

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

In the Matter of the Risk Level
Determination of Daniel L. Zurn

**ORDER GRANTING
MOTION FOR SUMMARY DISPOSITION**

This matter is pending before Administrative Law Judge Barbara J. Case pursuant to a Motion for Summary Disposition (Motion) filed by the End-of-Confinement Review Committee (ECRC) on April 14, 2020.¹ Daniel L. Zurn (Petitioner) was permitted extensions of the deadline to file a response. The record closed upon the filing of Petitioner's response on July 6, 2020.

John D. Gross, Assistant Attorney General, represents the ECRC. Petitioner represents himself without legal counsel.

Based on the record and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

1. The ECRC's Motion is **GRANTED**.
2. Petitioner's appeal is **DISMISSED**.
3. Petitioner's assignment of Risk Level 3 is **AFFIRMED**.

Dated: September 8, 2020



BARBARA J. CASE
Administrative Law Judge

¹ The ECRC did not file a Notice for Prehearing or Hearing pursuant to Minn. R. 1400.5600 (2019). Instead, the ECRC commenced this matter with a Notice and Order for Review of Risk Level Assignment, received by the Office of Administrative Hearings on April 7, 2020 and then, subsequently, a Motion for Summary Disposition filed on April 14, 2020.

NOTICE

Pursuant to Minn. Stat. § 244.052, subd. 6(c) (2020), 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

Petitioner has appealed the risk level assigned to him by the ECRC under the Minnesota Community Notification Act (Act).² The ECRC moves for summary disposition, contending that Petitioner has not identified an error in the ECRC's assignment of his risk level.³

II. Minnesota Community Notification Act

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.”⁴ 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.”⁵

The Act establishes three risk levels to which predatory offenders are assigned.⁶ Each risk level is associated with a different degree of community notification.⁷ 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.⁸ Risk Level 2 permits additional notice to individuals and groups, such as schools and daycares, likely to be victimized by the offender.⁹ Risk Level 3 permits notice to be given to any member of the community whom the offender is likely to encounter unless law enforcement determines public safety might be compromised or more limited disclosure is necessary to protect the identity of the offender’s victim(s).¹⁰

² Minn. Stat. § 244.052 (2020).

³ Motion for Summary Disposition (ECRC Motion) (Apr. 14, 2020).

⁴ Minn. Stat. §§ 243.166, subd. 1b, 244.052, subd. 4(a) (2020).

⁵ Minn. Stat. §§ 243.166, subd. 1b, 244.052, subd. 4(a).

⁶ See Minn. Stat. § 244.052, subd. 4(b).

⁷ See *id.*

⁸ *Id.*, subd. 4(b)(1).

⁹ *Id.*, subd. 4(b)(2).

¹⁰ *Id.*, subd. 4(b)(3).

Every predatory offender confined in a Minnesota state correctional or treatment facility must be assessed by the ECRC at the facility prior to release.¹¹ The ECRC considers the public risk posed by each predatory offender upon release and determining the appropriate risk level assignment.¹²

In doing so, the ECRC is required by law to apply six risk factors provided in Minn. Stat. § 244.052, subd. 3(g). These risk factors 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.¹³ This list is not exclusive.¹⁴

In addition, the ECRC must score an offender using a risk assessment tool. The score from that tool translates into a presumptive risk level.¹⁵ The ECRC, in its discretion, may deviate from the presumptive risk level by applying mitigating factors for a downward departure or special concerns for an upward departure.¹⁶

After considering the offender's score on the risk assessment tool, the impact of any mitigating factors or special concerns, and the statutory risk factors, the ECRC assigns the offender a risk level. 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."¹⁷

A risk level assignment applies for a minimum of ten years.¹⁸ During that time, the level of notice corresponding to the assigned risk level must be given every time the offender changes residence.¹⁹ An offender may seek a reassessment of the assigned risk level after three years have passed and may renew the request once every two years following subsequent denials.²⁰

Additionally, a predatory offender assigned Risk Level 2 or Risk Level 3 may seek administrative review of the ECRC's determination.²¹ In such a review, the Administrative Law Judge considers whether the ECRC's risk assessment determination was erroneous and, based on this decision, shall either uphold or modify

¹¹ *Id.*, subd. 3.

¹² *Id.*

¹³ *Id.*, subd. 3(g).

¹⁴ *Id.*

¹⁵ *Id.*, subd. 2.

¹⁶ Minnesota Department of Corrections Policy No. 205.220 (Apr. 28, 2020); see also *In re the Risk Level Determination of R.B.P.*, 640 N.W.2d 351, 354 (Minn. Ct. App. 2002).

¹⁷ Minn. Stat. § 244.052, subd. 3(f).

¹⁸ *Id.*, subd. 4(f); see also Minn. Stat. § 243.166, subd. 6(a) (2020).

¹⁹ See Minn. Stat. § 244.052, subd. 4(f).

²⁰ *Id.*, subd. 3(i).

²¹ *Id.*, subd. 6(a).

the review committee's determination."²² The decision of the Administrative Law Judge is final and subject to appellate judicial review.²³

III. Petitioner's Background

A. 2012 Predatory Offense Conviction

Petitioner is 68 years old,²⁴ and has three children, two sons and one daughter. He has been married to his wife since 1980.²⁵ Petitioner is a college graduate who has worked as a county employee and subsequently as a computer programmer, but he is now retired.²⁶

Petitioner has one predatory offense conviction.²⁷ In 2012, Petitioner was charged with three counts of second-degree criminal sexual conduct for offenses committed against two female victims, ages 9 and 11,²⁸ for conduct occurring between 2005 and 2008.²⁹ The charges were later amended to add four counts of possession of pornographic work after authorities found photos and videos on Petitioner's home and work computers containing images of minor children without clothing in sexual positions and committing sexual acts.³⁰ As part of a plea agreement, Petitioner pleaded guilty to one count of second-degree criminal sexual conduct and the other charges were dismissed.³¹ Petitioner was convicted of one count of second-degree criminal sexual conduct for sexually assaulting the 11-year-old female, who was his minor daughter's overnight guest.³² Petitioner was sentenced to 25 years of supervised probation.³³

In July 2013, Petitioner underwent a psychosexual assessment; he was diagnosed with Pedophilic Disorder, Nonexclusive Type, and received a recommendation to complete sex offender treatment.³⁴ The assessment report also recommended, among other things, that Petitioner not be allowed to have contact with anyone under the age of eighteen.³⁵ In August 2014, Petitioner was terminated from sex offender treatment because he was not making meaningful progress, did not disclose that he was having contact with minors, and appeared to deny the impact of his criminal sexual conduct on the victims and those around him. Petitioner also appeared to rationalize, defend, and intellectualize his contact with minors.³⁶

²² *Id.*, subd. 6(c).

²³ Minn. Stat. §§ 14.63, 244.052, subd. 6(c).

²⁴ Ex. 1 at 5 (Risk Assessment Recommendation).

²⁵ *Id.* at 9.

²⁶ *Id.*

²⁷ Ex. 1 at 219-25 (criminal complaint).

²⁸ *Id.*

²⁹ Ex. 1 at 115 (Uniform Case Report).

³⁰ Ex. 1 at 206-16 (criminal complaint).

³¹ Ex. 1 at 180 (Warrant of Commitment).

³² Ex. 1 at 6 (Risk Assessment Recommendation), 184 (Warrant of Commitment).

³³ *Id.* at 181.

³⁴ Ex. 1 at 191-205 (Psychosexual Assessment).

³⁵ *Id.* at 205.

³⁶ Ex. 1 at 176 (letter regarding termination), 173-75 (report of probation agent).

B. First Incarceration (12/09/14-07/13/15) and ECRC Assessment

Also, in 2014, Petitioner violated the terms of his probation by having contact with minor children, including contact with a minor female who had obtained a harassment restraining order (HRO) against him.³⁷ Petitioner's probation was revoked, and he was incarcerated from December 9, 2014, until July 13, 2015.³⁸ Prior to his release from prison, the ECRC at the Minnesota Correctional Facility (MCF)-Faribault assigned Petitioner a Risk Level 2.³⁹ At that time, Petitioner's presumptive score on the Minnesota Sex Offender Screening Tool (MnSOST)-3.1.2⁴⁰ placed him in Risk Level 2.⁴¹

C. Second Incarceration (07/14/17-11/16/17) and ECRC Assessment

On July 10, 2017, Petitioner was charged with violating an HRO and Failing To Drive With Due Care.⁴² The offense occurred on or about June 24, 2017.⁴³ Petitioner was observed staring at minor children as he drove by, including a minor female who had an active HRO against him.⁴⁴ Thereafter, he was incarcerated from approximately July 14, 2017, to November 16, 2017.⁴⁵

Prior to his release from his second period of incarceration, the ECRC assessed him again to determine a risk level.⁴⁶ The ECRC assigned Petitioner a Risk Level 2 by a split decision, with two votes in favor of Risk Level 3 and three votes to assign Petitioner Risk Level 2.⁴⁷ Although the ECRC ultimately did not vote to raise Petitioner to a Risk Level 3, the ECRC was concerned with Petitioner's lack of understanding regarding the harm he has caused and how his actions affect others. The ECRC noted the applicability of special concerns, including Petitioner's deviant orientation and sexual preoccupation and his "high-risk, grooming type behavior suggesting increased potential to reoffend."⁴⁸ The ECRC stated that this behavior, and Petitioner's non-incidental contact and befriending of family members of potential victims, suggested a broader degree of community notification.⁴⁹

³⁷ Ex. 1 at 7 (Risk Assessment Recommendation), 114-17 (Uniform Case Report).

³⁸ Ex. 1 at 8 (Risk Assessment Recommendation), 167 (Probation Violation Order), 175 (Probation Violation Order).

³⁹ Ex. 1 at 142 (Risk Assessment Report).

⁴⁰ The MnSOST-3.1.2 is the instrument predating the current instrument, the MnSOST-4.0.

⁴¹ Ex. 1 at 148 (Risk Assessment Report).

⁴² Ex. 1 at 116 (Uniform Case Report).

⁴³ Ex. 1 at 85 (criminal complaint).

⁴⁴ Ex. 1 at 111 (Notice of Hearing).

⁴⁵ Ex. 1 at 81 (Hearings and Release Unit violation report).

⁴⁶ Ex. 1 at 90-96 (Risk Assessment Report).

⁴⁷ *Id.* at 92.

⁴⁸ *Id.*

⁴⁹ *Id.*

D. Third Incarceration (12/26/19-06/12/20) and ECRC Assessment⁵⁰

On September 16, 2019, Petitioner was charged with “Stalking-Second or subsequent violation in 1 years.”⁵¹ Petitioner pleaded guilty on December 11, 2019.⁵² In this offense, Petitioner went to the home of the neighbor who lived immediately behind him when she was home and when she was absent, and, on one occasion, offered left-over Halloween candy to the neighbor’s minor son. The neighbor also had an 8-year-old daughter, who was with her when Petitioner came to her home. Petitioner’s corrections supervisor was particularly concerned that Petitioner had been videotaping the 8-year-old girl.⁵³ The investigating officer also found Petitioner had an app on his phone allowing him to search for information about people and that he had searched for, and received, information about the neighbor.⁵⁴

In addition to the stalking conviction, Petitioner violated many of the terms of his supervised release. These release violations included: (1) failing to refrain from possession of any type of firearm, ammunition, or dangerous weapon, because he possessed, among other contraband, pellet guns, air rifles, ammunition, and multiple knives; (2) failing to complete sexual offender programming; (3) possessing images of teenage females in their underwear; (4) possessing internet capable devices; and (4) having contact with minors. Petitioner’s case manager recommended a new end-of-confinement review.⁵⁵ Although Petitioner would have received a new end-of-confinement review by law, it appears that the case manager sought a re-evaluation of Petitioner’s risk level considering his release violations.⁵⁶

IV. Procedural History

In preparation for Petitioner’s most recent release, Shelley Leutschaft, Ph.D., a licensed psychologist with the Department of Corrections (DOC), prepared a risk assessment recommendation for Petitioner.⁵⁷ As part of the risk assessment, Dr. Leutschaft scored the MnSOST-4.0 for Petitioner.⁵⁸ According to the MnSOST-4.0, Petitioner’s predicted probability of sexual recidivism is 2.02 percent, which places Petitioner in the presumptive Risk Level 1 category.⁵⁹

⁵⁰ Ex. 1 at 8 (Risk Assessment Recommendation). There are slight differences in the dates of the most recent incarceration in various official documents.

⁵¹ Ex. 1 at 43 (criminal complaint).

⁵² Ex. 1 at 39 (treatment discharge letter).

⁵³ Ex. 1 at 31 (Violation Report).

⁵⁴ Ex. 1 at 59 (criminal complaint).

⁵⁵ Ex. 1 at 20 (DOC Office Memorandum).

⁵⁶ *Id.*

⁵⁷ Ex. 1 at 5-11 (Risk Assessment Recommendation).

⁵⁸ Ex. 1 at 8 (Risk Assessment Recommendation), 12 (MnSOST-4 scoring sheet).

⁵⁹ Ex. 1 at 6 (Risk Assessment Recommendation).

On February 20, 2020, Dr. Leutschaft scored Petitioner's MnSOST-4.0 as follows:⁶⁰

Items	Values
Total Violent Offenses	1
Felony Offenses	2
VOFP	1
Predatory Offenses	1
Stranger Victims	0
Male Victims	0
Public	1
Multiple Age Groups	0
Suicidal Concern	0
Employment	1
Married	1
Post-Secondary Degree	1
SO/CD Treatment	0
Release Violator	1
Age at Release	68
Unsupervised Release	0

Dr. Leutschaft noted the applicability of five special concerns to Petitioner's risk level assignment.⁶¹ First, Dr. Leutschaft applied Special Concern 2, which includes a history of prior supervision failures, a recent history of engaging in high-risk or grooming-type behaviors, or other behaviors suggesting increased potential to reoffend.⁶² Dr. Leutschaft cites Petitioner's recent violations, including his 2019 conviction for felony stalking.⁶³ Dr. Leutschaft also applied Special Concern 4, which

⁶⁰ Ex. 1 at 12 (MnSOST-4 scoring sheet).

⁶¹ Ex. 1 at 11 (Risk Assessment Recommendation).

⁶² *Id.*

⁶³ *Id.* at 10.

considers predatory offense behavior as noted in the most recent violation report and as supported by Petitioner's conviction for stalking a child and her family.⁶⁴ Dr. Leutschaft also applied Special Concern 5, which applies when the nature of the victim pool suggests a need for broader public notification. Dr. Leutschaft notes this concern is supported by Petitioner's use of the internet to search for information on families and the recording of at least one female child on his cellular telephone.⁶⁵ Dr. Leutschaft also applied Special Concern 6, pertaining to deviant sexual orientation and sexual preoccupation or compulsivity, and Special Concern 7, which relates to evidence of an intent to reoffend. Both of the last two concerns are supported by Petitioner's history of reoffending, which resulted in two additional periods of confinement in fairly short succession. While Dr. Leutschaft acknowledges that Petitioner has not expressed an intent to reoffend, she applied this concern because of his recent violative behaviors, his conviction for stalking, and his unwillingness or inability to refrain from engaging in offense related behaviors.⁶⁶

In reviewing the statutory risk factors, Dr. Leutschaft noted Petitioner's potential to reoffend based on his prior history of reoffending.⁶⁷ She also noted that nothing about Petitioner's physical condition appears to evidence an inability to reoffend.⁶⁸ Based on Petitioner's score on the risk assessment tool, consideration of the statutory risk factors, and application of special concerns, Dr. Leutschaft recommended assigning a Risk Level 3 to Petitioner.⁶⁹

Petitioner attended, and spoke at, the ECRC meeting and at the conclusion of the ECRC meeting, the ECRC unanimously voted to assign Petitioner a Risk Level 3.⁷⁰

On March 20, 2020, Petitioner appealed the ECRC's risk level determination.⁷¹ On April 14, 2020, the ECRC filed a Motion for Summary Disposition of Risk Level Administrative Review with the Office of Administrative Hearings.⁷²

V. Motion for Summary Disposition

Summary disposition is the administrative law equivalent of summary judgment.⁷³ 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.⁷⁴ The Office of Administrative Hearings follows the summary judgment standards

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 9.

⁶⁷ *Id.* at 6-10.

⁶⁸ *Id.* at 10.

⁶⁹ *Id.*

⁷⁰ Ex. 1 at 4 (Risk Assessment Report).

⁷¹ Ex. 1 at 1 (Notice of Appeal).

⁷² ECRC Motion.

⁷³ *Pietsch v. Minn. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2019).

⁷⁴ *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).

developed in the state district courts when considering motions for summary disposition in contested case matters.

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, material factual issues exist.⁷⁵ The Administrative Law Judge does not weigh the evidence;⁷⁶ instead, the Judge views the facts and evidence in a light most favorable to the non-moving party.⁷⁷

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.⁷⁸ A fact is material if its resolution will affect the outcome of the case.⁷⁹ If the moving party meets the initial burden, the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.⁸⁰ A genuine issue is not a "sham or frivolous" one,⁸¹ and it cannot rely on mere allegations or denials.⁸² Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.⁸³

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.⁸⁴ Thus, summary disposition is only proper when no fact issues need to be resolved.⁸⁵

VI. Arguments

The ECRC asserts that Petitioner has failed to allege any valid error or genuine issue of material fact and, therefore, that summary disposition of this matter is appropriate.⁸⁶ The ECRC contend that Petitioner has shown no error in the scoring of his MnSOST-4.0, which placed him at a presumptive Risk Level 1, or of the ECRC's application of Special Concerns 2, 4, 5, 6, and 7, to increase the risk level from his presumptive score.⁸⁷

The ECRC notes Petitioner's repeated release violations and his 2019 felony conviction for stalking a minor female and her family, where he video-recorded the girl on a trampoline from his car.⁸⁸ Petitioner took this video with his phone after the girl's

⁷⁵ See *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

⁷⁶ See *id.*

⁷⁷ See *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

⁷⁸ See *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

⁷⁹ See *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).

⁸⁰ See *Thiele*, 425 N.W.2d at 583.

⁸¹ See *Highland Chateau, Inc. v. Minn. Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).

⁸² See *DLH*, 566 N.W.2d at 71.

⁸³ See Minn. R. Civ. P. 56.05.

⁸⁴ See *Sauter*, 70 N.W.2d at 353.

⁸⁵ See *id.*

⁸⁶ ECRC Memorandum in Support of Summary Disposition (ECRC Mem.) at 1 (Mar. 16, 2020).

⁸⁷ *Id.* at 8.

⁸⁸ ECRC Motion at 3; Ex. 1 at 3 (Risk Assessment Report), 35 (Uniform Case Report).

mother had obtained a “no trespass” order against him.⁸⁹ Investigators also found images of young females in bikinis and underwear on Petitioner’s phone.⁹⁰ Petitioner’s agent and his sex-offender-treatment therapist both believe Petitioner poses a safety risk, his therapist stating that “his return to the community will be difficult in light of the pattern of offending persisting in his residence directed towards neighbors to whom he has access.”⁹¹

The ECRC maintains that it properly applied five special concerns, Special Concerns 2, 4, 5, 6, and 7, to raise Petitioner’s Risk Level to 3.⁹² The ECRC applied Special Concern 2, related to prior supervision failures, because of Petitioner’s numerous release violations and return to prison.⁹³ The ECRC also applied Special Concern 4, related to predatory behavior, Special Concern 5, which applies when the victim pool suggests a need for broader public notification, and Special Concern 6, relating to deviant orientation and/or sexual preoccupation or compulsivity on the basis of Petitioner’s stalking and recording of the girl and the surveillance of her family, which led to his most recent incarceration.⁹⁴ Lastly, the ECRC justified applying Special Concern 7, which applies when an offender displays evidence or information regarding intent to reoffend, based on Petitioner’s most recent stalking conviction and his admission that he struggles with fantasies involving minor females.⁹⁵ The ECRC argues that Petitioner has not raised any genuine issue of material fact that conflicts with the application of these special concerns or requires a hearing.⁹⁶

In opposing his risk level assignment at the ECRC meeting and in his written filings, Petitioner counters that his 2019 staking offense is not part of a pattern of behavior, but instead is a one-time event, as the evidence on his cell phone shows. Petitioner also asserts that his 2017 imprisonment was a wrongful incarceration, as the hearing officer erroneously thought that an HRO violation victim was one of his original victims.⁹⁷ Petitioner also challenges the assertion that he was trespassing in 2019, arguing that the mother “never reported a trespass on me on her property; she only requested a no-trespass order.”⁹⁸ He notes, regarding his video-recording of the girl, that he stated on the record during his guilty plea that if he could go back and do it over he would not have done it.⁹⁹ He argues that because he only did this once, it is an error to call it a “pattern of behavior.”¹⁰⁰

Petitioner also notes that his original assaults occurred over 14 years ago and that Dr. Leutschaft did not consider what Petitioner argues is a lack of new criminal

⁸⁹ Ex. 1 at 3 (Risk Assessment Report); see also Ex. 1 at 35 (Uniform Case Report).

⁹⁰ Ex. 1 at 36 (Uniform Case Report).

⁹¹ ECRC Motion at 4; Ex. 1 at 36 (Uniform Case Report), 39-41 (discharge from treatment summary).

⁹² ECRC Motion at 1.

⁹³ *Id.* at 7.

⁹⁴ *Id.*; Ex. 1 at 44-45 (criminal complaint).

⁹⁵ ECRC’s Motion at 8; Ex. 1 at 34 (Violation Report).

⁹⁶ ECRC’s Motion at 10.

⁹⁷ Ex. 1 at 1 (Notice of Appeal).

⁹⁸ Motion for Denial of ECRC’s Motion Request for Summary Disposition of this Matter (Apr. 24, 2020).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

charges.¹⁰¹ He also asserts that Dr. Leutschaft stated that he searched for, located, and parked near or drove by the homes of minor children. Petitioner denies this and notes that he has not approached any children.¹⁰² He states that his February 2020 Hearings and Release Unit (HRU) report says he has had no direct or indirect minor contact.¹⁰³

Petitioner further argues that while he pleaded guilty to his most current offense of stalking and his probation officer recommended that he be incarcerated through 2025, “the HRU Officer had a different outlook and sentenced me to 6 months in state prison in addition to the 6 months I had already spent in Scott County jail. He obviously didn’t consider the charge against me as serious as my probation officer nor the ECRC.”¹⁰⁴

Petitioner explains his use of the phone application to look up information on his neighbors by stating that he also used the application to look up information on friends, family, and all of his neighbors, not just the family living behind his home.¹⁰⁵ He argues that the ECRC provided no evidence of his intent to reoffend and that the only contact with minors he has had since 2014 was with the teenage son of the neighbor living behind his home.¹⁰⁶

Finally, Petitioner points to his supportive wife and children, his educational achievements, steady work record, and involvement in his community.¹⁰⁷ He argues that since his MnSOST-4.0 score placed him in the presumptive Risk Level 1 range, the ECRC made “quite a leap” to assign a Level 3.¹⁰⁸

VII. Analysis

Upon review of the ECRC’s Motion and Petitioner’s claims, the Administrative Law Judge concludes that the ECRC’s Motion should be granted.

According to the MnSOST-4.0, Petitioner scored in the presumptive Risk Level 1 range.¹⁰⁹ But this score only provides the ECRC with a suggested or presumptive risk level, which can be increased or decreased based on individual circumstances, not taken into account by the actuarial tool.¹¹⁰ By law, the ECRC is required to consider a number of factors in addition to the screening tool score when assigning a risk level, including: (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

¹⁰¹ *Id.* at 2.

¹⁰² *Id.* at 3.

¹⁰³ *Id.*

¹⁰⁴ Motion to Deny the ECRC Request for Summary Disposition at 1 (June 30, 2020).

¹⁰⁵ *Id.* at 2.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 3.

¹⁰⁸ *Id.*

¹⁰⁹ Ex. 1 at 10 (Risk Assessment Recommendation).

¹¹⁰ *In re R.B.P.*, 640 N.W.2d 354-56.

(6) whether the offender demonstrates a physical condition that minimizes the risk of re-offense.¹¹¹ The ECRC has discretion to apply one or more special concerns to raise the presumptive risk level.¹¹²

Petitioner does not challenge the MnSOST-4.0 scoring. Instead, Petitioner challenges the ECRC's application of special concerns to raise his risk level.

The ECRC applied five special concerns to assign Petitioner Risk Level 3. Special Concern 2 involves prior supervision failures and, among other concerning behavior, behaviors suggesting increased potential to reoffend. It is undisputed that Petitioner has had numerous release violations in addition to charges and convictions. Since 2012, when he was convicted of second-degree criminal sexual conduct and placed on supervised probation for sexually assaulting an 11-year-old female,¹¹³ Petitioner has been incarcerated three times and each time his behavior involved unwanted attention to minor females. In addition, Petitioner has committed numerous release violations, including failing to report all of his internet capable devices to his agent, possession of firearms, failing to remain law abiding, failing to complete sex offender treatment, and having contact with minor children. Petitioner's arguments do not demonstrate application of Special Concern 2 was an error. It was reasonable for the ECRC to conclude that Petitioner's failure to remain law abiding and to conform with the terms of his release indicates that he is at risk to reoffend. The fact that Petitioner's violations occurred in quick succession, and even after he had been assigned a Risk Level 2, makes the application of this concern especially reasonable. The ECRC appropriately applied Special Concern 2.

The ECRC also properly applied Special Concern 4 involving predatory offense behavior. It is unquestionable that Petitioner's engaged in predatory behavior leading to his most recent felony stalking conviction. Petitioner attempts to diminish the concerning nature of this behavior stating that the HRU officer did not think it was as serious as the probation officer or the ECRC as demonstrated by the sentence given Petitioner. Petitioner states that the behavior of taking pictures and a video of the neighbor's daughter only happened once, and he regrets it. Petitioner argues that, because this happened only once, it is not a pattern of behavior and that his deviant behavior occurred 14 years ago.¹¹⁴

However, the family that he stalked painted a very different picture of the effect of his behavior. The mother felt "scared, angry and violated" when she was told by the police that Petitioner had a video of her daughter on his phone.¹¹⁵ Petitioner's protestations and minimization of his behavior support the concerns voiced by his second ECRC committee when they indicated that they were raising him to a Risk Level 2 in part because he seemed unaware of the impact of his actions. Petitioner's

¹¹¹ Minn. Stat. § 244.052, subd. 3(d), (i), (g).

¹¹² Minnesota Department of Corrections Policy No. 205.220 (Apr. 28, 2020); *see also In re R.B.P.*, 640 N.W.2d at 354.

¹¹³ Ex. 1 at 6 (Risk Assessment Recommendation), 183 (Warrant of Commitment).

¹¹⁴ Memorandum in Support of Motion to Deny ECRC Motion at 1 (June 30, 2020).

¹¹⁵ Ex. 1 at 15 (victim impact statement).

expressed regret is not credible when, at the same time, he minimizes and rationalizes them when, for example, he notes that he received a light sentence or that he was using the surveillance software on people besides his neighbors. The ECRC appropriately applied Special Concern 4, and Petitioner has not alleged any evidence which, if true, would show that the ECRC erred.

Petitioner's most recent conviction, his release violations, and his use of software to research neighbors, including the family whom he stalked, make the application of Special Concern 5 appropriate. This special concern addresses whether the nature of the victim pool for an offender suggests a need for broader public notification. Risk Level 2 permits additional notice to individuals and groups, such as schools and daycares, likely to be victimized by the offender.¹¹⁶ Risk Level 3 permits notice to be given to any member of the community whom the offender is likely to encounter. Petitioner's most recent behavior implicates his entire community and supports imposition of Risk Level 3. As addressed above, Special Concern 6, pertaining to deviant sexual orientation and sexual preoccupation or compulsivity, and Special Concern 7, which relates to evidence of an intent to reoffend, are supported by Petitioner's history of reoffending.

In addition, Petitioner was assigned Risk Level 2 after his second incarceration, and he subsequently committed engaged in felony stalking. The ECRC's decision to apply the broader community notification permitted by a Risk Level 3 is warranted and reasonable. Two other professionals who have had extensive contact and conversations with Petitioner support the determination that a higher risk level is required: the therapist who terminated him from sex offender treatment, and his agent. They are both concerned about the safety of Petitioner's community in light of his offenses and continuing rationalization of his criminal conduct.

VIII. Conclusion

Petitioner has failed to raise a genuine issue of material fact related to the ECRC's risk level assignment. Therefore, the ECRC's Motion is **GRANTED**. Petitioner's appeal of his risk level determination is **DISMISSED** and assignment of Risk Level 3 is **AFFIRMED**.

Petitioner may request review of his risk level assignment three years after the date of the ECRC meeting and may renew his request once every two years following subsequent denials.¹¹⁷

B. J. C.

¹¹⁶ Minn. Stat. § 244.052, subd. 4(b)(2).

¹¹⁷ *Id.*, subd. 3(i).