OAH 24-1100-39387

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level Determination of Clarence Carthel Flowers	**ORDER DENYING MOTION FOR SUMMARY DISPOSITION**

This matter is pending before Assistant Chief Administrative Law Judge Kristien R. E. Butler of the Minnesota Office of Administrative Hearings pursuant to a Notice of and Order for Review of Risk Level Assignment filed with the Office of Administrative Hearings on July 11, 2023.

Lisa B. Jones, Assistant Attorney General, represents the Minnesota Department of Corrections' End-of-Confinement Review Committee (ECRC). Clarence Carthel Flowers (Petitioner) is self-represented.

On August 8, 2023, the ECRC filed and served a Motion for Summary Disposition. Petitioner was personally served on August 9, 2023. Petitioner filed no response to the ECRC's motion.

Based upon all the files and proceedings herein and the submissions of the Parties, and for the reasons set forth in the accompanying Memorandum, the Judge now hereby makes the following:

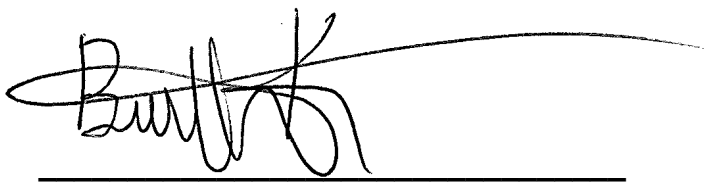
ORDER

1. The ECRC's Motion for Summary Disposition is **DENIED**.

2. A prehearing conference is scheduled for **January 23, 2024, at 10:30 a.m.**

3. At the above date and time, the **Parties** are instructed to **dial 651-395-7448**, and when prompted, enter **phone conference ID: 313 215 782#**.

Dated: December 21, 2023



KRISTIEN R. E. BUTLER
Assistant Chief Administrative Law Judge

MEMORANDUM

I. Legal Background

This case involves Petitioner's appeal of the risk level assigned by the ECRC pursuant to the Minnesota Community Notification Act (the Act).[1] Persons convicted of certain criminal offenses are considered "predatory offenders" and subject to the Act, which requires law enforcement agencies in the area where that person "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."[2] 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."[3]

The scope of community notification required by the Act is determined by assignment of one of the three different risk levels defined by statute.[4] Each risk level is associated with a different degree of community notification.[5] If an individual is assigned Risk Level 1, notification regarding that individual's residence may be given to local law enforcement agencies, as well as to victims and witnesses connected to the offender's criminal history.[6] Risk Level 2 permits additional notice to groups such as schools, child care facilities, and individuals likely to be victimized by the individual.[7] Risk Level 3 permits notice to be given to any community member whom the individual is likely to encounter, unless law enforcement determines public safety would be compromised by the disclosure or more limited disclosure is necessary to protect the identity of the offender's victim or victims.[8]

Every person deemed a predatory offender and confined in a Minnesota state correctional or treatment facility must be assessed by the ECRC at the facility prior to release.[9] The ECRC is responsible for assessing the public risk posed by each person deemed a predatory offender upon release and determining the appropriate risk level assignment.[10]

When assessing risk and assigning a risk level, the ECRC is required by law to apply the risk factors set forth in statute.[11] The risk factors to be considered include: (1) the seriousness of the offense should the individual reoffend, (2) the individual's prior offense history, (3) the individual's characteristics, (4) the availability of community supports to the individual, (5) whether the individual has indicated, or credible evidence

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[1] *See* Minn. Stat. § 244.052 (2022).
[2] *Id.*, subd. 4(a); Minn. Stat. § 243.166, subd. 1b (2022).
[3] Minn. Stat. § 244.052, subd. 4(a).
[4] *Id.*, subd. 4(b).
[5] *Id.*
[6] *Id.*, subd. 4(b)(1).
[7] *Id.*, subd. 4(b)(2).
[8] *Id.*, subd. 4(b)(3).
[9] *Id.*, subd. 3.
[10] *Id.*
[11] Minn. Stat. § 244.052, subd. 3(g).

in the record indicates, an intent to reoffend if released to the community, and (6) whether the individual demonstrates a physical condition that minimizes the risk of re-offense.[12] This list is not exclusive.[13]

In addition to consideration of the statutory risk factors, the ECRC is also required to apply a risk assessment scale when assigning a risk level.[14] The score from the risk assessment tool is translated into a presumptive risk level considered by the ECRC when assigning a risk level. The ECRC, in its discretion, can deviate from the presumptive risk level by applying mitigating factors for a downward departure or special concerns for an upward departure.[15]

Based upon the risk assessment tool, application of mitigating factors or special concerns, and analysis of the statutory risk factors, the ECRC must assign a final risk level. As part of the assignment, 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."[16]

An individual assigned Risk Level 2 or Risk Level 3 has the right to seek administrative review of the ECRC's determination within 14 days of receiving notice of the risk level assignment.[17] The administrative review is conducted by an Administrative Law Judge at the Office of Administrative Hearings and is subject to the contested case rules.[18] On review, "the administrative law judge shall decide whether the end-of-confinement review committee's risk assessment determination was erroneous and, based on this decision, shall either uphold or modify the review committee's determination."[19] The decision of the Administrative Law Judge is final and subject to appellate judicial review.[20]

A risk level is applicable for a minimum of 10 years.[21] During that time, the appropriate level of notice must be given every time the individual changes residence.[22] The individual may ask the ECRC to reassess the assigned risk level three years after the initial risk assessment and may renew the request once every two years following subsequent denials.[23]

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[12] *Id*.
[13] *Id*.
[14] *Id.*, subd. 2.
[15] Minn. Dep't Corr., Policy No. 205.220 (August 5, 2022); *In re R.B.P.*, 640 N.W.2d 351, 354 (Minn. App. 2002).
[16] Minn. Stat. § 244.052, subd. 3(f).
[17] *Id.*, subd. 6(a).
[18] *Id.*, subd. 6(b)–(d). The contested case rules are found at Minn. R. 1400.5010-.8401 (2023).
[19] *Id.*, subd. 6(c).
[20] *Id.*; Minn. Stat. § 14.63 (2022).
[21] Minn. Stat. § 243.166, subd. 6(a) (2022).
[22] *Id.*, subd 3 (2022).
[23] Minn. Stat. § 244.052, subd. 3(i).

II. Petitioner's Background Relevant to ECRC Consideration

Petitioner pleaded guilty to and was convicted for three Minnesota charges in 2015.[24] The factual bases for these pleas were not part of the record provided to this Court. The complaint bringing the first of these charges alleged penile-oral, oral-vaginal, and penile-vaginal penetration in 2015 involving the then 14-year-old victim and 20-year-old Petitioner.[25] Petitioner's guilty plea to this offense resulted in conviction for third-degree criminal sexual conduct with a victim between the ages of 13 and 15 and an actor more than 24 months older, in violation of Minn. Stat. § 609.344, subd. 1(b) (2014).[26] The court stayed a 36-month sentence for 15 years in October 2015.[27]

The remaining two charges arose from a complaint alleging that Petitioner used social media: to post threatening messages directed at and photographs of an unnamed victim with the same birthdate as the victim in the 2015 criminal sexual conduct matter; to post a statement threatening to murder another child; and to send messages containing threats of arson to two other children.[28] Petitioner's guilty pleas to two counts of that complaint resulted in a conviction for pattern of stalking conduct in violation of Minn. Stat. § 609.749, subd. 5(a) (2014), and a conviction for terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2014).[29] The court stayed a 28-month sentence for 10 years for the stalking conviction and a 15-month sentence for 5 years for the threats conviction in November 2015.[30]

While Petitioner was on probation in those matters, according to an unofficial criminal history report, Petitioner was convicted of a misdemeanor following an abduction occurring in Ohio in 2016, as well as four felonies occurring in Georgia in 2017 and 2018.[31] Petitioner was also alleged to have violated the terms of probation multiple times: 2016 reports alleged that Petitioner had a relationship with a 17-year-old, failed to comply with random testing, and used an internet-capable device without monitoring software[32]; in 2018, a report alleged that Petitioner failed to remain law-abiding based on a felony conviction in Georgia[33]; and in 2021 a report alleged that Petitioner failed to remain law abiding based on drug convictions in Georgia, possessed pornographic material, and failed to comply with sex offender programming.[34] It is unclear from the records which

[24] *See* Exhibit (Ex.) 4 at 210–13 (presentence investigation describing plea negotiations).
[25] Ex. 4 at 249–50.
[26] Ex. 4 at 203.
[27] Ex. 4 at 203–04.
[28] Ex. 4 at 245–46.
[29] Ex. 4 at 198.
[30] Ex. 4 at 198–200.
[31] Ex. 4 at 13–14. The ECRC report section describing Petitioner's criminal history differs from this unofficial report—a 2018 terroristic threats conviction listed in the unofficial report as a felony is described as a misdemeanor in the ECRC report, and the ECRC report includes reference to an additional felony conviction of criminal solicitation occurring in 2018. *See id.* at 79; Ex. 3 at 4–5 (Leutschaft Risk Level Recommendation Report, June 15, 2023). The record does include what appears to be court documentation from Georgia identifying a misdemeanor conviction for terroristic threats. Ex. 4 at 160. The information from the criminal solicitation conviction appears to come from a probation violation report, but the record does not contain any Georgia court documentation referring to this matter. *Id.* at 181.
[32] Ex. 4 at 188–92.
[33] Ex. 4 at 181.
[34] Ex. 4 at 151, 158.

violations were admitted and/or found in each violation hearing, but probation violations resulted in multiple reinstatements on probation from 2016 to 2018 and revocation in 2021.[35] The district court executed Petitioner's: 36-month sentence with a 10-year conditional-release term for the criminal sexual conduct conviction; 28-month sentence for the stalking conviction; and 15-month sentence for the terroristic threats conviction on June 16, 2021.[36]

In preparation for Petitioner's release on supervised release, Petitioner was assessed by Department of Corrections (DOC) psychologists in April of 2022.[37] Two assessments were performed, one by Jack Rusinoff, M.A., and one by Shelley Leutschaft, Ph.D., both of whom are licensed psychologists employed by the DOC.[38] Both psychologists completed the Minnesota Sex Offender Screening Tool 4 (MnSOST-4), and reached identical conclusions that Petitioner's predicted probability of sexual recidivism placed Petitioner in the presumptive Risk Level 2 category at that time.[39] The ECRC subsequently assigned Petitioner a Risk Level 2 before Petitioner's first supervised release on this obligation in 2022.[40] In reaching that determination, the ECRC considered all of the above-described probation violations and criminal history.[41]

On allegations of supervised release violation and a new pending criminal charge, Petitioner returned to custody on April 20, 2023.[42] Petitioner was subsequently found in violation of supervised release for possession of pornography and was returned to prison to serve 120 days in custody.[43] Petitioner was scheduled to return to the community on August 21, 2023.[44]

III. Procedural History

Shortly after Petitioner's return to prison for a violation of supervised release, Psychologist Rusinoff again assessed Petitioner's potential risk.[45] Psychologist Rusinoff's May 2023 screening tool differed from the 2022 tools described above in one meaningful way: Petitioner was assigned an additional point for release-violator status.[46] This increased Petitioner's predicted probability of sexual recidivism, but Petitioner remained within the presumptive Risk Level 2 category.[47] Despite the lack of change in presumptive

[35] Ex. 4 at 140–44, 164–65, 185–87, 193, 195.
[36] Ex. 4 at 140–44.
[37] Ex. 4 at 85–86.
[38] Ex. 4 at 85–86.
[39] Ex. 4 at 85–86.
[40] Ex. 4 at 75, 85, 86.
[41] *See* Ex. 4 at 78 (April 25, 2022, Risk Assessment Report) (considering risk of re-offense based, in part, on probation violations and on convictions from Georgia and Ohio).
[42] Ex. 4 at 17.
[43] Ex. 4 at 17.
[44] Ex. 4 at 3.
[45] Ex. 4 at 16.
[46] Ex. 4 at 16.
[47] Ex. 4 at 16.

level, Psychologist Rusinoff recommended a new ECRC review based on the release violation behavior.[48]

In preparation for Petitioner's rereview by ECRC, Dr. Leutschaft completed another screening tool and prepared an updated risk assessment recommendation.[49] According to the risk assessment tool, Petitioner's predicted probability of sexual recidivism was 8.46 percent, which placed Petitioner in the presumptive Risk Level 3 category.[50] Dr. Leutschaft's completed June 2023 screening tool differed in three meaningful ways from the 2022 screening tools: Petitioner was assigned one point each for release-violator status, public offense, and multiple age groups.[51] The assessor did not apply special concerns or mitigating factors.[52]

Based on Petitioner's score on the risk assessment tool and consideration of the statutory risk factors, Dr. Leutschaft recommended assigning a Risk Level 3.[53] Dr. Leutschaft emphasized previous probation violations and the behavior alleged in pending charges, as well as the lack of sex-related treatment completion.[54] Dr. Leutschaft provided the risk assessment recommendation to the ECRC.[55]

The ECRC convened on June 26, 2023, to address Petitioner's risk level assignment.[56] Petitioner attended the meeting and was given an opportunity to be heard by the ECRC prior to its vote.[57] Petitioner emphasized innocence of the pending charge until proven guilty, asked to stay at a Level 2 until the pending matter was resolved, and tried to explain or contextualize past violation behavior.[58] At the conclusion of the meeting, the ECRC voted to assign Petitioner a Risk Level 3.[59]

Following the ECRC's meeting, Dr. Leutschaft completed an amended risk assessment recommendation on June 29, 2023.[60] This recommendation noted that Petitioner was also required to register as a predatory offender for the misdemeanor abduction conviction from Ohio.[61] It provided additional detail about that case, indicating that a 19-year-old victim was in a car involuntarily, that Petitioner pushed the victim out of said car door, and that the victim was dragged by Petitioner after having become stuck in the seatbelt.[62] The report also included this offense in the "potential dangerousness of

[48] Ex. 4 at 15.
[49] Ex. 3; Ex. 3a (MnSOST-4, June 15, 2023).
[50] Ex. 3a. *See also* Ex. 5 at 4 (Mn-SOST coding rules dictating cutoffs for each presumptive level).
[51] Ex. 3a.
[52] Ex. 3 at 9.
[53] Ex. 3 at 9.
[54] Ex. 3 at 8–9.
[55] Ex. 10 (audio recording of ECRC meeting).
[56] Ex. 2 (ECRC Risk Assessment Report, June 26, 2023).
[57] Ex 2; Ex. 10.
[58] Ex. 10.
[59] Ex. 2.
[60] Ex. 9.
[61] Ex. 9 at 2.
[62] Ex. 9 at 2.

reoffense" section.[63] The report did not rescore the MnSOST-4 or change the recommendation for a Risk Level 3.[64]

On June 29, 2023, Petitioner requested an appeal of the ECRC's risk level determination.[65] On July 11, 2023, the ECRC filed a Notice of and Order for Review of Risk Level Assignment with the Office of Administrative Hearings.

As previously stated, on August 8, 2023, the ECRC filed a Motion for Summary Disposition. Petitioner was personally served with the motion on August 9, 2023. Petitioner did not file a response to the ECRC's motion.

IV. Legal Standard for Summary Disposition

"Summary disposition is the administrative equivalent of summary judgment."[66] 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.[67] 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.[68] 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.[69]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[70] "A fact is material if its resolution will affect the outcome of the case."[71] 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.[72] A genuine issue is not a "sham or frivolous" one, and it cannot rely on mere allegations or

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[63] Ex. 9 at 3.
[64] Ex. 9 at 9.
[65] Ex. 1 (Notice of Appeal).
[66] *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2023).
[67] *See Sauter v. Sauter*, 244 Minn. 482, 70 N.W.2d 351, 353 (1955); *Louwagie v. Witco Chemical Corp*., 378 N.W.2d 63, 66 (Minn. App. 1985).
[68] *See e.g., DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997) ("The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist.").
[69] *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. App. 1984).
[70] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[71] *O'Malley v. Ulland Bros*., 549 N.W.2d 889, 892 (Minn. 1996).
[72] *Thiele,* 425 N.W.2d at 583.

denials.[73] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[74]

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[75] Thus, summary disposition is only proper when no fact issues are present that require resolution.[76]

V. Arguments

The ECRC seeks summary disposition of this case based on its contention that Petitioner has not raised any "genuine issues of material facts that would affect [the] risk level" and because the decision to assign a level 3 is "supported by [Petitioner's] convictions, the MnSOST-4 score and the fact that there are no mitigating factors."[77]

In opposing the risk level assignment, Petitioner asserts that the ECRC improperly relied on "an old pattern of behavior I no longer exhibit," "my confession of possession of pornography and statements," a pending misdemeanor charge based on "disputable evidence" for which Petitioner has not been found guilty, and a number of other facts Petitioner argues are inaccurate or untrue.[78]

VI. Analysis

Upon review of the ECRC's motion and Petitioner's claims, the Judge concludes that the ECRC's Motion for Summary Disposition should be denied.

Petitioner objects to the assignment of Risk Level 3 for a number of reasons, as described above and in Petitioner's Notice of Appeal. Petitioner's written objections can be classified in two categories: explaining, contextualizing, or distancing from past behavior; and questioning whether the ECRC focused on the pending criminal charges at the recent review hearing.

As to the first general category of arguments, Petitioner raises several specific issues seeking to clarify or contextualize past probation violation behavior and argues Petitioner no longer exhibits the pattern described in the ECRC's recommendation. Petitioner does not, however, connect these clarifications to issues that ultimately weigh on risk level assignment—none of Petitioner's factual disputes change scoring of the MnSOST-4, and the ECRC did not consider any special concerns that might be impacted by the context Petitioner suggests. Likewise, none of Petitioner's arguments rise to the level of mitigating factors at defined by DOC policy.[79]

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[73] *A & J Builders, Inc. v. Harms*, 179 N.W.2d 98, 103 (Minn. 1970); *Highland Chateau, Inc. v. Minnesota Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).
[74] *A & J Builders, Inc.* 179 N.W.2d at 103.
[75] *Sauter*, 70 N.W.2d at 353.
[76] *Id*.
[77] ECRC Memorandum in Support of Summary Disposition (ECRC Mem.) at 5–7 (Aug. 8, 2023).
[78] Ex. 1 (Notice of Appeal).
[79] Ex. 7 (Mitigating Factors for the Mn-SOST 4); Policy 205.220 (promulgating the factors listed in Ex. 7).

As to the second category of arguments, Petitioner challenges the ECRC's use of the pending charge to increase the assigned risk level. The ECRC responds that Petitioner's "appeal appears to presume the ECRC used [the] pending charges against" Petitioner, "[h]owever the decision is supported by [Petitioner's] convictions, the MnSOST-4 score and the fact that there are no mitigating factors."[80] It is not clear whether the ECRC's position is that the pending charge was or was not significant in assigning the new risk level, but the evidence suggests that it was.

The ECRC report includes the pending charge in the pattern of behavior section, notes Petitioner's objection to consideration of that charge, and indicates that Petitioner "was informed that being back in front of this committee has more to do with not following the special conditions of release, being in the company of minors, and use of devices more so than the new charge Petitioner has now incurred."[81] The only new information available to the ECRC at the time of the hearing and relevant to MnSOST-4 calculation concerned Petitioner's release violation, as the report suggests. However, the release violation was based on a no contest plea to possession of pornography of an unspecified nature at an unspecified time.[82] Petitioner was expressly not reincarcerated for the pending charge or allegations stemming from that charge, all of which the hearing officer declined to address until they had been resolved in court.[83] In other words, the admitted and found violative behavior did not include the pending charge, nor did it include a finding of violation for being in the company of minors or an allegation or finding of violation involving unauthorized use of devices. The reasons the ECRC gave Petitioner for being back before it do not appear to entirely align with the facts of Petitioner's reincarceration.

Importantly, whether the ECRC considered the new charge impacts more than the mere fact of re-review: Petitioner's level would differ if the ECRC considered the admitted release violation but not the allegations underlying the pending criminal case. This conclusion follows from the two MnSOST-4 screenings performed following Petitioner's reincarceration in April 2023. The May screening performed by Psychologist Rusinoff includes a point for release violator status and predicts a recidivism probability of 4.27 percent, which correlates to a presumptive Level 2.[84] The June screening performed by Dr. Leutschaft includes a release violator point, as well as points for "public" and "multiple age groups" and predicts a recidivism probability of 8.46 percent, which correlates to a presumptive Level 3.[85] While it may well be true that Petitioner's reappearance before the ECRC was based more on the occurrence of a violation and resulting reincarceration than the pending criminal case, it appears that Petitioner's presumptive risk level changed because of ECRC's consideration of the pending case

[80] ECRC Mem. at 7.
[81] Ex. 2 at 2.
[82] *Compare* Ex. 3 (Risk Assessment Recommendation dated June 15, 2023) *with* Ex. 4 at 76–84 (Risk Assessment Recommendation dated April 25, 2022).
[83] Ex. 4 at 17–19 (DOC Hearings and Release Unit Hearing Notes from May 11, 2023) (indicating that the hearing officer treated the new charge as a detention matter instead of a violation matter and that the hearing officer held remaining allegations, which were based exclusively on the pending charge, in abeyance).
[84] Ex. 4 at 16.
[85] Ex. 3a.

and not because of the release violation. The extent, if any, to which the pending criminal charge impacted the risk level determination is a disputed material fact.

Construing the evidence in the light most favorable to the non-moving party, questions of fact regarding the weight given to the pending charge in the review process remain unresolved. Given these questions impact Petitioner's MnSOST-4 score and presumptive level, they are material, and therefore summary disposition is improper at this time.

VII. Conclusion

Given disputed issues of material fact do exist regarding the assignment of Risk Level 3 to Petitioner, the ECRC's Motion for Summary Disposition is **DENIED**. This matter will proceed to an evidentiary hearing in which Petitioner will have the burden of proof to show, by a preponderance of the evidence, that the ECRC erred.

K. R. E. B.