OAH 82-1100-38386

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level Determination of Corey L. Clafin	**ORDER GRANTING MOTION FOR SUMMARY DISPOSITION**

This matter is pending before Administrative Law Judge Barbara J. Case upon a Motion for Summary Disposition (Motion) filed June 16, 2022, by the Department of Corrections' (Department) End-of-Confinement Review Committee (ECRC or Committee). The ECRC served Corey L. Clafin (Petitioner) by U.S. Mail on June 16, 2022. The record closed on June 28, 2022, with the filing of Petitioner's response to the Motion.

Noah Cashman, Assistant Attorney General, appears on behalf of the ECRC. Petitioner appears on his own behalf and 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 23, 2022

Barbara Case

BARBARA J. CASE
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 244.052, subd. 6(c) (2022), 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 requested and received a reassessment of his risk level assignment.[1] Upon reassessment, the ECRC assigned him a Risk Level 3,[2] and Petitioner appealed.[3] The ECRC argues that it should be granted summary disposition because no issues of material fact exist, and it contends Petitioner cannot meet his burden to show that the ECRC erred in making his risk level assignment.[4]

In his appeal, Petitioner argues that the ECRC erred in assigning Risk Level 3 to him because he was not afforded an opportunity to cross-examine witnesses, the committee relied on statements unrelated to his predatory offense, his compliance with post-release conditions is proven by the fact that he was given a reassessment, and the ECRC did not consider that his original Risk Level 3 might have been in error.[5]

Based on a review of the Motion and the record, the Administrative Law Judge agrees that there are no genuine issues of material fact in dispute and concludes Petitioner's risk level assignment must be affirmed as a matter of law.

II. The Minnesota Community Notification Act

Minnesota law provides that individuals convicted of certain criminal offenses are considered "predatory offenders" and are subject to the Minnesota Community Notification Act (Act).[6] The Act requires law enforcement agencies in the area where a predatory offender resides, expects to reside, is employed, or is regularly found, to disclose information "relevant and necessary to protect the public and to counteract the offender's dangerousness."[7] 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."[8]

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.[9] If an offender is assigned to a 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.[10] Risk Level 2 permits additional notice to individuals and

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[1] Exhibit (Ex.) 1 (Notice of Appeal).
[2] Ex. 2 (Risk Assessment Report).
[3] Ex. 1 (Notice of Appeal).
[4] Mem. in Support of the ECRC's Mot. for Summ. Disposition of Risk Level Admin. Review (June 23, 2022) (ECRC Mem.).
[5] Ex. 1 (Notice of Appeal).
[6] Minn. Stat. §§ 243.166, subd. 1b, 244.052, subd. 4(a) (2022).
[7] Minn. Stat. § 244.052, subd. 4(a).
[8] *Id*.
[9] *See id*.
[10] *Id*., subd. 4(b)(1) (2022).

groups, such as schools and daycares, likely to be victimized by the offender.[11] 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).[12]

Every predatory offender confined in a Minnesota state correctional, or treatment facility must be assessed by an ECRC prior to release.[13] The ECRC considers the public risk posed by each predatory offender upon release and determines the appropriate risk level assignment.[14]

In doing so, the ECRC is required by law to apply six risk factors set forth 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 available to the offender; (5) whether the offender has indicated, or credible evidence in the record indicates, that the individual will reoffend if released to the community; and (6) whether the offender demonstrates a physical condition that minimizes the risk of re-offense.[15] This list is not exclusive.[16]

In addition, the ECRC must score an offender using a risk assessment tool. The score from that tool translates into a presumptive risk level.[17] 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.[18]

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 to 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."[19]

A risk level assignment applies for a minimum of ten years.[20] During that time, the level of notice corresponding to the assigned risk level must be given every time the offender changes residence.[21] An offender may seek a reassessment of the assigned

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[11] *Id.*, subd. 4(b)(2) (2022).
[12] *Id.*, subd. 4(b)(3) (2022).
[13] *Id.*, subd. 3 (2022).
[14] *Id.*
[15] *Id.*, subd. 3(g).
[16] *Id.*
[17] *Id.*, subd. 2 (2022).
[18] Minn. Dep't of Corrections Policy No. 205.220 (Aug. 5, 2022); *see also In re the Risk Level Determination of R.B.P.*, 640 N.W.2d 351, 354 (Minn. Ct. App. 2002).
[19] Minn. Stat. § 244.052, subd. 3(f).
[20] *Id.*, subd. 4(f) (2022); *see also* Minn. Stat. § 243.166, subd. 6(a) (2022).
[21] *See* Minn. Stat. § 244.052, subd. 4(f).

risk level after three years have passed and may renew the request once every two years following subsequent denials.[22]

Additionally, a predatory offender assigned to Risk Level 2 or Risk Level 3 may seek administrative review of the ECRC's determination.[23] 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 the review committee's determination.[24] The decision of the Administrative Law Judge is final, subject to appellate judicial review.[25]

III. Petitioner's Background

Petitioner has one predatory offense conviction stemming from his sexual abuse of a six-year-old girl on December 13, 2001. Petitioner was an adult caretaker for the child, and he used his access and status with the child to manipulate her into masturbating and fellating him to ejaculation. Petitioner also accessed child pornography frequently in the months preceding the offense.[26] On May 23, 2002, Petitioner was found guilty and convicted of first-degree criminal sexual conduct, for which he received a 144-month sentence.[27] This offense triggered the requirement that Petitioner register as a predatory offender.[28]

In addition to Petitioner's predatory offense conviction, the record contains evidence giving rise to concerns about possible sexual misconduct by Petitioner. For example, on June 23, 2009, Petitioner's case manager at the Minnesota Correctional Facility--Faribault received a call from a woman in Australia who reported that she had been writing back and forth with Petitioner for five years, that his letters had become increasingly sexual in nature, and that he had asked her, if she became pregnant with his child, at what age would she feel it would be appropriate for him to begin having sexual intercourse with the child.[29]

There is also evidence that Petitioner engaged in misconduct while living in the community after his release from prison. Petitioner was placed on supervised release in Hennepin County on May 18, 2010.[30] On August 1, 2012, Petitioner's supervising agent restructured the conditions of his supervised release based on concerns that Petitioner used computers with internet access without permission, used the internet to access social dating sites, and failed to report all relationships he developed with females, in violation of his supervised release conditions.[31]

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[22] *Id*., subd. 3(i).
[23] *Id.*, subd. 6(a).
[24] *Id.*, subd. 6(c).
[25] Minn. Stat. §§ 14.63, 244.052, subd. 6(c).
[26] *Id.* at 194; Ex. 2 at 2 (Risk Assessment Report).
[27] Ex. 4 at 187 (ECRC Packet).
[28] *Id.* at 107.
[29] *Id.* at 171.
[30] Ex. 4 at 162 (ECRC Packet).
[31] *Id.* at 162.

On July 1, 2014, Petitioner's intensive supervised release (ISR) agent filed a violation report alleging Petitioner violated his release conditions by: possessing a cell phone with pornography on it, accessing the internet, owning a device with internet access (a cell phone, two computers, and laptop computer), engaging in unauthorized contact with two children (including being in the presence of one in the bedroom in his underwear), taking photographs of himself and his genitals, and not following his agent's orders.[32] As a result, on August 14, 2014, the Hearings and Release Unit (HRU) found he committed the violations, revoked Petitioner's release, and required Petitioner to serve the remainder of his sentence in prison.[33] Petitioner offered no contest to the violations.[34]

Petitioner was re-released from prison at the expiration of his sentence on May 18, 2015.[35] On September 1, 2015, Petitioner was charged with third-degree criminal sexual conduct based upon allegations that Petitioner had sexual contact, including intercourse, with his 17-year-old daughter; the alleged victim has cognitive learning disabilities and is considered vulnerable.[36] That charge was dismissed on October 9, 2016, because "material witnesses for the State, including the victim, are unavailable for trial at this time."[37] Petitioner is currently on probation and living in the community,[38] after receiving a stay of adjudication on July 6, 2021, upon a charge that he failed to register as a predatory offender.[39]

This case involves Petitioner's third ECRC assessment. On February 11, 2010, the ECRC assigned Risk Level 1 to Petitioner.[40] He was informed that any return to incarceration could result in reassessment of his risk level.[41] As noted above, Petitioner violated his supervised release conditions while living in the community, and he returned prison in August 2014.[42] On January 8, 2015, the ECRC assessed Petitioner for a second time and assigned Risk Level 3 to Petitioner.[43] At that time the ECRC departed upward from his presumptive assignment of Risk Level of 2, citing four special concerns.[44] Petitioner appealed the assignment of Risk Level 3, and on May 15, 2015, an Administrative Law Judge granted the ECRC's motion for summary disposition and dismissed Petitioner's appeal.[45] Petitioner now seeks a reduction of that risk level

[32] *Id.* at 150-51.
[33] *Id.* at 110-12.
[34] *Id.*
[35] Ex. 4 at 102 (ECRC Packet).
[36] *Id.* at 50-53.
[37] Ex. 3 at 2 (Risk Assessment Recommendation); Ex. 4 at 1 (ECRC Packet).
[38] Ex. 9(recording of ECRC meeting).
[39] Ex. 4 at 15 (ECRC Packet).
[40] Ex. 4 at 167-69 (ECRC Packet).
[41] *Id*.
[42] *Id.* at 110-12.
[43] *Id.* at 107-09.
[44] *Id.* at 109.
[45] Ex. 10 (Order).

assignment.[46] After reassessing Petitioner, the ECRC assigned Risk Level 3 to Petitioner again, based on a split decision among the Committee members.[47]

IV. Summary Disposition Standard of Review

Summary disposition is the administrative law equivalent of summary judgment.[48] 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.[49] 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.[50] The Administrative Law Judge does not weigh the evidence;[51] instead, the Judge views the facts and evidence in a light most favorable to the non-moving party.[52]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[53] A fact is material if its resolution will affect the outcome of the case.[54] 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.[55] A genuine issue is not a "sham or frivolous" one,[56] and it cannot rely on mere allegations or denials.[57] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[58]

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[59] Thus, summary disposition is only proper when no fact issues need to be resolved.[60]

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[46] Ex. 1 (Notice of Appeal).
[47] *See* Ex. 2 (Risk Assessment Report).
[48] *Pietsch v. Minn. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2021).
[49] *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).
[50] *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[51] *Id*.
[52] *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[53] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[54] *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).
[55] *Thiele,* 425 N.W.2d at 583.
[56] *Highland Chateau, Inc. v. Minn. Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).
[57] *DLH*, 566 N.W.2d at 71.
[58] *See* Minn. R. Civ. P. 56.05.
[59] *Sauter*, 70 N.W.2d at 353.
[60] *Id*.

V. The Most Recent ECRC Risk Assessment

On November 13, 2020, Petitioner completed a Risk Level Reassessment Application.[61] According to Department of Corrections' (Department) policy, upon receipt of a registrant's application for reassessment, the Risk Assessment/Community Notification (RA/CN) unit checks, among other things, whether the "timelines have been met for the registrant to be eligible for consideration of reassessment."[62] On October 20, 2021, Department staff completed a Risk Level Reassessment Background Summary regarding Petitioner.[63]

On March 10, 2022, Brian Heinsohn, M.A., L.P.C., completed a risk reassessment for the ECRC to consider in connection with Petitioner's request for reassessment.[64] He noted that Petitioner's score on the Static-99R was +4, placing Petitioner in the Above Average Category of risk.[65] Mr. Heinsohn also utilized the Stable-2007 and determined that Petitioner received a total score of 3, placing Petitioner in the lower risk category.[66] Mr. Heinsohn determined that the combination of the two scores made Petitioner a relatively lower supervisory priority and recommended that the ECRC assign a Risk Level 2 to Petitioner .[67]

Petitioner appeared before the ECRC. Petitioner stated the Australian woman who contacted the Department was a friend of his and a long-time friend of his mother's, and he stated he had no idea why she made allegations against him.[68] He agreed that in or about 2014 he had engaged in sexual talk with or about the children of a girlfriend which an officer investigating another matter found extremely disturbing.[69] He stated that the allegations made by his daughter were the result of his mother-in-law not liking him. He forthrightly admitted that he is still attracted to girls as young as age six but explained that he is also attracted to adult women, has a fulfilling relationship, and would not allow himself to offend against a child again. He also explained how difficult being assigned level 3 is on his ability to maintain steady employment, attend church and maintain relationships. [70]

VI. Arguments

As stated above Petitioner's appeal offered four reasons his risk level should be reduced:[71] (1) assignment of Risk Level 3 was error because he was denied the right to cross-examine witnesses; (2) he demonstrated full compliance with supervised release conditions, treatment conditions, and compliance with registration requirements; (3) apparent bias because he was a level 3; and (4) it was a split decision, with

[61] Ex. 4 at 16-17 (ECRC Packet).
[62] Minn. Dept of Corrections Policy No. 205.220 (Aug. 5, 2022).
[63] Ex. 4 at 1-3 (ECRC Packet).
[64] Ex. 3 (Risk Assessment Recommendation).
[65] *Id.* at 3; Ex. 3a (Static-99-R scoring sheet); *see* Ex. 5 at 11 (Static-99R Coding Rules).
[66] Ex. 3 at 3 (Risk Assessment Recommendation); Ex. 3b (Stable-2007 scoring sheet).
[67] Ex. 3 at 3 and 5.
[68] Ex. 9 (recording of ECRC meeting).
[69] Ex. 4 at 5; Ex. 9 (recording of ECRC meeting).
[70] *Id*.
[71] Ex. 1 (Notice of Appeal).

Mr. Heinsohn recommending a level 2.[72] In his response to the ECRC's motion, Petitioner further explained that the special concerns applied at his last ECRC should not apply now, the ECRC abused its discretion, and the committee was biased.[73]

The ECRC asserts that Petitioner failed to allege any material error by the ECRC, that there are no issues of material fact requiring an evidentiary hearing, and summary disposition is appropriate.[74]

VII. Analysis

Under Minn. Stat. § 244.052, subd. 3(i), an offender may request a reassessment of his or her assigned risk level by an ECRC if three years have passed since the committee's initial risk assessment, and then may renew the request once every two years following subsequent denials. A reassessment under that statute is subject to different requirements than those of a pre-release risk level assignment. For an offender-initiated risk reassessment, the offender:

> [S]hall list the facts and circumstances which demonstrate that the offender no longer poses the same degree of risk to the community. In order for a request for a risk level reduction to be granted, the offender must demonstrate full compliance with supervised release conditions, completion of required post-release treatment programming, and full compliance with all registration requirements as detailed in section 243.166. The offender must also not have been convicted of any felony, gross misdemeanor, or misdemeanor offenses subsequent to the assignment of the original risk level.[75]

The ECRC must follow the process outlined in Minn. Stat. § 244.052, subd. 3(a)-(c), in conducting the reassessment.[76]

Notably, the statute does not direct the ECRC to apply the risk factors found in section (f) of subdivision 3. This difference follows from the fact that the statute places the burden on the offender to demonstrate compliance with all release terms and that the offender has remained law-abiding, and to show that the facts, and circumstances demonstrate that the offender no longer poses the same degree of risk as previously determined by an ECRC.[77] That is, the ECRC reassessing an offender is not required to reapply factors or reasoning that the prior ECRC used to assign a risk level, because that prior risk level determination is the status quo.

To be eligible to receive a risk level reduction, Petitioner needed to demonstrate full compliance with all registration requirements. Petitioner falls short as to that factor,

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[72] Ex. 1 (Notice of Appeal); Petitioner's Motion to Dismiss the ECRC's Motion (June 28, 2022) (Petitioner's Mem.).
[73] Petitioner's Mem.
[74] ECRC Mem. at 1.
[75] *Id.*
[76] *Id.*
[77] *Id.*

as he failed to register as a predatory offender in Scott County in 2021. Petitioner does not dispute this failure.[78] He relies instead on an assessment done by the RA/CN upon receiving his request for reassessment.[79] This document suggests that because Petitioner received a stay of adjudication for his failure to register offense, he is eligible for a reduction of his risk level.[80] The RA/CN's determination regarded whether Petitioner could move forward to a reassessment and not whether his risk level should be reduced. The statute governing reassessments states that in order for an offender's risk level to be reduced, the offender must demonstrate full compliance with all registration requirements. The stay of adjudication notwithstanding, Petitioner did not comply with all registration requirements. The ECRC's Motion is granted on that basis.

Even if Petitioner was otherwise eligible for a reduction of his risk level assignment, he did not list facts and circumstances demonstrating that he no longer poses the same degree of risk to the community. Mr. Heinsohn's reassessment showed that Petitioner continues to merit a presumptive assignment of Risk Level 2, the same presumptive risk level Petitioner received when the ECRC assigned him Risk Level 3 in 2015. The ECRC also articulated numerous concerns that cannot be deemed in error, and based on these concerns, it determined that Risk Level 3 remained the appropriate assignment. Petitioner had the burden to come forward with facts showing that his risk of sexually reoffending has been reduced, and he failed to do so.

The undersigned is mindful of the difficulties posed by the assignment of Risk Level 3, including the negative impacts offenders experience in finding employment and housing when they return to the community. However, the purpose of the Act is to protect the community, and the Act must be construed to that end. While Petitioner has demonstrated tenacity in securing employment, and is commended for doing so, the ECRC pointed out a number of concerns regarding his ability to accept responsibility. The ECRC identified several actions Petitioner can take to make it more likely that he might obtain a lower risk level in the future. These included attending support groups, broadening his support, remaining law abiding, and showing accountability for his actions.[81] The Administrative Law Judge encourages Petitioner to consider these items and follow the ECRC's advice.

VIII. Conclusion

Petitioner failed to raise a genuine issue of material fact related to the ECRC's risk level assignment, and the ECRC is entitled to summary disposition 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**.

B. J. C.

[78] Ex. 4 at 1 (ECRC Packet); Ex. 9 (recording of ECRC meeting).
[79] Ex. 1 at 2. Petitioner argues that were he guilty of a failure to register he would not have been granted a new assessment.
[80] Ex. 4 at 1 (ECRC Packet).
[81] Ex. 9 (recording of ECRC meeting).