OAH 23-1100-38408

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level Determination of Raciel Z. Zaldivar-Proenza	**ORDER GRANTING MOTION FOR SUMMARY DISPOSITION**

This matter is pending before Administrative Law Judge Suzanne Todnem pursuant to a Notice and Order for Hearing filed with the Office of Administrative Hearings on June 27, 2022.

John D. Gross, Assistant Attorney General, represents the End-of-Confinement Review Committee (ECRC) for the Minnesota Correctional Facility at Moose Lake (MCF-Moose Lake). Raciel Z. Zaldivar-Proenza (Petitioner) represents himself and appears without legal counsel.

On June 27, 2022, the ECRC filed a Motion for Summary Disposition (Motion). The ECRC served Petitioner by personal service on June 29, 2022.[1] Petitioner did not file a response to the ECRC's Motion. Petitioner's response was due on July 17, 2022.

On October 10, 2022, the Administrative Law Judge reopened the record to receive a copy of the ECRC meeting recording, which had been corrupted in the original filing.[2] The record closed on October 10, 2022, upon receipt of the recording.

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

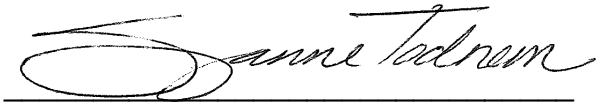
ORDER

1. The ECRC's Motion is **GRANTED**.

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

3. Petitioner's assignment of Risk Level 2 is **AFFIRMED**.

Dated: November 30, 2022



SUZANNE TODNEM
Administrative Law Judge

[1] *See* Affidavit of Service (June 29, 2022).
[2] Ex. 9 (ECRC Meeting Audio Recording, April 18, 2022).

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 (2022).

MEMORANDUM

I. Introduction

Petitioner appeals the ECRC's Risk Level 2 assignment under the Minnesota Community Notification Act (Act).[3] The ECRC argues that it should be granted summary disposition because no issues of material fact exist, and 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. Minnesota Community Notification Act and Predatory Offender Registration

Minnesota law provides for both the registration of predatory offenders with law enforcement and the notification to the community about those offenders.[4] There are two acts that work together to accomplish the purposes of community awareness and public safety: Minnesota Predatory Offender Registration Act and Minnesota Community Notification Act.[5]

The Minnesota Predatory Offender Registration Act requires that offenders who are charged with certain predatory offenses, or who are later convicted of other criminal offenses arising out of the same set of circumstances as the predatory offense, register with state law enforcement.[6] 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.[7] Registration seeks to ensure that law enforcement is able to locate predatory offenders living, working, or found within the state.[8]

The Minnesota Community Notification Act, in turn, provides for the community notification of predatory offenders who are registered in the state of Minnesota.[9] The purpose of community notification is to ensure that the public "in the area where a predatory offender resides, expects to reside, is employed, or is regularly found" is provided with information "that is relevant and necessary to protect the public and counteract the offender's dangerousness . . ."[10] The extent of the information disclosed, and the persons to whom the disclosure is made, must relate "to the level of danger posed

[3] Minn. Stat. § 244.052 (2020).
[4] Minn. Stat. §§ 243.166-.167; 244.052 (2020).
[5] *Id.*
[6] Minn. Stat. § 243.166, subd. 1b(a).
[7] Minn. Stat. § 243.166, subd. 1b.
[8] *See generally* Minn. Stat. § 243.166.
[9] Minn. Stat. § 244.052.
[10] Minn. Stat. § 244.052, subd. 4(a).

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."[11]

The scope of community notification required is related to the risk level assigned to a predatory offender. There are three risk level assignments under Minnesota law: Risk Level 1, Risk Level 2, and Risk Level 3.[12] Each risk level is associated with a different degree of community notification.[13] Risk Level 3 is the highest risk level and requires the broadest degree of notification.[14] In contrast, Risk Level 1 is the lowest risk level and provides for the least extensive notification.[15]

The law requires the assignment of a risk level to "predatory offenders" before they are released from a Minnesota prison or treatment facility, upon their release from a correctional facility in another state if the offender intends to reside in Minnesota, or before an relocates to Minnesota from another jurisdiction.[16]

Risk level assignments are made by end-of-confinement review committees (ECRCs) composed of five individuals with varied sex offender experience, 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.[17] ECRCs are established by the Department of Corrections (DOC) at each state correctional facility or state treatment facility where predatory offenders are confined.[18] 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.[19]

When assigning a risk level to an offender, the ECRC is required to apply the risk factors set forth in Minn. Stat. § 244.052, subd. 3(g), as well as utilize the "risk assessment scale" developed by the Commissioner of the DOC under Minn. Stat. § 244.052, subd. 2.[20] The statutory 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.[21]

To ensure that the statutory risk factors are consistently applied and based upon empirical data, the DOC has developed certain statistical tools to weigh the statutory risk factors consistent with actuarial information obtained from test groups of predatory

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[11] Minn. Stat. §§ 244.052, subd. 4(a), 243.166, subd. 1b.
[12] *See generally* Minn. Stat. § 244.052.
[13] Minn. Stat. § 244.052, subd. 4.
[14] *Id.*
[15] *Id.*
[16] *See* Minn. Stat. § 244.052, subd. 3(a)(1)-(3).
[17] Minn. Stat. § 244.052, subd. 3(a).
[18] *Id.*
[19] *Id.*
[20] *Id.* at subds. 2, 3(d)(i).
[21] *Id.* at subd. 3(g).

offenders.[22] These statistical tools help the ECRC determine which risk level to assign a predatory offender. The application of the risk assessment tool is conducted by a professional, generally a licensed psychologist, who has been specifically trained on the proper scoring method.[23]

One of the risk assessment tools developed by the Commissioner pursuant to Minn. Stat. § 244.052, subd. 2, is the Minnesota Sex Offender Screening Tool (MnSOST-4.0).[24] The MnSOST-4.0 is a computerized actuarial matrix or statistical tool that estimates or "predicts" the likelihood of recidivism for adult male sex offenders within four years of release.[25] The predicted probability of recidivism is then translated into a presumptive risk level and used as guidance for the ECRC in making its risk level assignment.[26]

The MnSOST-4.0 uses 16 factors to estimate the probability of recidivism: (1) the number of "violent offense sentences" that the offender has received; (2) the number of "felony sentences" that the offender has received; (3) the number of sentences the offender has received for stalking, harassment, and violations of orders for protection, no-contact orders, or restraining orders; (4) the number of "predatory offense sentences" that the offender has received; (5) the number of "stranger victims" the offender has; (6) the number of sexual predatory offense sentences in which the victim was a male; (7) whether the offender was charged with or convicted of any sex or sex-related offense that occurred in a public place; (8) the age groups of the offender's victims; (9) whether there are any suicidal concerns pertaining to the offender; (10) the offender's employment status following release; (11) the offender's marital status; (12) the offender's education achievement; (13) whether the offender completed both sex offender and chemical dependency treatment while incarcerated; (14) whether the offender is incarcerated as a release violator; (15) the current age and date of release for the offender; and (16) whether the offender's release is supervised or unsupervised.[27]

Using all available documents and information on an offender, the professional conducting the MnSOST-4.0 assigns a score for each of the 16 scoring factors.[28] The scoring data is then inserted into the MnSOST-4.0 computerized actuarial program, which calculates an individual's "predicted probability of sexual recidivism" (expressed as a percentage) and ranks the individual in a percentile relative to other individuals who have been convicted of a sex or sex-related offense in Minnesota.[29]

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[22] Exhibit (Ex.) 5 (MnSOST-4.0 Coding Rules).
[23] Department of Corrections Policy 205.220 (April 28, 2020) (DOC Policy 205.220).
[24] Ex. 5; DOC Policy 205.220.
[25] *See* Ex. 5 at 3. The MnSOST-4.0 predicts the probability of reconviction, not necessarily reoffending, which may not result in conviction. Accordingly, the MnSOST-4.0 predicts recidivism, not necessarily re-offense.
[26] *See* Ex. 5.
[27] *Id.*
[28] *Id.*
[29] *Id*.

Ranges of predicted probability of sexual recidivism and percentile rank are then categorized into three "presumptive" risk levels, as follows:[30]

	Presumptive Risk Level 1	Presumptive Risk Level 2	Presumptive Risk Level 3
Predicted Probability of Sexual Recidivism	Less than 2.50%	2.50% to 4.29%	4.30% and higher
Percentile Rank	Less than 56th percentile	56th to 87th percentile	88th percentile and higher

The ECRC, in its discretion, can deviate from the presumptive risk level identified by the offender's score on the MnSOST-4.0.[31] The ECRC may apply mitigating factors for a downward departure, or special concerns, which are aggravating factors, for an upward departure.[32] DOC Policy 205.220 identifies eight special concerns and six mitigating factors[33] that an ECRC can consider along with an offender's MnSOST-4.0 score.[34] For example, an individual whose score on the MnSOST-4.0 places him in the presumptive Risk Level 2 category can be elevated to a Risk Level 3 if special concerns exist to justify increasing his risk level or can be reduced to a Risk Level 1 if mitigating factors exist to decrease his risk level.[35]

Prior to an ECRC meeting, the professional who scored the risk assessment tool prepares a report and recommendation for the ECRC.[36] 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 the rationale therefor.[37]

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, its consideration of special concerns or mitigating factors, and the offender's score on the risk assessment scale.[38]

Based on 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

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[30] *Id.*
[31] DOC Policy 205.220.
[32] DOC Policy 205.220; *see also In re the Risk Level Determination of R.B.P.*, 640 N.W.2d 351, 356-57 (Minn. Ct. App. 2002) (holding that an ECRC did not err by applying special concerns to assign an offender to Risk Level 3 when the presumptive risk level was Risk Level 1).
[33] While DOC Policy 205.220 lists seven mitigating factors, only six are applicable to the MnSOST-4.0. *See* DOC Policy 205.220 at 3-4.
[34] DOC Policy 205.220; Ex. 6 (Special Concerns for MnSOST-4.0); Ex. 7 (Mitigating Factors for MnSOST-4.0).
[35] DOC Policy 205.220; Ex. 6; Ex. 7.
[36] Ex. 3 (Risk Assessment Recommendation).
[37] *See id.*
[38] *See generally* Minn. Stat. § 244.052; DOC Policy 205.220; Ex. 5 (MnSOST-4.0 Coding Rules).

risk level.[39] 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.[40]

An offender must register as a predatory offender and maintain his or her registration for a minimum of ten years.[41] Throughout that time, the appropriate level of notice must be given every time the offender changes residences.[42] 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.[43]

III. Undisputed Facts

A. Petitioner's Background

Petitioner is a 53-year-old man who is required to register as a predatory offender based upon a conviction for felony second-degree criminal sexual conduct in 1997 and felony fourth-degree criminal sexual conduct in 2018.[44] According to the criminal complaint for the 1997 offense, the victim (a 14-year-old girl) and her mother were staying at Petitioner's residence.[45] Petitioner had sexual intercourse with the 14-year-old girl on multiple occasions.[46] One of the occasions took place in a cemetery.[47] The criminal complaint for the 2018 offense states that Petitioner entered a house where a woman was sleeping.[48] While she was sleeping, Petitioner slid his hand under the victim's clothing, over her buttocks to her vaginal area, and placed his fingers on her vagina.[49]

Petitioner was later convicted of Failure to Register as a Predatory Offender and sentenced to 30 months.[50] However, that conviction was vacated on or about July 29, 2020.[51] Petitioner's criminal history also includes two felony convictions for issuance of dishonored checks in 2003 and 2004.[52] Petitioner was convicted of multiple traffic-related misdemeanor and gross-misdemeanor offenses, two fifth-degree assault offenses in 2015, and one fourth-degree assault charge in 2006.[53]

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[39] *See generally* Minn. Stat. § 244.052.
[40] Minn. Stat. § 244.052, subd. 6(a).
[41] Minn. Stat. § 243.166, subds. 1b, 3, 5a.
[42] *Id.*, subd. 3.
[43] Minn. Stat. § 244.052, subd. 3(i).
[44] Ex. 4 at 13 and 15 (Criminal Record Report).
[45] Ex. 4 at 159 (Criminal Complaint).
[46] *Id*.
[47] *Id*. at 160.
[48] Ex. 4 at 82 (Criminal Complaint).
[49] *Id*.
[50] Ex. 4 at 17 (Amended Order Warrant of Commitment, case number 76-CR-17-280).
[51] Ex. 4 at 4 (Annual Review Report); Ex. 4 at 13 (Criminal Record Report). Petitioner appealed this conviction in the Minnesota Court of Appeals, A19-0799. The Court of Appeals reversed the conviction in its May 18, 2020 decision. *See* Ex. 1 at 1-012.
[52] Ex. 4 at 61 (Pre-Sentence Investigation Report, dated October 11, 2018).
[53] Ex. 4 at 13-15.

Petitioner has a history of substance abuse and suicide attempts.[54] After being arrested in 1997 for second-degree criminal sexual conduct, Petitioner attempted suicide multiple times.[55] Petitioner has never completed sex offender treatment.[56]

B. MnSOST-4.0 and Recommendation to ECRC

In preparation for Petitioner's anticipated release from prison in September 2022, Terrel Backes, M.A., Psy.D., LP, a sex offender treatment professional with the DOC, prepared a risk assessment recommendation for Petitioner.[57] A memorandum dated March 2, 2022, was provided to the ECRC detailing Dr. Backes's assessment and recommendation.[58]

As part of the risk assessment, Dr. Backes conducted a MnSOST-4.0 on Petitioner.[59] Dr. Backes scored Petitioner's MnSOST-4.0 as follows:[60]

MnSOST-4.0 Inventory Item	Score
Total Violent Offense Sentences	5
Felony Offense Sentences	4
Offenses for Harassment, Stalking, VOFP/No Contact	0
Predatory Offense Sentences	2
Number of Stranger Victims (Maximum of 5)	0
Male Victims (0 = No; 1 = Yes)	0
Whether sex offenses occurred in public places (0 = No; 1 = Yes)	0
Victims in multiple age groups (0 = No; 1 = Yes)	1
History of suicidal concerns (0 = No; 1 = Yes)	1
History of stable employment (0 = No; 1 = Yes)	0
Married (0 = No; 1 = Yes)	0
Obtained a post-secondary degree (0 = No; 1 = Yes)	0

[54] Ex. 4 at 43 (Mandatory Assessment, October 25, 2018) and 64 (Pre-Sentence Investigation Report, October 11, 2018).
[55] Ex. at 43.
[56] Ex 3 at 8.
[57] Ex. 3; Ex. 8 (Dr. Backes's Curriculum Vitae).
[58] Ex. 3.
[59] Ex. 3a (MnSOST-4.0 Scoring Sheet).
[60] *Id*.

MnSOST-4.0 Inventory Item	Score
Completed sex offender and CD treatment while incarcerated on Index Offense (0 = No; 1 = Yes)	0
Release Violator (0 = No; 1 = Yes)	0
Age at Release	53
Unsupervised Release (0= No; 1 = Yes)	0

Petitioner's score on the MnSOST-4.0 predicted a probability of sexual recidivism of 2.58 percent within four years, placing him in the 58th percentile of sexual offenders for risk of re-offense.[61] This score placed Petitioner in the presumptive Risk Level 2 category.[62]

In his analysis, Dr. Backes did not apply any special concerns to increase Petitioner's recommended risk level as it is consistent with the presumptive risk level indicated by the MNSOST-4.0.[63] Dr. Backes noted that although the presumptive risk level is recommended, Special Concern No. 1 (history of sexual reoffending after initial detection), No. 2 (history of prior supervision failures, a recent history of engaging in high-risk or grooming-type behaviors or other behaviors suggesting increased potential to reoffend), and No. 5 (the nature of the victim pool suggests need for broader public notification) apply to Petitioner, and none of the mitigating factors apply.[64]

In addition to conducting the MnSOST-4.0, Dr. Backes applied the risk factors set forth in Minn. Stat. § 244.052, subd. 3(g).[65] Based upon his analysis of the statutory risk factors and Petitioner's score on the MnSOST-4.0, Dr. Backes recommended that the ECRC assign Petitioner to Risk Level 2, the risk level indicated by Petitioner's score on the MnSOST-4.0.[66]

C. ECRC Meeting and Petitioner's Appeal

The ECRC at MCF-Moose Lake convened on April 18, 2022, to address Petitioner's risk level assignment.[67] Petitioner appeared at the hearing, with the assistance of a Spanish language interpreter, and was granted an opportunity to be heard.[68] Petitioner made arguments and claims that:

1) he is innocent of the failure to register as a predatory offender offense;
2) he has not committed any crimes in 25 years

[61] Ex. 3a.
[62] Ex. 5 at 4.
[63] Ex. 3 at 9; s*ee also* Ex. 6.
[64] Ex. 3 at 9.
[65] Ex. 3.
[66] *Id.*
[67] Ex. 2 (Risk Assessment Report).
[68] *Id.* at 2; Ex. 9.

3) he is appealing his fourth-degree criminal sexual conduct conviction in federal court; and
4) his contributions to the community and his family have not been acknowledged by the ECRC.[69]

Petitioner stated he plans to live with his wife and children in Kerkhoven, Minnesota, and work as a butcher upon release.[70]

At the conclusion of the meeting, the ECRC voted by unanimous decision to assign Petitioner a Risk Level 2, consistent with Dr. Backes's recommendation and the presumptive risk level indicated by his score on the MnSOST-4.0.[71]

On April 26, 2022, Petitioner submitted his appeal of the ECRC's risk level determination.[72] In his appeal, Petitioner argues that his MnSOST-4.0 presumptive risk level was incorrect, that he has not had disciplinary action while at Moose Lake, and that he works hard.[73] Petitioner reiterated his arguments from the ECRC meeting and claimed his innocence for past convictions.[74]

As a result of the Notice of Appeal, on June 27, 2022, the ECRC filed a Notice and Order for Hearing with the Office of Administrative Hearings, thereby initiating this contested case proceeding.[75] On that same date, the ECRC filed this Motion for Summary Disposition.

IV. Summary Disposition Standard of Review

Summary disposition is the administrative law equivalent of summary judgment.[76] 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.[77] 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.[78]

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 factual issues exist.[79] In other words, the

[69] Ex. 9; *see also* Ex. 1 at 1-020 (Notice of Appeal).
[70] Ex. 9.
[71] Ex. 2 at 3; Ex. 9.
[72] Ex. 1.
[73] *Id*.
[74] Ex. 1 at 1-019 to 1-022 (Petitioner's Appeal Letter).
[75] Notice and Order for Hearing (June 27, 2022).
[76] *Pietsch v. Minn. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2021).
[77] *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).
[78] Minn. R. 1400.6600 (2021).
[79] *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

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.[80]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[81] A fact is material if its resolution will affect the outcome of the case.[82] 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.[83] A genuine issue is not a "sham or frivolous" one, and it cannot rely on mere allegations or denials.[84] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[85]

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[86] Thus, summary disposition is only proper when no factual issues need to be resolved.[87]

V. Analysis

The ECRC argues that Petitioner does not raise any issues of material fact, and that the ECRC is entitled to judgment as a matter of law that Risk Level 2 is appropriate. Petitioner did not reply to the ECRC's Motion for Summary Disposition, so his arguments are drawn from his Notice of Appeal and the ECRC meeting. Petitioner makes three arguments: (1) the 2018 conviction for failure to register was vacated and therefore should not have been considered by the ECRC; (2) Petitioner's MnSOST-4.0 assessment was incorrectly scored; and (3) the fourth-degree criminal sexual conduct conviction is under appeal and should not have been considered by the ECRC.[88]

A. Scoring of Petitioner's MnSOST-4.0

Petitioner argues that the ECRC erred in assigning him to a Risk Level 2 because the failure to register conviction was vacated and he is appealing the 2018 criminal sexual conduct offense conviction.[89] The record shows that both Dr. Backes and the ECRC recognized that the failure to register conviction was vacated and was not included in Petitioner's MnSOST-4.0 score.[90] Therefore, there is no issue of material fact regarding the vacated 2018 conviction for the failure to register.

Petitioner also argues that he is appealing one of his felony convictions and therefore it should not be counted on the MnSOST-4.0 score.[91] Whether a conviction is under appeal or not, the conviction must be counted on the MnSOST-4.0 score unless it

[80] *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[81] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[82] *O'Malley v. Ulland Bros*., 549 N.W.2d 889, 892 (Minn. 1996).
[83] *Thiele,* 425 N.W.2d at 583.
[84] *Highland Chateau, Inc. v. Minn. Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).
[85] *See* Minn. R. Civ. P. 56.05.
[86] *Sauter*, 70 N.W.2d at 353.
[87] *Id*.
[88] Exs. 1 and 9.
[89] Exs 1 and 9.
[90] Exs. 2, 3, and 3a.
[91] Ex. 1.

has been vacated before the time of the scoring.[92] Therefore, there is no issue of material fact regarding the number of convictions included in Petitioner's MnSOST-4.0 scoring analysis.

The Administrative Law Judge has carefully reviewed the scoring of the MnSOST-4.0 and concludes that Dr. Backes properly scored the tool based upon Petitioner's criminal history and the undisputed facts in the record. Because Petitioner's MnSOST-4.0 score places him in the presumptive Risk Level 2 range, the ECRC did not err in assigning Petitioner to a Risk Level 2.

B. Application of Mitigating Factors to Reduce Petitioner's Presumptive Risk Level

Petitioner further argued that the ECRC should have reduced his risk level assignment to a Risk Level 1 but identified no mitigating factors.[93]

Under DOC policy, the ECRC may apply mitigating factors to reduce a risk level assignment from the presumptive risk level indicated by the MnSOST-4.0.[94] The DOC Policy recognizes six mitigating factors for use with the MnSOST-4.0: (1) intervention followed by significant period of positive community adjustment; (2) inhibiting or incapacitating physical illness or condition; (3) satisfactory participation in sex offender treatment with no sexual reoffending or high-risk behaviors; (4) sexual offenses limited to juvenile adjudications; (5) sexual offenses related to child sexual abuse images only; and (6) sex offenses limited to intrafamilial female victims.[95] None of these mitigating factors apply to Petitioner. Therefore, the ECRC did not err by declining to apply mitigating factors to reduce Petitioner's risk level assignment.

In addition to mitigating factors, the ECRC must consider the statutory risk factors set forth in Minn. Stat. § 244.052, subd. 3(g). The record shows Dr. Backes and the ECRC properly considered the statutory risk factors.[96]

Petitioner's score on the MnSOST-4.0 places him squarely within the Risk Level 2 range. Because the ECRC correctly scored the MnSOST-4.0 and properly applied the statutory risk factors, the Administrative Law Judge concludes that the ECRC did not err when it assigned Petitioner to a Risk Level 2. Given the absence of any genuine issue of material fact, summary disposition in favor of the ECRC is warranted.

VI. Conclusion

In conclusion, Petitioner has not established that a genuine issue of material fact exists related to the ECRC's risk level assignment. The ECRC has demonstrated that it is entitled to judgment as a matter of law. Accordingly, the ECRC's Motion for Summary Disposition is **GRANTED**. Petitioner's appeal of his risk level determination is **DISMISSED**, and the ECRC's assignment of Risk Level 2 is **AFFIRMED**.

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[92] *See* Ex. 5 at 11.
[93] Exs. 1 and 9.
[94] DOC Policy 205.220.
[95] Ex. 7.
[96] Exs. 3 and 2.

S. T.