OAH 71-1100-39901

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level Determination of Christopher Jon Berg	**ORDER GRANTING MOTION FOR SUMMARY DISPOSITION**

This matter is pending before Administrative Law Judge Jessica A. Palmer-Denig upon a Motion for Summary Disposition (Motion) filed by the Minnesota Department of Corrections (DOC) End-of-Confinement Review Committee (ECRC). Christopher Jon Berg (Petitioner) did not file a response. The record closed on April 24, 2024, which was the deadline for Petitioner's response.

Lisa Jones, Assistant Attorney General, represents the ECRC. Petitioner represents himself without legal counsel.

Based on the record and for the reasons explained 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 2 is **AFFIRMED**.

Dated: June 17, 2024

JESSICA A. PALMER-DENIG
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 (2022).

MEMORANDUM

I. Introduction

Petitioner has appealed the ECRC's assignment to him of Risk Level 2 under the Minnesota Community Notification Act (Act).[1] The ECRC asserts that Petitioner has not presented a valid challenge to his risk level assignment because he has not identified any material error in the ECRC's review. Based on the Motion and the record, the Administrative Law Judge concludes that Petitioner's risk level assignment must be **AFFIRMED.**

II. The Act

Minnesota law provides that individuals convicted of certain criminal offenses are considered "predatory offenders" and are subject to the Act.[2] Under the Act, law enforcement agencies in the area where a predatory offender resides, expects to reside, is employed, or is regularly found, must disclose information "relevant and necessary to protect the public and to counteract the offender's dangerousness."[3] The extent of the disclosure, and the persons to whom the disclosure is made, relates "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 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.[5] If an offender is assigned Risk Level 1, information about the offender may be given to local law enforcement agencies as well as victims and witnesses related to the offender's criminal history.[6] Risk Level 2 permits additional notice to groups such as schools, child care facilities, and individuals likely to be victimized by the offender.[7] Risk Level 3 permits notice to be given to any community member whom the offender is likely to encounter, unless law enforcement determines public safety might be compromised by the disclosure or more limited disclosure is necessary to protect the identity of the offender's victims.[8]

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

Every predatory offender confined in a Minnesota state correctional or treatment facility must be assessed by the ECRC prior to release and assigned a risk level based upon the degree of risk to the public that the offender poses.[9] In making a risk level assignment, the ECRC assesses each offender using a variety of tests and tools. Under Minn. Stat. § 244.052, subd. 3(g), the ECRC must apply six risk factors to the offender: (1) the seriousness of the offense should the offender reoffend, (2) the offender's prior offense history, (3) the offender's characteristics, (4) the availability of community supports to the offender, (5) whether the offender has indicated or credible evidence in the record indicates that he will reoffend if released to the community, and (6) whether the offender demonstrates a physical condition that minimizes the risk of re-offense.[10] This list is not exclusive.[11]

The ECRC also must score the predatory offender using a risk assessment tool.[12] Relevant to this case, the DOC developed the Minnesota Screening Tool Assessing Recidivism Risk 2.0 (MnSTARR 2.0) for use in evaluating the risk posed by non-sexual violent offenders who are subject to the Act.[13] The MnSTARR 2.0 is a fully automated, gender-specific recidivism risk assessment that was developed and validated on the Minnesota prison population,[14] and it scores factors related to a registrant's criminal history, experience during incarceration, and social background.[15] The input values generate a non-sexual violent recidivism probability, non-violent recidivism probability, and a felony recidivism probability.[16] The predicted probability of recidivism (expressed as a percentage) translates into a presumptive risk level that guides the ECRC in making its risk level assignment, as shown in the chart below.[17]

	Presumptive Risk Level 1	Presumptive Risk Level 2	Presumptive Risk Level 3
Non-Sexual Violence Recidivism	Less than 30%	30.00% to 59.99%	60% and higher

The ECRC, in its discretion, may deviate from the presumptive risk level identified by the offender's score on the MnSTARR 2.0.[18] The ECRC may apply mitigating factors for a downward departure, or special concerns, which are aggravating factors, for an upward departure.[19] Based upon all of these considerations, the ECRC assigns a final risk level to the predatory offender, and it must prepare a report that "specifies the risk

[9] *Id.*, subd. 3.
[10] *Id.*, subd. 3(g).
[11] *Id.*
[12] *See id.*, subd. 2.
[13] Exhibit (Ex.) 7 at 2; Ex. 10.
[14] Ex. 7 at 2.
[15] *See* Ex. 3a; Ex. 5.
[16] *See* Ex. 3a; Ex. 7 at 2.
[17] Ex. 6.
[18] Ex. 10.
[19] *Id.*; *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).

level to which the offender has been assigned and the reasons underlying the committee's risk assessment decision."[20]

A predatory offender assigned Risk Level 2 or Risk Level 3 may seek administrative review of the ECRC's determination within 14 days of receiving notice of the risk level assignment.[21] The administrative review is conducted by an administrative law judge at the Office of Administrative Hearings and is subject to the contested case rules.[22] 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."[23] The decision of the administrative law judge is final and subject to appellate judicial review.[24] A predatory offender 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 in the event of subsequent denials.[25]

III. Factual Background

A. Petitioner's Offense History

On April 3, 1995, when he was 17 years old, Petitioner was charged with one count of kidnapping, one count of terroristic threats, one count of felony assault in the fifth degree, and one count of assault in the fifth degree.[26] The Cass County Sheriff's Office received a report that Petitioner chased, assaulted, threatened, and kidnapped his then-girlfriend, victim K.M.P., in Pillager, Minnesota on or about January 26, 1995.[27]

At the outset of this extended altercation, Petitioner stood in the street and then jumped on the hood of K.M.P.'s car when she attempted to leave his home.[28] She opened the car door, afraid if she did not that Petitioner would break the window, and Petitioner dragged her out of the car and slammed her down on the ice; Petitioner hit her and slammed the back of her head on the ice "a few times."[29] Petitioner told K.M.P. to get into the car, and when they both attempted to get into the driver's seat, Petitioner continued hitting her.[30] After K.M.P. made it to the passenger seat, Petitioner drove to a local dam, yelling at K.M.P. and pulling her hair.[31] At the dam, after K.M.P. told Petitioner they were through as a couple, Petitioner grabbed K.M.P. by her hair again, and told her: "The last time I see you, you are going to die, you are going to be dead."[32] K.M.P. jumped out of

[20] Minn. Stat. § 244.052, subd. 3(f).
[21] *Id.*, subd. 6(a).
[22] *Id.*, subd. 6(d); Minn. R. 1400.5010-.8401 (2023).
[23] Minn. Stat. § 244.052, subd. 6(c).
[24] Minn. Stat. §§ 14.63, 244.052, subd. 6(c).
[25] Minn. Stat. § 244.052, subd. 3(i).
[26] Ex. 4 at 247-52 (1995 criminal complaint).
[27] *Id.* at 247-249.
[28] *Id.* at 248.
[29] *Id.* at 248.
[30] *Id.*
[31] *Id.* at 248-49.
[32] *Id.* at 249.

the car, with Petitioner chasing her, and ran to a nearby house.[33] Inside the home, K.M.P. told the homeowner that Petitioner had beaten her and the homeowner told her she could use the phone.[34] Petitioner grabbed the phone, however, preventing K.M.P. from calling 911, and threatened K.M.P. and the homeowner, who had just returned home from the hospital with a four-day-old baby.[35] K.M.P. and Petitioner left the house together and once outside the house, K.M.P. fled and was able to get away.[36]

Petitioner entered a guilty plea to felony assault in the fifth degree, and the remaining charges were dismissed.[37] Petitioner received a stay of imposition with credit for time served and was placed on supervised probation for five years.[38] Petitioner violated the terms of his probation, and the court vacated the stay of imposition and imposed sentence of twelve months and one day.[39] Petitioner is subject to the Act as a result of the kidnapping charge which arose from the same incident as his conviction for felony assault in the fifth degree.[40]

On January 7, 2009, Petitioner was indicted in Arizona on twelve charges, including attempted second degree murder, based on Petitioner's conduct with his then-girlfriend, L.P., in November 2008.[41] L.P. reported that the incident started when Petitioner hit a deer as they were driving home.[42] When L.P. refused to help clean and dress the deer, Petitioner beat her, dragged her in the house by her hair, made her strip off her clothes so that she would be unable to run away, and took her phone away so she could not call for help.[43] Petitioner butchered the deer in her bathroom with a circular saw, put the deer's legs in her kitchen sink, and put the deer's heart in a frying pan on her stove.[44]

L.P. reported that, for over five hours, Petitioner threatened and assaulted her, including that he: beat and kicked her; pulled out her hair; hit her with closed fists and a 1x4' piece of wood; shot an arrow at her head and left the arrow lodged in the wall; strangled her multiple times; bit her face multiple times; cut her wrist and finger with a knife; put the dead deer on top of her; set her hair on fire; and urinated on her when she asked for water.[45] During this time he also threatened to burn her house down and told her to write a note to her family because he planned to kill her and himself.[46]

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[33] *Id.*
[34] *Id.*
[35] *Id.* at 247, 249.
[36] *Id.* at 249.
[37] *Id.* at 235, 238.
[38] *Id.* at 235.
[39] *Id.* at 233.
[40] Minn. Stat. § 243.166, subd. 1b.
[41] Ex. 4 at 160-162.
[42] *Id.* at 154, 156.
[43] *Id.* at 154.
[44] *Id.* at 156.
[45] *Id.* at 154-156.
[46] *Id.* at 154.

Eventually, L.P. found her cell phone on top of the refrigerator and was able to call 911.[47] L.P. left the home wrapped only in a blanket, and medical responders at the scene found that she had numerous injuries, including black eyes, multiple bruises, blood running from her ear, and stab wounds and cuts on her wrist, finger, and breast.[48] Police officers found Petitioner inside on the couch with a rifle next to him and discovered the butchered deer in the bathtub.[49]

Petitioner entered a guilty plea to three felonies arising from this incident: one count of misconduct involving weapons by a felon and two counts of aggravated assault.[50] Petitioner was sentenced to a total of twelve years of imprisonment.[51]

Beyond these offenses, Petitioner's criminal history shows that he has engaged in extensive criminal conduct as both a juvenile and as an adult; Petitioner has over 30 criminal convictions, including multiple convictions for assault and violating orders for protection.[52] Petitioner was most recently incarcerated in connection with a conviction for fleeing a police officer in a motor vehicle and was sentenced to 17 months in prison.[53]

B. Petitioner's Incarceration and ECRC Risk Level Assignment

While in prison, Petitioner underwent a Substance Use Disorder Assessment on November 15, 2023.[54] Petitioner was diagnosed with severe alcohol use disorder and severe opioid use disorder, both in remission, and was not recommended for treatment.[55] Petitioner did not incur any formal discipline during his current incarceration period.[56] The DOC noted, however, that Petitioner is a predatory offender and that an end-of-confinement review was required before his release, scheduled for July 8, 2024.[57]

In anticipation of Petitioner's release date, Dr. Shelley A. Leutschaft, Ph.D., L.P., a licensed psychologist with the DOC, prepared a risk assessment recommendation for Petitioner.[58] Dr. Leutschaft subsequently issued an amended recommendation to correct a reference to Petitioner's incarceration offense.[59]

Dr. Leutschaft scored Petitioner using the MnSTARR 2.0.[60] According to the risk assessment tool, Petitioner's predicted probability of non-sexual violence recidivism was 34.75 percent, placing Petitioner in the presumptive Risk Level 2 category.[61]

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[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* at 149-50, 153.
[51] *Id.* at 149-50.
[52] *Id.* at 9-13, 27-41.
[53] *Id.* at 5, 24-25, 42.
[54] *Id.* at 15.
[55] *Id.* at 15, 17.
[56] Ex. 7 at 3.
[57] Ex. 4 at 3, 8.
[58] Ex. 3; Ex. 8.
[59] Ex. 7; Ex. 11.
[60] Ex. 3a; Ex. 7.
[61] Ex. 7 at 2; Ex. 3a.

Dr. Leutschaft also applied the risk factors found in Minn. Stat. § 244.052, subd. 3(g).[62] She noted that Petitioner "does not currently display a behavioral pattern of sexual or predatory registration misconduct. He displays a problematic pattern of engaging in acts of aggression and violence against domestic partners and others."[63] Based upon her analysis of the statutory risk factors and Petitioner's score on the MnSTARR 2.0, Dr. Leutschaft recommended that Petitioner be assigned the presumptive Risk Level 2.[64] She did not apply any special concerns or mitigating factors to increase or reduce the presumptive risk level indicated by the MnSTARR 2.0.[65]

The ECRC met on February 26, 2024, to consider Petitioner's risk level assignment.[66] Petitioner and his legal counsel attended the meeting and had an opportunity to be heard.[67] Petitioner provided a statement regarding his background and additional information about himself as a person, and he discussed his goals upon release, including maintaining sobriety.[68] He contended that he was not informed that he would be required to register at the time he was convicted of the registration offense, and he pointed out that he had never previously received a risk level, notwithstanding his history of repeated incarceration.[69] He argued he should not be assigned a Risk Level 2.[70]

The ECRC unanimously assigned Risk Level 2 to Petitioner.[71] The ECRC issued a risk level report, and later amended the report to correct the listing of Petitioner's registration offense, include arguments Petitioner made, and move a note to a different section of the report.[72] Petitioner appealed the risk level assignment.[73]

IV. Summary Disposition Standard

Summary disposition is the administrative law equivalent of summary judgment.[74] 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.[75] 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.

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[62] Ex. 7 at 2-5.
[63] *Id.* at 7.
[64] *Id.* at 6-8.
[65] *Id.* at 7.
[66] Ex. 2; Ex. 9.
[67] Ex. 11.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] Ex. 2; Ex. 9.
[72] Ex. 2; Ex. 9.
[73] Ex. 1.
[74] *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2023).
[75] *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).

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.[76] 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.[77]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[78] A fact is material if its resolution will affect the outcome of the case.[79] 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.[80] A genuine issue is not a "sham or frivolous" one, and it cannot rely on mere allegations or denials.[81] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[82]

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[83] Thus, summary disposition is only proper when no fact issues need to be resolved.[84]

V. Analysis

Petitioner did not respond to the ECRC's Motion, so Petitioner's arguments are drawn from his appeal notice and from his arguments made at the ECRC's meeting.[85] Petitioner argues he should be assigned Risk Level 1 because it has been 28 years since his registration offense.[86] He contends:

> (1) This event took place in 1995. Having received a level in 95 it would have been a 1;
>
> (2) [He] was a juvenile and was never made aware of this information; and
>
> (3) This classification is based on a profile that was issued from police reports.[87]

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[76] *See e.g., DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[77] *See Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[78] *See Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[79] *See O'Malley v. Ulland Bros*., 549 N.W.2d 889, 892 (Minn. 1996) (citing *Zappa v. Fahey*, 245 N.W.2d 258, 259-260 (Minn. 1976)).
[80] *See Thiele,* 425 N.W.2d at 583.
[81] *See Highland Chateau, Inc. v. Minnesota Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984) (citing *A & J Builders, Inc. v. Harms*, 179 N.W.2d 98, 103 (Minn. 1970)).
[82] *See* Minn. R. Civ. P. 56.05.
[83] *See Sauter*, 70 N.W.2d at 353.
[84] *See id*.
[85] Ex. 1; Ex. 11.
[86] Ex. 1 at 1.
[87] *Id.*

Under Minn. Stat. § 244.052, subd. 6(b), Petitioner bears the burden to establish that the ECRCs assignment of Risk Level 2 to him was erroneous. The Administrative Law Judge has reviewed the record in the light most favorable to Petitioner. Even so, Petitioner has not identified any material fact in dispute that requires that this matter proceed to an evidentiary hearing, and he has not identified any legal error in the ECRC's assignment of Risk Level 2.

Petitioner objects to the ECRC's consideration of police reports. In assigning a risk level, the ECRC is permitted to review court services data, corrections data, and criminal history information, and must consider an offender's prior criminal history.[88] Police reports are well within the scope of the documentation that the ECRC may review. The scope of the ECRC's review also includes non-registration offenses, and documents related to such offenses, including Petitioner's 2009 Arizona convictions. Dr. Leutschaft clearly identified that Petitioner was not required to register as a result of these convictions according to the Minnesota Bureau of Criminal Apprehension,[89] but they are a part of Petitioner's criminal history.

Petitioner contends he was not given notice of his duty to register when he was originally convicted in 1995, and he argues that he would have been assigned a Risk Level 1 at that time. He contends that the lack of notice should be considered a mitigating factor. During the ECRC's meeting, a committee member explained that notice practices were not always clear or standardized at the time of the 1995 offense.[90] Further, while it is possible that Petitioner might have received a Risk Level 1 in 1995, his current risk level assignment is based on his entire criminal history, not just on the criminal history he had amassed as a juvenile. Finally, a lack of notice nearly 30 years ago is not a mitigating factor, and Petitioner spent many years in the community without a risk level due to the failure to previously identify him as a predatory offender subject to the Act.

The Administrative Law Judge encourages Petitioner to comply with the conditions of his supervision, and to follow through with his plans to maintain sobriety, and work toward stability in the community. If Petitioner can establish a track record of stable, law-abiding conduct, he may be able to obtain a risk level reduction in the future. At this time, however, the record does not show that the ECRC erred in assigning Risk Level 2 to Petitioner.

VI. Conclusion

Petitioner has not shown that there is a material issue of fact in dispute or that the ECRC erred in assigning a Risk Level 2 to him. Therefore, the ECRC's Motion is **GRANTED**. Petitioner's appeal of his risk level determination is **DISMISSED**, and his assignment of Risk Level 2 is **AFFIRMED**.

J. P. D.

[88] Minn. Stat. § 244.052, subd. 3(c), (d)(i).
[89] Ex. 7 at 5.
[90] Ex. 11.