably, by serving as a counselor and mentor to help others. He states he is in a stable relationship that will provide support following his release. The Petitioner is commended for taking these steps and is encouraged to keep up the good work.

The Administrative Law Judge reminds Petitioner that he may request the ECRC reassess his risk level assignment after three years have elapsed since the ECRC's meeting on January 27, 2020.⁸⁵ If the request is denied, Petitioner may renew the request once every two years following subsequent denials.⁸⁶

J. E. L.

⁸³ *State v. Her*, 862 N.W.2d 692, 700 (Minn. 2015).

⁸⁴ *See Thole v. Comm'r of Pub. Safety*, 831 N.W.2d 17, 20 (Minn. Ct. App. 2013) (parties to civil proceedings have no constitutional right to counsel appointed at public expense); *Boutin v. LaFleur*, 591 N.W.2d 711, 717-18 (Minn. 1999) (Minnesota's registration and community notification laws are "regulatory" because they do not impose an affirmative disability or restraint, are not historically regarded as a punishment, and do not promote retribution and deterrence).

⁸⁵ Minn. Stat. § 244.052, subd. 3(i).

⁸⁶ *Id.*