OAH 71-1100-36845

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level Determination of Desmond G. Danial

ORDER GRANTING MOTION FOR SUMMARY DISPOSITION

This matter is pending before Administrative Law Judge Jessica A. Palmer-Denig upon a Motion for Summary Disposition (Motion) filed by the End-of-Confinement Review Committee (ECRC) on May 28, 2020. Desmond G. Danial (Petitioner) did not file a response to the Motion and the record closed on July 24, 2020, which was the deadline for the filing of Petitioner's response.

Noah Cashman, 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 for Summary Disposition is **GRANTED**.

2. Petitioner's appeal is **DISMISSED**.

3. Petitioner's assignment of Risk Level 3 is **AFFIRMED**.

Dated: September 1, 2020

JESSICA A. PALMER-DENIG
Administrative Law Judge

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

The ECRC assigned Risk Level 3 to Petitioner under the Minnesota Community Notification Act (Act),[1] and Petitioner appealed that determination. The ECRC now seeks summary disposition, contending that no issues of material fact exist, and that Petitioner cannot meet his burden to show that the ECRC erred in making his risk level assignment. Based upon a review of the Motion and the record, the Administrative Law Judge concurs and concludes that Petitioner's risk level assignment should be affirmed.

II. Service of the Motion

The ECRC attempted service of the Motion on Petitioner several times. On May 28, 2020, the ECRC sent the Motion by U.S. Mail to the Tazewell County Sheriff's Department in Pekin, Illinois, where Petitioner was confined in the Federal Correctional Institution-Pekin (FCI-Pekin). The ECRC requested that a process server personally serve Petitioner and that the process server return an affidavit of personal service.[2] No such affidavit was filed into the record of this case. On July 1, 2020, the ECRC sent the Motion by U.S. Mail to FCI-Pekin, addressed directly to Petitioner.[3] Subsequently, on July 7, 2020, the ECRC served the Motion upon Petitioner by U.S. Mail at an address in Minneapolis, Minnesota.[4] The deadline for Petitioner's response is calculated from the final service of the Motion upon Petitioner and according to the contested case rules.[5]

III. The Provisions of the Act

Minnesota law provides that individuals convicted of certain criminal offenses are considered "predatory offenders" and are subject to the Act.[6] Though many of the offenses triggering application of the Act are sexual in nature, the list of predatory

[1] Minn. Stat. § 244.052 (2020).
[2] Letter from Darcy M. Sloneker to the Administrative Law Judge and Tazewell County Sheriff's Department (May 28, 2020) (on file with the Minn. Office Admin. Hearings); Affidavit (Aff.) of Service by U.S. Mail (May 28, 2020).
[3] Aff. of Service by U.S. Mail (July 1, 2020).
[4] Aff. of Service by U.S. Mail (July 7, 2020).
[5] *See* Minn. R. 1400.6100, subp. 2, .6600 (2019).
[6] *See* Minn. Stat. §§ 243.166, subd. 1b, 244.052, subd. 4(a) (2020).

offenses includes some non-sexual crimes[7] and felony-level violations of certain criminal statutes are considered predatory, including stalking offenses.[8]

Under the Act, law enforcement agencies in the area where a predatory offender resides, expects to reside, is employed, or is regularly found, must disclose information "relevant and necessary to protect the public and to counteract the offender's dangerousness."[9] The extent of the disclosure, 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."[10]

The Act creates a tiered structure of three risk levels to which an offender may be assigned, and that assignment determines the scope of community notification.[11] If an offender is assigned Risk Level 1, information about the offender may be given to local law enforcement agencies as well as victims and witnesses related to the offender's criminal history.[12] Risk Level 2 permits additional notice to groups such as schools, child care facilities, and individuals likely to be victimized by the offender.[13] 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 victim(s).[14] Every predatory offender confined in a Minnesota state correctional or treatment facility must be assessed by the ECRC prior to release and assigned a risk level based upon the degree of risk to the public that the offender poses.[15] The ECRC's process also applies to offenders who intend to reside in Minnesota following their release from prison in another state or from federal prison.[16]

The ECRC must assess each offender using a variety of tests and tools. Under Minn. Stat. § 244.052, subd. 3(g), the ECRC must apply six risk factors to the offender: (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 reoffense.[17] This list is not exclusive.[18] The ECRC also must score the predatory offender using a risk assessment scale.[19] The offender's score translates into a presumptive risk level to

[7] Minn. Stat. § 243.166, subd. 1b(a)(1)(i), (ii), (2)(ii).
[8] Minn. Stat. § 243.167, subd. 1 (2020).
[9] Minn. Stat. § 244.052, subd. 4(a).
[10] *Id.*
[11] *See id.*, subd. 4(b).
[12] *Id.*, subd. 4(b)(1).
[13] *Id.*, subd. 4(b)(2).
[14] *Id.*, subd. 4(b)(3).
[15] *Id.*, subd. 3.
[16] *Id.*; subd. 3a(a)(1).
[17] *Id.*, subd. 3(g).
[18] *Id.*
[19] *See id.*, subd. 2.

be considered by the ECRC. The ECRC, in its discretion, may deviate downward from the presumptive risk level by applying mitigating factors or may increase the risk level based upon special concerns.[20] Based upon these considerations, the ECRC assigns a final risk level to the predatory offender and it 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."[21]

A predatory offender assigned Risk Level 2 or Risk Level 3 may seek administrative review of the ECRC's determination within 14 days of receiving notice of the risk level assignment.[22] The administrative review is conducted by an Administrative Law Judge at the Office of Administrative Hearings and is subject to the contested case rules.[23] 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."[24] The decision of the Administrative Law Judge is final and subject to appellate judicial review.[25] A predatory offender may also 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.[26]

IV. Petitioner's Background

A. Petitioner's Offense History

Petitioner qualifies as a predatory offender based upon his convictions for stalking in 2012 and criminal sexual conduct in 1988. Petitioner's criminal history contains additional convictions as well.

In 1988, Petitioner was convicted of criminal sexual conduct in the third degree for engaging in sexual contact with 14-year-old female victim, C.G.[27] C.G. and her mother reported Petitioner's actions to the police stating that he had engaged in over 40 instances of sexual intercourse with her, including in a gas station bathroom, and that Petitioner used violence and threats of violence to induce her to engage in sexual activity with him.[28] They also reported that Petitioner had so terrorized C.G. that she attempted suicide.[29]

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[20] 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).
[21] Minn. Stat. § 244.052, subd. 3(f).
[22] *Id.*, subd. 6(a).
[23] *Id.*, subd. 6(d). The contested case rules are found at Minn. R. 1400.5010-.8401 (2019).
[24] Minn. Stat. § 244.052, subd. 6(c).
[25] Minn. Stat. §§ 14.63, 244.052, subd. 6(c).
[26] Minn. Stat. § 244.052, subd. 3(i).
[27] Exhibit (Ex.) 1 at 245-46 (Pre-Sentence Investigation Report).
[28] *Id.*
[29] *Id.* at 245.

In 2012, Petitioner was convicted of stalking.[30] Petitioner bombarded a former girlfriend, C.W., with hundreds of voicemail messages, texts, and emails and she feared he would act on threats he made to kidnap her.[31] Among the threatening messages, over a period of fewer than ten days in March 2012, Petitioner left voicemails and sent texts telling C.W.:

> You leave me no f*ckin' choice but to pop out of f*ckin' nowhere and you know I'm gonna do it . . . I'm not gonna be responsible for what happens . . . If you're gonna hear me to come f*ckin grab ya', that's what I'm gonna have to do.
>
> Today's gonna be your last day, okay? I – I'm not gonna f*ck around with you anymore . . . I asked you nicely. Don't make me do this because you know I will.
>
> I would suggest that you text me. Because if you go through today without not even contacting me at all, I'm going to have your little bottom on my front. Okay? Good-bye.
>
> Come [M]ay, I will tell you right now . . . you will not be going home at all when your graduation takes place, so don't even plan nothing, cuz you will be coming with me, and you will be taking care of, and fixing all this sh*t.
>
> This time, c*ck is going to stay in your nice *ss. I am deciding on three guys or just me and another one. You will have a mask on so no one will be able to know who you are. Hope you get some time off here soon, cuz they will be meeting us at a hotel. I am going to f*ck you like a greedy slut, omg you are going to enjoy it. I'm going to rape you and use you, every hole too."[32]

Petitioner had also sent C.W. emails with attachments, including photographs of his genitalia, a broken tooth, a bloody rag, and blood spatters.[33] C.W. reported that Petitioner had a police scanner that he used to track law enforcement and her.[34]

Subsequently, while receiving treatment at a hospital, he reported to a nurse that he wanted to "violently harm" C.W., stating "if he found her he would wrap his hands around her neck and choke her."[35] Petitioner was found to have violated the conditions of his probation by making violent threats and his release was revoked.[36]

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[30] Ex. 1 at 220 (Felony Level Pre-Sentence Investigation).
[31] *Id.* at 221.
[32] Ex. 1 at 225 (Stearns County criminal complaint).
[33] *Id.* at 226.
[34] *Id.*
[35] Ex. 1 at 81 (Violation Report).
[36] Ex. 1 at 77-78 (Revocation Hearing Report).

Petitioner also later stalked a family member of C.W. C.W.'s father reported to police that he received disturbing voicemails, including one of a police scanner reporting a possible hostage situation or kidnapping and a suspect wanted for homicide, and another of a woman screaming.[37] Police traced the calls to Petitioner's mother's home, where Petitioner had been living, and they found an audio file on a computer that matched one voicemail left with C.W.'s father.[38] C.W.'s father had also received a letter, marked with C.W.'s return address, containing nude or partially nude photographs of his daughter and a letter stating she had engaged in sex for money and that information about her would be "spread around until [she] solves what needs to be done."[39] C.W.'s father provided a victim impact statement, stating that during some periods of time he received "near constant phone calls . . . coming in at all hours of the day and night" from Petitioner.[40] Petitioner was convicted of this stalking offense in 2015.[41]

Petitioner has also been convicted of stalking and violating an order for protection in 1996, terroristic threats in 1989, fifth-degree assault in 1987, and illegal possession of an assault weapon in 1986.[42] In 2019, Petitioner was convicted of interstate stalking in federal court.[43]

B. Prior Risk Level Assignments

In April 2015, while confined at the Minnesota Correctional Facility (MCF)-Faribault, Petitioner was assessed by the ECRC and assigned Risk Level 1 on a split decision.[44] Petitioner's score on the Minnesota Sex Offender Screening Tool (MnSOST)-3.1.2[45] indicated a presumptive assignment of Risk Level 2, and assignment to Risk Level 2 was recommended.[46] At that time, the ECRC decided that a broader level of community notification was not warranted.[47]

After a return to prison, in December 2015, Petitioner was incarcerated at MCF-Lino Lakes and again underwent review by the ECRC.[48] Petitioner was assigned Risk Level 2.[49] Petitioner's score on the MnSOST-3.1.2 indicated a presumptive assignment of Risk Level 3, but at that time a Risk Level 2 was recommended, as an evaluator noted that Petitioner "currently does not appear to display a behavioral pattern similar to most Level 3 registrants."[50]

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[37] Ex. 1 at 69 (Adult Felony Pre-Sentence Investigation).
[38] *Id.*
[39] *Id.* at 68-69.
[40] *Id.* 69.
[41] Ex. 1 at 61-62 (Order Warrant of Commitment).
[42] Ex. 1 at 29-39 (Criminal Record Report).
[43] Ex. 1 at 33 (Judgment in a Criminal Case).
[44] Ex. 1 at 93 (Risk Assessment Report).
[45] This instrument preceded the MnSOST-4.0, which is the instrument currently in use.
[46] Ex. 1 at 99 (Risk Assessment Recommendation).
[47] Ex. 1 at 94 (Risk Assessment Report).
[48] Ex. 1 at 50 (Risk Assessment Report).
[49] *Id.*
[50] Ex. 1 at 58, 60 (Risk Assessment Recommendation).

V. Procedural History

Petitioner was confined at FCI-Pekin as a result of his federal conviction and was scheduled for release.[51] In preparation for Petitioner's release, Dr. Shelley Leutschaft, a licensed psychologist with the Department of Corrections (DOC), prepared a risk assessment recommendation for Petitioner.[52]

Dr. Leutschaft scored the MnSOST-4.0 for Petitioner.[53] According to the risk assessment tool, Petitioner's predicted probability of sexual recidivism is 5.90 percent, which places Petitioner in the presumptive Risk Level 3 category.[54]

Based on Petitioner's score on the risk assessment tool and considering the statutory risk factors, Dr. Leutschaft recommended assigning a Risk Level 3 to Petitioner.[55] Dr. Leutschaft saw no reason to depart from the presumptive score and did not apply special concerns or mitigating factors.[56] Dr. Leutschaft noted that Petitioner had experienced a variety of medical and mental health conditions, but concluded that these conditions did not suggest a lower risk of reoffense.[57] She noted his extensive history of predatory offense behaviors, which continued over a long span of time and continued after he received a risk level assignment.[58]

The ECRC convened on March 31, 2020, to consider Petitioner's risk level assignment.[59] Petitioner attended the meeting by telephone and addressed the committee prior to their vote.[60] Petitioner maintained that he is not a violent person and that his offenses were not sexual, indicating he did not know whether he would benefit from sex offender treatment.[61] Petitioner denied some of the details of his offense history, but maintained that he had learned additional skills in prison that would help him to make better decisions.[62] At the conclusion of the meeting, the ECRC voted to assign Petitioner a Risk Level 3.[63] Petitioner submitted a notice of appeal and this case ensued.[64]

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[51] The exact date of Petitioner's release from confinement is not clear from the record. The ECRC's Risk Level Report identifies his release date as March 7, 2016, approximately four years before the ECRC's meeting. Ex. 1 at 10 (Risk Level Report). The Risk Level Recommendation states that his release date was anticipated to be April 16, 2020, but also that he had already been released. Ex. 1 at 14, 17 (Risk Level Recommendation). Petitioner's appeal notice, dated April 10, 2020, suggests that he was still incarcerated at that time. Ex. 1 at 1-9 (Notice of Appeal).
[52] Ex. 1 at 14-18 (Risk Assessment Recommendation).
[53] Ex. 1 at 19 (MnSOST-4.0 Scoring Sheet).
[54] *Id.*; Ex. 1 at 18 (Risk Assessment Recommendation).
[55] Ex. 1 at 18 (Risk Assessment Recommendation).
[56] *Id.*
[57] *Id.* at 17.
[58] *Id.* at 17-18.
[59] Ex. 1 at 10 (Risk Assessment Report).
[60] *Id.* at 11-12; Ex. 6 (audio recording of ECRC meeting).
[61] Ex. 1 at 11-12 (Risk Assessment Report); Ex. 6 (audio recording of ECRC meeting).
[62] Ex. 1 at 11-12 (Risk Assessment Report); Ex. 6 (audio recording of ECRC meeting).
[63] Ex. 1 at 10, 12 (Risk Assessment Report).
[64] Ex. 1 at 1-9 (Notice of Appeal).

VI. Summary Disposition Standard

Summary disposition is the administrative law equivalent of summary judgment.[65] 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.[66] The Office of Administrative Hearings follows the summary judgment standards 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.[67] 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.[68]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[69] A fact is material if its resolution will affect the outcome of the case.[70] 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.[71] A genuine issue is not a "sham or frivolous" one, and it cannot rely on mere allegations or denials.[72] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[73]

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[74] Thus, summary disposition is only proper when no fact issues need to be resolved.[75]

VII. Analysis

Upon a review of the record, the Administrative Law Judge concludes that no material disputes of fact exist and that the ECRC is entitled to judgment as a matter of law. Therefore, the ECRC's Motion is granted.

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[65] *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2019).
[66] *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).
[67] *See, e.g., DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[68] *See Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[69] *See Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[70] *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)).
[71] *See Thiele,* 425 N.W.2d at 583.
[72] *See Highland Chateau, Inc. v. Minn. 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)).
[73] *See* Minn. R. Civ. P. 56.05.
[74] *See Sauter*, 70 N.W.2d at 353.
[75] *See id*.

Petitioner objects to assignment of Risk Level 3 for several reasons. Petitioner asserts that his only sexual offense was long ago, making it "outdated," and that the ECRC should not rely on that offense.[76] Petitioner contends that all of his crimes are non-violent and he denies engaging in some of the conduct cited in the criminal complaints for his convicted offenses; in particular, he denies making threats against the victims in his stalking cases.[77] He maintains that all of the victims of those offenses were people he had helped at their request and all owed him money.[78] Petitioner also denies sending a picture of his penis to one victim, and asked that the ECRC provide a copy of any such pictures so that a doctor at FCI-Pekin could perform a "side by side comparison" to determine whether the picture actually depicts Petitioner's genitalia.[79] Petitioner denies that he qualifies for assignment of Risk Level 3 and is concerned that assignment of that risk level will impair his ability to obtain housing, employment, and medical care.

Petitioner has not raised a viable claim in opposition to his risk level assignment or demonstrated there are any material facts in dispute that would require a hearing. The ECRC is directed by statute to consider an offender's prior offense history,[80] without limitation as to the time period. Petitioner denies certain facts related to his offenses, but the ECRC process does not provide an opportunity to contest his convictions or to further investigate the underlying facts of those offenses. He denies engaging in any violent conduct, but victims of his offenses reported he used force or threats of force against them. Petitioner's concerns regarding the consequences of the assignment of Risk Level 3 are valid, as this is the highest risk level and carries the broadest degree of community notification. Yet, these concerns are not a basis to overturn the designation assigned to him.

Petitioner has a long history of criminal offending and more than one predatory offense. Petitioner has only one convicted sexual offense, but his stalking offense against C.W., which qualifies as a predatory offense as well, involved threats of sexual violence. He has appeared before the ECRC three times, and each time he has been assigned a higher risk level after engaging in additional offending. Petitioner is encouraged to remain law-abiding and to comply with the conditions of his release in order to demonstrate, through his conduct in the community, that he poses a lower risk of harm. Once three years have elapsed since the imposition of his Risk Level 3 assignment, Petitioner may ask the ECRC to reevaluate him and seek assignment of a lower risk level.[81]

[76] Ex. 1 at 1-2 (Notice of Appeal).
[77] *Id.* at 3-4.
[78] *Id.* at 3.
[79] *Id.* at 4-5.
[80] Minn. Stat. § 244.052, subd. 3(g)(2).
[81] *Id.*, subd. 3(i).

VIII. Conclusion

The ECRC has established that there are no material facts at issue and that it is entitled to disposition of this case as a matter of law. Therefore, the ECRC's Motion is **GRANTED**. Petitioner's appeal of his risk level determination is **DISMISSED**, and the assignment of Risk Level 3 is **AFFIRMED**.

J. P. D.