OAH 82-1100-37516

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level Determination of Frank L. Timblin	**ORDER DENYING ECRC'S MOTION FOR SUMMARY DISPOSITION**

This matter is pending before Administrative Law Judge Barbara J. Case pursuant to Notice and Order for Hearing dated May 20, 2021.

Noah A. Cashman, Assistant Attorney General, appeared on behalf of the Minnesota Department of Corrections (Department). End-of-Confinement Review Committee (ECRC) for the St. Peter Forensic Services Facility. Frank L. Timblin (Petitioner) appears on his own behalf and without counsel.

On June 14, 2021, the ECRC served and filed a Motion for Summary Disposition. Petitioner did not respond to the ECRC's Motion. The record closed on June 28, 2021, the date on which Petitioner's response was due.

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 **DENIED**.

2. This matter shall proceed to an evidentiary hearing on the issues of whether the ECRC's risk level assignment is erroneous and, if so, what risk level is appropriate.

3. The details for the hearing on this matter will be determined by separate order.

Dated: September 24, 2021

Barbara Case

BARBARA J. CASE
Administrative Law Judge

MEMORANDUM

I. Legal Background

Persons who are charged with certain "predatory offenses" delineated in Minn. Stat. § 243.166, subd. 1b (2020), and who are either: (1) convicted of a predatory offense; or (2) convicted of other offenses arising out of the same set of circumstances as a predatory offense, are considered "predatory offenders" subject to registration with law enforcement.[1] Predatory offenses include, but are not limited to, kidnapping, false imprisonment, criminal sexual conduct, felony indecent exposure, child pornography, and other specific sex-related offenses.[1] Registration seeks to ensure that law enforcement is able to locate predatory offenders living, working, or found within the state.

In addition to registration, predatory offenders in Minnesota are subject to the provisions of the Minnesota Community Notification Act (Act).[2] The Act provides that a law enforcement agency in the area where a predatory offender resides, expects to reside, is employed, or is regularly found, shall disclose to the public any information about the offender that is "relevant and necessary to protect the public and to counteract the offender's dangerousness."[3] 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."[4]

The scope of community notification related to a predatory offender is determined by the "risk level" assigned to the offender. There are three risk levels under Minnesota law: Risk Level 1, Risk Level 2, and Risk Level 3.[5] Each risk level is associated with a different degree of community notification.[6] Risk Level 3 is the highest risk level and requires the broadest degree of community notification by law enforcement.[7] In contrast, Risk Level 1 is the lowest risk level and requires the least extensive community notification.[8]

Every predatory offender confined in a Minnesota state prison or treatment facility is subject to an end-of-confinement review prior to release from incarceration to determine the offender's risk level for community notification.[9] Predatory offenders released from federal facilities or who move to Minnesota from other states may also be subject to an end-of-confinement review and risk level determination.[10]

Risk level assignments are made by ECRCs established at each facility and at the central office of the Department of Corrections.[11] ECRCs are comprised of

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[1] Minn. Stat. § 243.166, subd. 1b.
[2] *See generally* Minn. Stat. § 244.052 (2020).
[3] Minn. Stat. § 244.052, subd. 4(a).
[4] *Id.*
[5] *Id.*, subd. 4(b).
[6] *Id.*, subd. 4.
[7] *Id.*, subd. 4(b)(3).
[8] *Id.*, subd. 4(b)(1).
[9] *Id.*, subd. 3(a).
[10] *Id.*, subd. 3a.
[11] *Id.*, subd. 3(a).

five individuals, including the head of the correctional or treatment facility where the offender is confined, a law enforcement officer, a treatment professional trained in the assessment of sex offenders, a caseworker experienced in supervising sex offenders, and a victim's services professional.[12] The ECRCs assess, on a case-by-case basis, the public risk posed by predatory offenders who are about to be released from confinement, and determine the risk level assignment for those offenders.[13]

When assessing risk and assigning a risk level, the ECRC is required to apply the risk factors set forth in Minn. Stat. § 244.052, subd. 3(g).[14] These risks factors include, but are not limited to, the following: (1) the seriousness of the offense should the offender reoffend; (2) the offender's prior offense history; (3) the offender's characteristics; (4) the availability of community supports to the offender; (5) whether the offender has indicated or credible evidence in the record indicates that the offender will reoffend if released to the community; and (6) whether the offender demonstrates a physical condition that minimizes the risk of re-offense.[15]

In addition to the statutory risk factors, ECRCs are required to apply a risk assessment scale when assigning a risk level to a predatory offender.[16] The application of the risk assessment tool is generally conducted by a professional who has been specifically trained on the proper scoring method.[17] As part of the end-of-confinement review process, the Commissioner employs a trained professional, generally a licensed psychologist, to evaluate the offender's risk to the community using the statutory risk factors and to conduct the risk assessment tool on the offender.[18]

In this case, the Department used a tool called the Static-99R to evaluate Petitioner.[19] The Static-99R is an actuarial tool "designed to assess risk of sexual recidivism for adult males who have already been charged with or convicted of at least one sex offence[20] against a child or a non-consenting adult."[21]

An ECRC can, in its discretion, deviate from the presumptive risk level identified by the offender's score on the Static-99R. The ECRC may apply mitigating factors for a downward departure, or special concerns, which are aggravating factors, for an upward departure.[22] The Static-99R identifies eight special concerns.[23] Although DHS policy says

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[12] *Id.*, subd. 3(b).
[13] *Id.*
[14] *Id.*, subd. 3(d)(i).
[15] *Id.*, subd. 3(g).
[16] *Id.*, subds. 2, 3(d)(i).
[17] *See* Ex. 8 (Department of Human Services Policy No. 4070 (May 5, 2015)) (Policy 4070); Ex. 9 (Stated Operated Service End of Confinement Review Committee Procedure Manual (Feb. 27, 2012) (ECRC Manual).
[18] *Id.*
[19] *See* Exhibits (Exs.) 3 (Risk Assessment Recommendation), 3a (Static-99R score sheet).
[20] The Static-99R coding rules, partly developed in Canada, use Commonwealth spelling, such as "offence" and "behaviour."
[21] Exhibit (Ex.). 5 at 12 (Static-99R Coding Rules); *see also* Ex. 9 at 5.
[22] Minn. Stat. § 244.052, subds. 2, 3; *see also In re the Risk Level Determination of R.B.P.*, 640 N.W.2d 351 (Minn. Ct. App. 2002).
[23] Ex. 6 (Special Concerns for Static-99R).

that "mitigating circumstances" may lower a risk level from a presumptive level,[24] the ECRC did not attach a list of mitigating circumstances as an exhibit, and it is unclear whether such a list has been developed for the Static-99R tool.

Prior to an ECRC meeting, the professional who scored the risk assessment tool prepares a report and recommendation for the ECRC.[25] The report generally contains: (1) a summary of the offense(s) for which the offender is currently incarcerated; (2) the offender's score on the risk assessment scale and the resulting presumptive risk level; (3) an evaluation of the six statutory risk factors applied to the offender's specific circumstances; (4) an analysis of any mitigating factors or special circumstances applying to the offender; and (5) a recommended risk level assignment and associated rationale.[26]

The professional's report and recommendation are instructive for the ECRC but not dispositive. Using the information provided in the report and recommendation, the ECRC can either: (1) follow the professional's recommendation and assign the recommended risk level; or (2) use its own discretion and assign a different risk level based upon its application of the statutory risk factors and the offender's score on the risk assessment scale.[27]

Based upon the report and recommendation, the offender's score on the risk assessment tool, the application of mitigating factors or special concerns, and the analysis of the statutory risk factors, the ECRC then assigns the predatory offender to a risk level.[28] An offender who is assigned to Risk Level 2 or 3 may seek administrative review of the ECRC's risk assessment determination within 14 days of receiving notice of the ECRC's decision.[29] The hearing is subject to the contested case provisions of chapter 14 of the Minnesota Statutes.[30]

Offenders must register as predatory offenders and maintain their registration for a minimum of ten years.[31] Throughout that time, the appropriate level of notice must be given every time the offender changes residences.[32] The offender may request that the ECRC reassess the offender's assigned risk level after three years have elapsed since the initial risk assessment and may renew the request once every two years following subsequent denials.[33]

II. Background and Procedural History

A. Petitioner's Criminal History

[24] *See* Ex. 9 at 1-2.
[25] Ex. 3 (Risk Assessment Recommendation).
[26] *Id.*
[27] *See* Minn. Stat. § 244.052.
[28] *See id.*
[29] *Id.*, subd. 6(a).
[30] *Id.*, subd. 6(d).
[31] Minn. Stat. § 243.166, subds. 1b, 3, 5a.
[32] *Id.*, subd. 3.
[33] Minn. Stat. § 244.052, subd. 3(i).

Petitioner is required to register as a predatory offender because of a 1995 conviction of first-degree criminal sexual conduct.[34] The 1995 conviction was a result of a guilty plea that arose from criminal conduct from 1992 to 1994 against a developmentally disabled girl who was then ages 9 through 11.[35] The victim was the sister of Petitioner's then-girlfriend.[36] Petitioner's criminal sexual conduct included fondling the victim, touching her, digitally penetrating her, ejaculating on her body, and penetrative sex.[37] As a result of the plea deal, five other felony sex crime counts against Petitioner were dismissed.[38] The dismissed counts included three that pertained to the same 9 to 11-year-old victim and two that pertained to a 1 to 2-year-old victim who was the daughter of Petitioner's then-girlfriend.[39]

As a result of his conviction, Petitioner was sentenced to 86 months in prison. The civil commitment court documented that Petitioner had six release violations, two of which resulted in restructures, and four of which resulted in revocations, including a revocation that required him to serve out the rest of his sentence:

- From May to September 2000, Petitioner was on intensive supervised release; he received a restructure after a violation for being terminated from sex offender programming and a revocation and 150 days' reincarceration after a subsequent violation for the same reason.[40]

- From February to September 2001, Petitioner was on intensive supervised release; he received a violation for failure to comply with his agent, which led to a revocation and 120 days' reincarceration.[41]

- From December 2001 to July 2002, Petitioner was on intensive supervised release; he was restructured after a violation related to an arrest that led to his fifth-degree assault conviction and revoked and reincarcerated for 120 days for a subsequent violation involving unauthorized contact with minors.[42]

- From November 2002 to October 2004, Petitioner was again on intensive supervised release; in the course of a treatment program, he failed two polygraph tests concerning his past misconduct, and, based on a violation for unauthorized sexual contact with an ex-girlfriend, being discharged from sex offender treatment, and possessing unauthorized materials of a sexual nature (pornographic movies and stolen women's underwear), his release was revoked entirely and he was made to serve the remainder of his sentence.[43]

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[34] Ex. 4 at 2 (Background Check Report); 260 (Criminal Complaint); 255 (Pre-Sentence Investigation Report); 177 (Order for Civil Commitment).
[35] Ex. 4 at 177-78 (Order for Civil Commitment).
[36] *Id.*
[37] *Id.*
[38] Ex. 4 at 255 (Pre-Sentence Investigation Report).
[39] *Id.*; Ex. 4 at 262-63 (Criminal Complaint).
[40] Ex. 4 at 239-40 (Order for Civil Commitment).
[41] *Id.* at 240.
[42] *Id.* at 241-42.
[43] *Id.* at 245-48.

In January 2005, as the conclusion of Petitioner's imposed sentence neared, he was referred for civil commitment.[44] In May 2005, Petitioner was civilly committed as a sexual dangerous person and sexual psychopathic personality.[45]

Petitioner's criminal record report lists a May 22, 2002 conviction of felony simple robbery.[46] Petitioner's background check slightly contradicts this, listing instead a May 22, 2002, conviction of fifth-degree simple assault (with the same court file number).[47] The civil commitment order states that this was a conviction of fifth-degree simple assault.[48] According to the civil commitment proceeding, this charge and conviction arose from a series of stalking incidents in which Petitioner attempted to get a woman to sleep with him; during the civil commitment trial, the victim testified that Petitioner had raped her.[49] There is no documentation indicating that Petitioner was charged for anything other than the fifth-degree assault at the time.[50]

Petitioner also has a 1991 stay of adjudication for misdemeanor assault, a 1992 misdemeanor conviction for violating an order for protection, a 1993 misdemeanor conviction for shoplifting, and a 1994 misdemeanor conviction for theft.[51] The ECRC has not included primary documentation of these convictions, but they were described in detail in the order civilly committing Petitioner, and they are discussed in calculations of Petitioner's criminal history score elsewhere in the record; the 1991 misdemeanor assault was not used in the computation of his criminal history score, but the three convictions from 1992, 1993, and 1994 were.[52]

As a result of Petitioner's civil commitment hearing, the district court found that Petitioner had sexually abused or assaulted: (1) an unknown 8 or 9-year-old girl in 1985 or 1986, when he was about 13 years old, resulting in Petitioner being arrested and held for one week before charges were dropped; (2) three unknown girls in 1987 or 1988, when Petitioner was around 15 years old, resulting in Petitioner becoming a suspect but not being arrested or prosecuted; (3) his wife, an adult woman, in 1991, when he was 19 years old, for which he was not arrested or prosecuted; (4) the 1 to 2-year-old daughter of his then-girlfriend from 1993 to 1994, when he was 21 and 22 years old, for which he was prosecuted and the associated charges dropped, as described above; and (5) an adult woman in 2002, resulting in his prosecution and conviction of fifth-degree simple assault.[53] Aside from the charges and convictions listed above, none of this behavior was criminally charged or resulted in criminal convictions.

Although the ECRC did not include previous risk level reports and recommendations in its exhibits, records indicate that Petitioner has had four previous

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[44] *Id.* at 250.
[45] Ex. 4 at 252 (Order for Civil Commitment).
[46] Ex. 4 at 6 (Criminal Record Report).
[47] Ex. 4 at 2 (Background Check Report).
[48] Ex. 4 at 183 (Order for Civil Commitment).
[49] *Id.* at 182-84.
[50] *Id.*
[51] Ex. 4 at 186 (Order for Civil Commitment); *see also* Ex. 4 at 254 (Sentencing Worksheet).
[52] *Id.*
[53] Ex. 4 at 177-83 (Order for Civil Commitment).

ECRC risk level assessments.[54] In 1999, 2001, and 2003, an ECRC assigned Petitioner to Risk Level 2; in 2005, he received Risk Level 3.[55]

B. Static-99R and Recommendation to ECRC

Petitioner has petitioned for provisional discharge.[56] As a result, Peter Marston, Ph.D., a licensed psychologist, and sex offender treatment professional hired on contract by DHS, prepared a Risk Assessment Recommendation for Petitioner.[57] A memorandum, dated March 6, 2021, was provided to the ECRC, detailing Dr. Marston's assessment and recommendation.[58]

Dr. Marston's recommendation contained the following description of Petitioner's criminal history:

> In the index Registerable and Reportable Offense (50K895000438), [Petitioner] engaged in sexual contact with the two-year-old female victim, ALW, that included fondling, cunnilingus and digital-vaginal penetration and resulted in charges of two counts of Criminal Sexual Conduct in the First Degree. The victim, ALW, was the two year-old daughter of [Petitioner's] girlfriend, TMW, at the time, 1993-1994. In the same time frame, [Petitioner] also engaged in sexual contact with his girlfriend, TMW's, seven to nine-year-old sister. Relative to this offense, [Petitioner] was charged with four counts of Criminal Sexual Conduct in the First Degree and convicted of one count Criminal Sexual Conduct in the First Degree on 03.20.05 (50K895000438) after he previously had been charged with three other counts of Criminal Sexual Conduct in the First Degree in the 03.20.95 time frame. At that time, the Court convicted [Petitioner] to one of the four counts and sentenced him to 86 months in prison for the CSC-1 conviction for the offense against TMW's nine year old daughter. The other three charges for that victim, at that time, were dismissed. Later, in 2005, [Petitioner] was convicted of the 1993-1994 offense against the two year old child (same file number 50K895000438) after he had repeatedly violated terms of conditional release/probation in the 2001-2004 time frame.[59]

The Administrative Law Judge has reviewed the record and has found no documentation of a second felony conviction dating to 2005 and arising from Petitioner's 1994-1995 conduct. Relevant parts of the record are described below:

- Petitioner's criminal history report from the Department of Corrections, which was generated in January 2021, lists a single conviction, dated to October 1995, arising from file number 50K895000438; the report lists

[54] Ex. 4 at 113 (Sexual Violence Risk Assessment).
[55] *Id.*
[56] *See* Exs. 2, 3.
[57] Ex. 3 at 1-5 (Risk Assessment Recommendation).
[58] *Id.*
[59] *Id.* at 2.

five dismissed counts, which accounts for each charge in the six-count initial complaint.[60]

- The ECRC's exhibits do not contain any additional criminal complaints or court orders, except those pertaining to the civil commitment proceedings, from the years 2002-2006.

- The civil commitment order, dated May 10, 2005 (which is after March 20, 2005), does not mention a second felony conviction arising from the 1995 complaint, or any criminal conviction in the year 2005.[61]

- A patient background check generated by DHS also lists a single conviction arising from the 50K895000438 file, although it does list an "[o]ffense filing date" of March 20, 2005 (but does not explain what an offense filing date means); that report also lists five dismissed counts arising from the same complaint.[62] Exactly 10 years prior to that date, on March 20, 1995, law enforcement received its first report that Petitioner was abusing young girls,[63] and "3/20/1995" is listed as the "offense date" on Petitioner's criminal record report.[64] A March 20 of any year does not appear elsewhere in the record.

The Administrative Law Judge concludes that Petitioner's background check contained a typographic error listing March 20, 2005, as a significant date, when the report should have indicated March 20, 1995. This may have led to Dr. Marston finding there existed 2005 and 1995 convictions of criminal sexual conduct, when in actuality, Petitioner had a single 1995 conviction arising from the 1995 complaint. Because the record does not clearly support the conclusion that Petitioner has two criminal sexual conduct convictions, the Administrative Law Judge treats Petitioner has having a single criminal sexual conduct conviction for the purposes of this Motion.

As part of the risk assessment, Dr. Marston scored the Static-99R for Petitioner.[65] Dr. Marston scored Petitioner's Static-99R as follows:[66]

Static-99R Tally Sheet	Answer	Score
Age at release from index sex offense	Aged 40 to 59.9	-1
Ever lived with a lover for 2+ years	No	1
Index non-sexual violence—any convictions	No	0
Prior non-sexual violence—any convictions	Yes	1
Prior sex offenses	6+ charges N/A convictions	3
Four or more prior sentencing dates (excluding index)	4 or more	1
Any convictions for non-contact sex offenses	No	0

[60] Ex. 4 at 6 (Criminal Record Report).
[61] Ex. 4 at 177-83.
[62] Ex. 4 at 2-3 (Background Check Report).
[63] Ex. 4 at 260 (Criminal Complaint).
[64] Ex. 4 at 6 (Criminal Record Report).
[65] Ex. 3a (Static-99R score sheet).
[66] *Id*.

Static-99R Tally Sheet	Answer	Score
Any unrelated victims	Yes	1
Any stranger victims	No	0
Any male victims	Yes	1
Total score		**+7**

According to Dr. Marston's scoring of Petitioner's Static-99R, Petitioner's +7 places him in category IVb ("well above average risk"), which would place him with a 27.2 percent five-year risk of re-offense, corresponding to the 97.2 percentile of registered sex offenders for risk of re-offense.[67] Dr. Marston's report states that Petitioner falls within an "well above average risk" range, but it does not specifically mention what presumptive risk level, if any, the Static-99R suggested for Petitioner.[68] According to DHS's ECRC Manual, Petitioner's +7 corresponds to a presumptive Risk Level 3.[69]

Dr. Marston's report also analyzes the six statutory risk factors: potential dangerousness of re-offense, prior criminal/sex offending history, offender characteristics, community support upon release or oversight on status change, evidence of intent to reoffend, and Petitioner's physical condition.[70]

Based upon the Static-99R, an analysis of the statutory risk factors, a lack of mitigating factors, and an application of four special concerns, Dr. Marston recommended that the ECRC assign Petitioner to Risk Level 3.[71] The four special concerns invoked by Dr. Marston were: #1, history of sexual offending after initial detection, #2, history of prior supervision failures; #4, predatory offense behavior, and #5, the nature of the victim pool suggests the need for broader public notification.[72]

C. ECRC Meeting and Petitioner's Appeal

The ECRC at the St. Peter facility convened on March 17, 2021, to determine Petitioner's risk level.[73] Petitioner attended the meeting and was given an opportunity to be heard by the ECRC prior to their vote.[74] Petitioner reported that he was doing well with treatment and was in the last phase of his treatment program, which involved community outings, reflections, and peer support.[75] Petitioner reported that he used to have trouble asking for help but now finds it easier.[76] He said that his oldest brother has been in constant contact with him since 2005 and has been a great support, and that he has found better community by choosing to socialize and no longer isolating himself from his peers.[77]

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[67] Ex. 3 at 2 (Risk Assessment Recommendation); Ex. 3a (Static-99R score sheet).
[68] Ex. 3 at 1-5; Ex. 3a.
[69] Ex. 9 Attachment V at 2.
[70] Ex. 3 at 2-5.
[71] *Id.* at 4-5.
[72] *Id.* at 5.
[73] Ex. 2 (Risk Assessment Report).
[74] *See id.* at 5; Ex. 10 (audio recording of ECRC meeting).
[75] *Id.*
[76] *Id.*
[77] *Id.*

In response to questions from the ECRC, Petitioner described his experience in treatment. He reported staying connected with peers, using strategies from treatment to avoid problematic thoughts, and going on walks and playing games as important parts of his practice and routine.[78] He reported being "different" now because he can talk about his feelings and problematic thoughts instead of bottling them up.[79] He said that treatment has taught him self-worth, and that he is committed to following through on strategies he has learned and taking advantage of his support structures, because he does not want to be incarcerated again.[80]

Petitioner took issue with a few details in Dr. Marston's report. Although Petitioner acknowledged pleading guilty to the fifth-degree assault charge, he denied actually committing the assault, stating that his attorney told to him plead guilty and receive time served.[81]

At the conclusion of the meeting, the ECRC voted unanimously to assign Petitioner to Risk Level 3.[82] The ECRC's report stated that the four special concerns raised by Dr. Marston were applicable.[83]

D. Petitioner's Appeal of the Risk Assessment

On April 1, 2021, Petitioner filed a Notice of Appeal of the ECRC's risk level determination.[84] As a result, on May 24, 2021, the ECRC filed a Notice and Order for Hearing with the Office of Administrative Hearings, initiating this contested case proceeding.[85]

III. Standard of Review

Summary disposition is the administrative law equivalent of summary judgment.[86] 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.[87] The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition of contested case matters.[88]

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

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[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] Ex. 2 (Risk Assessment Report).
[83] *Id.*
[84] Ex. 1 at 1 (Notice of Appeal).
[85] Notice and Order for Hearing.
[86] *Pietsch v. Minn. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2021).
[87] *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).
[88] Minn. R. 1400.6600 (2021).

fact, but to determine whether genuine factual issues exist.[89] 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.[90]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[91] A fact is material if its resolution will affect the outcome of the case.[92] If the moving party meets the initial burden, then the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.[93] A genuine issue is not a "sham or frivolous" one and it cannot rely on mere allegations or denials.[94] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[95]

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[96] Thus, summary disposition is only proper when no fact issues need to be resolved.[97]

IV. Arguments

In his Notice of Appeal, Petitioner asserts that the ECRC's risk level determination is erroneous because he "did not get a new charge when [he] was living on parole/probation and [he] feel[s] the ECRC did not get a chance to know why [he is] today."[98]

Petitioner further asserts that he is "doing well in treatment" by progressing to the final phase and "gaining liberties like going on outings into the public"; that he is "following the rules of supervision"; and that he has "accountability with choices [he's] made in the past and today."[99]

The ECRC seeks summary disposition of this matter, arguing Petitioner fails to assert a valid error or a genuine issue of material fact.[100]

V. Analysis

The ECRC raises three arguments in support of summary disposition. First, the ECRC argues that Petitioner's Notice of Appeal does not raise a material challenge to his risk level. Second, the ECRC argues that Dr. Marston properly scored Petitioner's Static-99R. Third, the ECRC argues that it properly applied four special concerns.

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[89] *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[90] *See Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[91] *See Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[92] *See O'Malley v. Ulland Bros*., 549 N.W.2d 889, 892 (Minn. 1996).
[93] *See Thiele,* 425 N.W.2d at 583.
[94] *See Highland Chateau, Inc. v. Minn. Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).
[95] *See* Minn. R. Civ. P. 56.05.
[96] *See Sauter*, 70 N.W.2d at 353.
[97] *See id*.
[98] Ex. 1 at 1 (Notice of Appeal).
[99] *Id.*
[100] ECRC Memorandum at 4-6.

A. Material Challenge

The Administrative Law Judge agrees with the ECRC that the arguments in Petitioner's Notice of Appeal do not raise a material challenge to summary disposition. From reading this record, the Administrative Law Judge is aware that, although Petitioner has admitted to and been convicted of dangerous and harmful crimes, he is also himself a victim of abuse and has innate challenges controlling his impulses. Considering Petitioner's experience and challenges, the fact that he is progressing well in treatment is laudable.

This proceeding is, however, narrow in scope, and only certain challenges to the ECRC's risk level determination are permitted. To be successful, an appeal must show more than that the factors that the ECRC is documented to have considered—such as Petitioner's treatment progress—should have been given more weight, because that is a matter left to the ECRC's reasoned judgment. Instead, an appeal must show that the factual basis of the ECRC's decision was flawed. Petitioner does not raise such an argument.

Nonetheless, because Dr. Marston's recommendation appears to contain an error involving Petitioner's criminal history score, the Administrative Law Judge will examine the factual basis of the ECRC's decision to determine whether it was materially affected by any errors.

B. Static-99R Scoring

Petitioner has not challenged the scoring of his Static-99R. The ECRC's section header argues that Dr. Marston "properly scored [Petitioner's] Static-99R," but does not fully address the scoring, asserting only that Dr. Marston "is trained on scoring the Static-99R . . . and [Petitioner] did not challenge the scoring at the ECRC meeting or in his notice of appeal."[101] The undersigned is unable to determine from the briefing that Dr. Marston scored the Static-99R correctly.

From the Administrative Law Judge's review of the record, the items on Petitioner's Static-99R pertaining to prior non-sexual violence, prior sentencing dates, and prior sex offense charges warrant further review. The remaining items, which sum to +2, are scored correctly.

The Static-99R coding rules state: "For the five items that assess criminal history . . ., an official criminal history record (e.g., from some law enforcement or correctional authority) is required to score these items and self-report is not acceptable."[102] Furthermore:

> In some cases, evaluators may have official criminal records but they are incomplete and therefore not sufficient to establish a conviction. This may occur if the record displays a charge for an offence but is missing information on the outcome of the charge (i.e., conviction/acquittal/

[101] ECRC's Memorandum at 5.
[102] Ex. 5 at 9.

> dismissal), or if the record indicates that there are youth convictions but does not specify what the convictions are for. In other circumstances, events which may constitute a conviction (e.g., for priests, military, etc.) may not necessarily appear on the criminal record. In these situations, credible self-report or additional information can be used to count these as convictions, provided that the self-report information is sufficient to confidently determine that the events in question meet the threshold of Clear and Convincing Evidence[.][103]

Elsewhere, the coding rules state that, "[i]n order to score Static-99R, the evaluator must have access to an official criminal record as recorded by police, court, or correctional officials."[104] To determine "whether something counts as a conviction/sentencing date" for purposes of scoring the Static-99R, the minimal acceptable standard is "clear and convincing," which, according to the coding rules, is a higher standard than balance of probabilities/preponderance of the evidence (which requires at least 51percent certainty) but less stringent than beyond a reasonable doubt (which requires near certainty).[105]

1. Release Violations

"Probation, parole, or conditional release violations resulting in arrest or revocation/breach are considered sex offences when the behavior could have resulted in a charge/conviction for a sex offence if the offender were not already under legal sanction and the behavior results in a sanction."[106] "The issue that determines if a violation of conditional release is a sex offence or not is whether a person who has never been convicted of a sex offence could be charged and convicted of the breach behavior."[107]

Similarly, for a release violation "to be considered a conviction or sentencing date, at least one aspect of the offending behavior must be an offence that would normally result in arrest and conviction had the offender not already been under sanction."[108]

Petitioner's release violations were not sex offenses, prior convictions, or prior sentencing dates. Four of the six violations were based on behavior that would not have resulted in arrest had Petitioner not already been under sanction: termination from programming (two violations), failure to comply with his agent (once), and unauthorized contact with minors (once).[109] One violation was based on an independent crime, fifth-degree assault, but was not charged or prosecuted as a sex crime;[110] it is a charge, violent non-sexual conviction, and sentencing date, but it is not "prior" because it occurred after the index offense.[111]

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[103] *Id.*
[104] *Id.* at 18.
[105] *Id.* at 19.
[106] *Id.* at 25.
[107] *Id.*
[108] *Id.* at 30.
[109] Ex. 4 at 239-42.
[110] Ex. 4 at 241-42.
[111] *See* section V.B.3 below for further discussion of the fifth-degree assault/index offense.

The remaining violation was for Petitioner's unauthorized sexual contact with an ex-girlfriend, discharge from sex offender treatment, and possession of unauthorized "pornographic videotapes and several pairs of women's underwear that [he] admitted stealing."[112] Because the violation report is not in the record and the civil commitment order does not clearly and convincingly establish that what "stealing" means in this context is equivalent to behavior that would be criminal for someone not already under sanction, and because there is no evidence or argument in the record as to the equivalent crime that such conduct would amount to, the Administrative Law Judge is unable to summarily decide that this violation constitutes a separate sex offense, charge, conviction, or sentencing date.

2. Charges and Convictions Established

Under the Static-99R coding rules and the clear-and-convincing standard, Petitioner's official criminal record report, the primary documents from his 1995 conviction, and the court findings from the civil commitment proceeding are sufficient to establish the following charge and conviction dates:[113]

- 1985/86: one charge (no conviction) for arrest as a juvenile on suspicion of sexually abusing an 8-or-9-year-old girl.[114] (Sole prior sex crime charge.)

- 1991: one charge (no conviction) for misdemeanor assault.[115]

- 1992: one charge and misdemeanor conviction of violating an order for protection.[116] (Prior sentencing date #1.)

- 1993: one charge and misdemeanor conviction of shoplifting.[117] (Prior sentencing date #2.)

- 1994: one charge and misdemeanor conviction of theft.[118] (Prior sentencing date #3.)

- 1995: six charges for felony sex crimes and one conviction of first-degree criminal sexual conduct.[119] (Index offense cluster.)

- 2002: one charge and conviction of misdemeanor fifth-degree simple assault.[120] (Post-index non-sexual offense.)

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[112] *Id.* at 245-48.
[113] The designates noted in parentheticals are discussed in further detail below.
[114] Ex. 4 at 174. Under Static-99R coding rules, arrests are equivalent to charges. Ex. 5 at 36.
[115] Ex. 4 at 186.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] Ex. 4 at 260 (Criminal Complaint); 255 (Pre-Sentence Investigation Report); 177 (Order for Civil Commitment); 6 (Criminal Record Report).
[120] Ex. 4 at 182-84.

The 1991 charge warrants further discussion. The ECRC has included no primary documentation of this charge. The civil commitment court found:

> On December 9, 1991, [Petitioner] had a stay of adjudication for misdemeanor assault. . . . At trial, [Petitioner] testified that his assault victim was [his then-wife's] aunt. [Petitioner] claimed that he did not recall the circumstances of the assault other than that it involved threats. [Petitioner's then-wife] testified that [Petitioner] pushed her aunt into a refrigerator.[121]

A 1995 pre-sentence investigation report marks this assault as "Stay Adj" (stay of adjudication), in contrast to "Stay Exec" (stay of execution) and "Stay Imp" (stay of imposition) for subsequent misdemeanors.[122] In that same report, the "stay of execution" and "stay of imposition" misdemeanors were used in the computation of Petitioner's criminal history score, but the "stay of adjudication" misdemeanor was not.[123] Under the Minnesota Sentencing Guidelines, "a stay of adjudication . . . is not a conviction,"[124] while stays of execution and of imposition are "stayed sentences" that flow from a conviction.[125]

According to the Static-99R coding rules, if there is a sanction associated with a stay, it counts as a conviction, but if there is no sanction, it does not.[126] Because the 1991 charge has no primary documentation, is not present on Petitioner's DOC criminal record report, was not counted in subsequent calculations of criminal history scores, has no associated sanction discussed in any document in the record, and is not considered a conviction under Minnesota's sentencing guidelines, it does not meet the clear-and-convincing standard for a conviction or sentencing date under Static-99R coding rules.

3. Index Sex Offense

Scoring the Static-99R requires determining an index sex offense.[127] "The index sex offence is generally the most recent sex offence."[128] A group of charges brought together are typically an "index cluster" that constitutes a single index offense.[129] The coding rules state that, "[f]or two offences to be considered separate offences, the second offence must have been committed after the offender was detected (i.e., arrested or charged) and/or sanctioned for the previous offence."[130]

Dr. Marston evidently considered a 2005 conviction, which is not documented in the record, to be the index offense.[131] On the record as submitted, the six-count complaint

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[121] *Id.* at 186.
[122] Ex. 4 at 257.
[123] Ex. 4 at 254.
[124] Minn. Sentencing Guidelines cmt. 2.D.106 (2021).
[125] Minn. Sentencing Guidelines 3.A.1 (2021).
[126] Ex. 5 at 15.
[127] Ex. 5 at 38.
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] Ex. 3 at 2 (Risk Assessment Recommendation).

from 1995, and the resulting conviction of first-degree criminal sexual assault, constitutes the "cluster" that is the index offense.[132]

Under the coding rules, the 2002 fifth-degree assault conviction is not the index offense because it is not a sex offense.[133] Dr. Marston characterized the 2002 offense as "result[ing] in a sexual offense and a physical assault against" the victim—and it is unclear whether he used "sexual offense" to mean the commitment court's civil finding that Petitioner raped the victim or to mean that he thought the 2002 offense counted as a sex offense for coding purposes[134]—but there is no documentation in the record that supports finding that Petitioner was charged with or convicted of a sex offense in 2002.

Under the coding rules, "prior" charges, offenses, and sentencing dates must have taken place before the index offense and must not be a part of the index cluster.[135] "Post-index violent or non-violent offences," such as Petitioner's 2002 assault conviction, "should be considered 'external' risk factors and would be included separately in any report about the offender's behavior."[136]

4. Prior Non-Sexual Violent Convictions

Dr. Marston's report is not clear on what he considered to be the prior non-sexual violent conviction or convictions. Petitioner's 1991 stay of adjudication does not count as a prior non-sexual violent conviction because, as discussed above, there is no evidence in the record to support that it counts as a conviction. Petitioner's 1992 conviction for violation of an order of protection counts as a prior non-sexual violent conviction, however, so this item was properly scored as +1.[137]

5. Prior Sex Offenses

Dr. Marston scored Petitioner as having 6+ prior sex offense charges, which is a +3 on the Static-99R.[138] To reach this number, Dr. Marston apparently counted the six charges from the 1995 complaint. But those charges were a part of the index offense, and when scoring this item, "[t]he index sex offence charge(s) and conviction(s) are not counted, even when there are multiple offences and/or victims involved, and the offences occurred over a long period of time."[139]

Because charges that are not proceeded with (such as arrests), and juvenile charges, do count, the 1985/86 arrest found by the civil commitment court is a prior sex offense.[140] Petitioner's other prior charges were not sex offenses. Thus, it appears

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[132] *See* Ex. 5 at 38.
[133] *See id.* at 38-39.
[134] Ex. 3 at 3.
[135] Ex. 5 at 42, 58-59, 63-64, 68-69.
[136] *Id.* at 40.
[137] *See* Ex. 5 at 59 (listing violation of orders for protection as convictions that count as prior violent offenses).
[138] Ex. 3a.
[139] *See* Ex. 5 at 63.
[140] *See id.*

Petitioner should have been scored with having 1 prior sex charge (and 0 prior sex convictions), which should have resulted in a +1, rather than a +3, for this item.

6. Prior Sentencing Dates

This item records "the number of distinct occasions on which the offender was sanctioned for criminal offences."[141] The number of charges or convictions is not relevant; the count for this item also does not include court appearances resulting in complete acquittal or reversal on appeal, sentencing dates included in the index offense, or stayed charges (but stayed sentences do count).[142] An offender receives a +1 for this item if there are 4 or more prior sentencing dates and a "0" if there are three or fewer.[143] Dr. Marston scored this item for Petitioner as a +1.[144]

As discussed above, Petitioner's 1991 misdemeanor assault charge does not, on this record, count as a conviction. Petitioner's 2002 conviction post-dates the index offense and thus does not count. There are only three remaining sentence dates (in 1991, 1992, and 1993). Thus, on this record, Petitioner should have been scored a 0 rather than a +1 on this item.

7. Summary of Static-99R Score

Based on Petitioner's criminal history as documented in the motion record, he should have been scored a 0 rather than a +1 on prior sentencing dates, and a +1 rather than a +3 on prior sex offenses. Thus, on this record, Petitioner's Static-99R should be a +4 rather than a +7. This is significant because a +4 falls within the presumptive Risk Level 2 range, rather than the presumptive Risk Level 3 range of a +7.[145]

C. Special Concerns

Special concerns are distinct categories of past offender behavior that the reviewing professional may recommend, and the ECRC may invoke, to raise an offender's risk level above the presumptive risk level.[146]

1. Application of MnSOST-4.0 Special Concerns

The ECRC argues that, "[f]or individuals such as [Petitioner], the ECRC uses the Static-99R as a starting point to assign risk levels and applies the same special concerns as those for the MnSOST-4."[147]

As support for that proposition, the ECRC cites to two sources: Exhibit 6 (Special Concerns for the MnSOST-4.0), which does not document the use of the MnSOST-4.0 special concerns for the Static-99R; and Exhibit 9 (ECRC Manual) at 5 and Attachment IV. Page 5 of the ECRC Manual describes when Static-99R should be used

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[141] *Id.* at 68.
[142] *Id.*
[143] *Id.*
[144] Ex. 3a.
[145] Ex. 9 Attachment V at 2.
[146] *See* ECRC Manual Attachments IV, V.
[147] ECRC Memorandum at 5.

but does not mention special concerns.[148] Attachment IV of the ECRC Manual is a compendium of several distinct lists of special concerns that apply when various assessment tools are used.[149] The list of special concerns that applies "[f]or male patients when MNSOST-3.1 and/or Static 99R is used as the actuarial tool" is materially different from the MnSOST-4.0 list of special concerns.[150]

A review of the rest of the record turns up no documentation of a policy for using the MnSOST-4.0 special concerns with the Static-99R. The ECRC Manual dates to 2012, which is before the MnSOST-4.0 was issued; it appears that the MnSOST-3.1 was in force at that time. Because it is not clear from the record which set of special concerns should be applied, the Administrative Law Judge will not base this summary disposition decision on special concerns whose use is not supported by the motion record.

2. Special Concern #1

Further discussion of special concern #1 is warranted. Dr. Marston supported his recommendation by applying four special concerns, including #1, which applies to a history of sexual offending after initial detection.[151] The ECRC found that all four concerns, including #1, applied to Petitioner.[152] Petitioner raised no arguments as to the special concerns in his Notice of Appeal.[153]

Special concern #1 "applies to individuals who have two separate felony-level sexual offenses and minimal criminal histories."[154] On the motion record, this special concern does not appear to apply to Petitioner's single felony conviction.

VI. Conclusion

Because the motion record does not clearly to establish Petitioner as a presumptive Risk Level 2, and because Dr. Marston's use of the MnSOST-4.0 special concerns is not clearly supported by the motion record, ECRC's Motion for Summary Disposition is **DENIED**, and this matter will proceed to an evidentiary hearing.

At the evidentiary hearing, the Administrative Law Judge would like the ECRC to present:

1. Further evidence or documentation, if any exists, that supports Petitioner scoring +6 or higher on the Static-99R, corresponding to a presumptive Risk Level 3. Although the motion record only supports a +4 score on the Static-99R, corresponding to a presumptive Risk Level 2, it is possible that additional documentation of Petitioner's criminal history would establish that a presumptive Risk Level 3 is warranted, on the preponderance of the evidence.

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[148] *See* Ex. 9 at 5.
[149] *See* Ex. 9 Attachment IV.
[150] *Compare* Ex. 6 *with* Ex. 9 Attachment IV at 1-3.
[151] Ex. 3 at 5.
[152] Ex. 2.
[153] Ex. 1.
[154] Ex. 6 (Special Concerns for the MnSOST-4.0).

2. Foundation for Dr. Marston and the ECRC's use of the MnSOST-4.0 special concerns list.,

3. If the MnSOST-4.0 special concerns apply, arguments and evidence that support the application of the relevant special concerns to Petitioner's circumstances—in particular, further evidence or documentation, if any exists, to support the application of Special Concern #1.

4. If there is no foundation for the use of the MnSOST-4.0 special concerns, foundation establishing the applicable list of special concerns, and arguments and evidence, if any, that supports the application of the applicable and relevant special concerns to Petitioner's circumstances.

5. Primary documentation of Petitioner's misdemeanor adjudication and convictions, as well as his post-incarceration supervision failures, if any exists; presently, records of those events appear to be confined to mentions in the civil commitment order and other secondary documents.

B. J. C.