OAH 22-1100-40069

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level Determination of Nathan W. C. Jones	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

This matter came on before Administrative Law Judge Administrative Law Judge Christa L. Moseng for an evidentiary hearing on August 1, 2024, remotely via Microsoft Teams.

James Austad, Assistant Attorney General, appeared on behalf of the End-of-Confinement Review Committee (ECRC). Nathan W. C. Jones (Petitioner) appeared on his own behalf and without legal counsel.

STATEMENT OF THE ISSUE

Did the ECRC err in assigning Petitioner a Risk Level 3?

SUMMARY OF CONCLUSION

Petitioner failed to show by a preponderance of the evidence that his assignment of Risk Level 3 by the ECRC is erroneous.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Petitioner is subject to the Minnesota Community Notification Act (Act) based on his 2013 conviction for second-degree criminal sexual conduct.[1]

2. The basis for Petitioner's conviction was his grabbing of an 11-year-old girl's buttocks while she was shopping in a store.[2] Store surveillance video showed a man matching Petitioner's description following the victim around the store and watching her.[3] The victim reported she could feel Petitioner's fingers going between the cheeks of her buttocks.[4] The incident occurred in 2011, when Petitioner was 29.[5]

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[1] Minn. Stat. § 243.166, subd. 1b (2024); Ex. 3 at 1 (Risk Assessment Recommendation); Ex. 4 at 123.
[2] Ex. 4 at 85.
[3] Id. at 165.
[4] *Id.* at 85–86.

3. Petitioner was placed on probation as a result of his conviction,[6] which he violated in 2016 by failing to complete outpatient sex-offence-specific treatment and then by failing to complete inpatient sex-offence-specific treatment.[7] His failure occurred after he was accused of following a young girl at a store, and, when confronted with the accusation, gave varying, inconsistent, and untrue explanations of his whereabouts at the day and time of his alleged behavior.[8] Petitioner was remanded to custody at Minnesota Correctional Facility (MCF)-St. Cloud for 36 months, with conditional release after his confinement.[9]

4. In advance of his anticipated release on October 29, 2018, an ECRC convened on August 2, 2018, and assigned Petitioner Risk Level 2.[10] It based its risk-level assignment on a Risk Assessment Recommendation that did not identify any applicable special concerns, but stated "several could be," without identifying them.[11]

5. Petitioner returned to custody of the Commissioner of Corrections in March 2024 because Petitioner again violated the conditions of his release. The violations included keeping sexually explicit material in his residence, such as videos of himself masturbating and ejaculating on his TV to images of young females.[12] Petitioner was also observed following two minor girls at the Mall of America, and admitted to seeking out young girls to secretly videotape them.[13]

6. Petitioner's criminal history includes two misdemeanor indecent exposure convictions.[14]

7. Petitioner is expected to be released from custody on September 3, 2024.[15] In preparation for Petitioner's release, Jack Rusinoff, M.A., a licensed psychologist with the Department of Corrections (DOC), prepared a risk assessment recommendation for Petitioner.[16]

8. As part of the risk assessment, Dr. Rusinoff scored the MnSOST-4 for Petitioner.[17] According to the risk assessment tool, Petitioner's predicted probability of

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[5] Ex. 4 at 123.
[6] Ex. 4 at 124.
[7] Ex. 4 at 114–116, 110.
[8] Ex. 4 at 114–116.
[9] Ex. 4 at 108.
[10] Ex. 4 at 68.
[11] Ex. 4 at 73.
[12] Ex. 4 at 23.
[13] Ex. 4 at 21.
[14] Ex. 4 at 56.
[15] Ex. 3 at 1.
[16] Risk Assessment Recommendation; Test. of Shelley Leutschaft. Dr. Leutschaft testified regarding Dr. Rusinoff's Risk Assessment Recommendation because after Dr. Rusinoff prepared the recommendation, Petitioner was transferred to the facility where Dr. Leutschaft is the treatment professional. Dr. Leutschaft was a member of the ECRC, and adopted Dr. Rusinoff's recommendation.
[17] *Id.* at 4; Ex. 3a.

sexual recidivism is 3.97% which places Petitioner in the presumptive Risk Level 2 category.[18]

9. Dr. Rusinoff noted the applicability of three special concerns to Petitioner's risk level assignment: Special Concern #1 (history of sexual reoffending after initial detection), #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 #4 (predatory offense behavior).

10. Based on Petitioner's score on the risk assessment tool, consideration of the statutory risk factors, and application of special concerns, Dr. Rusinoff recommended assigning a Risk Level 3 to Petitioner. Dr. Rusinoff concluded: "[g]iven Mr. Jones ongoing struggle with his sexual behavior, after such an extensive amount of sex offense specific treatment, his risk level assignment of Level 2 did not adequately inform the public of the risk he poses." Dr. Rusinoff gave the risk assessment recommendation to the ECRC.

11. The ECRC convened on May 13, 2024, to address Petitioner's risk level recommendation.[19] Petitioner attended the meeting and was given an opportunity to be heard by the committee prior to their vote.[20] At the conclusion of the meeting, the ECRC voted to assign Petitioner a Risk Level 3.[21]

12. On May 14, 2024, Petitioner requested an appeal of the ECRC's risk level assignment.[22]

13. On June 10, 2024, the ECRC filed a Notice and Order for Review of Risk

14. Level Assignment with the Office of Administrative Hearings.

Based on the Findings of Fact, the Judge makes the following:

CONCLUSIONS OF LAW

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 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."[23]

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

[18] Ex. 3a; Ex. 5 at 4.
[19] Ex. 2 (Risk Assessment Report).
[20] Risk Assessment Report, 1; Ex. 9 (audio recording of ECRC meeting).
[21] Risk Assessment Report, 1.
[22] Ex. 1 at 1 (Notice of Appeal).
[23] Minn. Stat. §§ 243.166, subd. 1b, 244.052, subd. 4(a) (2024).

offender's pattern of offending behavior, and to the need of community members for information to enhance their individual and collective safety."[24]

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.[25] Each risk level is associated with a different degree of community notification.[26]

4. Every predatory offender confined in a Minnesota state correctional or treatment facility must be assessed by the ECRC at the facility prior to release.[27] The ECRC is responsible for assessing the public risk posed by each predatory offender upon release and determining the appropriate risk level assignment.[28]

5. When assessing risk and assigning a risk level, the ECRC is required by law to apply the risk factors set forth in Minn. Stat. § 244.052, subd. 3(g) (2024). The six risk factors to be considered 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 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.[29] This list is not exclusive.[30]

6. In addition to the statutory risk factors, the ECRC is also required to apply a risk assessment scale when assigning a risk level to a predatory offender.[31] The score from the risk assessment tool is translated into a presumptive risk level considered by the ECRC when assigning a risk level to a predatory offender. 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.[32]

7. As part of the risk level 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."[33]

8. The Administrative Law Judge is authorized to review risk levels assigned by the ECRC.[34]

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[24] Minn. Stat. §§ 243.166, subd. 1b, 244.052, subd. 4(a).
[25] Minn. Stat. § 244.052, subd. 4(b) (2024).
[26] *Id.*
[27] *Id.*, subd. 3 (2024).
[28] *Id.*
[29] *Id.*, subd. 3(g).
[30] *Id.*
[31] *Id.*, subd. 2 (2024).
[32] Minnesota Department of Corrections Policy No. 205.220 (August 5, 2022); *see also In the Matter of the Risk Level Determination of R.B.P.*, 640 N.W.2d 351, 354 (Minn. Ct. App. 2002).
[33] Minn. Stat. § 244.052, subd. 3(f).
[34] Minn. Stat. §§ 14.50, 244.052, subd. 6 (2024).

9. The ECRC has complied with all relevant substantive and procedural requirements of rule and law for this proceeding.

10. In a risk level appeal, the offender has the burden of proving by a preponderance of the evidence that the ECRC's risk assessment determination is erroneous.[35] If the offender meets his burden, the Administrative Law Judge has the authority to make a *de novo* determination of the appropriate risk level to be assigned to the offender.[36]

11. In this case, Petitioner failed to show by a preponderance of the evidence that his assignment of Risk Level 3 by the ECRC is erroneous.

Based upon the Conclusions of Law, and for the reasons set forth in the accompanying Memorandum, the Judge makes the following:

ORDER

IT IS HEREBY ORDERED that the ECRC's assignment of a Risk Level 3 to Petitioner is **AFFIRMED**.

Dated: August 28, 2024

CHRISTA L. MOSENG
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

NOTICE

Pursuant to Minn. Stat. § 244.052, subd. 6(c) (2024), 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 (2024).

[35] Minn. Stat. § 244.052, subd. 6(b).
[36] *Id.*, subd. 6(c).

MEMORANDUM

In a risk level appeal, the offender has the burden of proving by a preponderance of the evidence that the ECRC's risk level assignment is erroneous.[37] If the offender meets this burden, the Administrative Law Judge has the authority to make a *de novo* determination of the appropriate risk level to be assigned to the offender.[38]

Petitioner objected to assignment of a Risk Level 3 because, he argues, the special concerns were incorrectly applied or already considered in the MnSOST-4 that resulted in a presumptive Risk Level 2.[39] He denies "several alleged reoffense acts," including the act that resulted in his termination from sex-offender-specific treatment. Petitioner also argues that he was "told not to read the release plan that [he] had prepared and that had many safeguards included."[40] Petitioner included his release plan as part of his appeal.[41]

A. Application of Special Concerns

First, Petitioner argues that the ECRC erroneously applied special concerns to assign him Risk Level 3. The ECRC departed from Petitioner's presumptive risk level based on three special concerns: Special Concern #1 (history of sexual reoffending after initial detection), #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 #4 (predatory offense behavior).

i. Special Concern #1: History of Sexual Reoffending After Initial Detection

Special Concern #1 cannot appropriately be applied to Petitioner. Dr. Leutschaft testified that Petitioner's misdemeanor indecent exposure convictions establish his initial detection, and his felony conviction constitutes his reoffense after initial detection. However, the DOC's policy concerning application of Special Concern #1 states: "[t]his concern applies to individuals who have two separate felony-level sexual offenses and minimal criminal histories."[42] Petitioner has one felony sex offense conviction. Notwithstanding that Petitioner offended after his misdemeanor indecent exposure convictions, DOC policy does not support applying this special concern to elevate Petitioner's risk level assignment.

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[37] Minn. Stat. § 244.052, subd. 6(b).
[38] *Id.*, subd. 6(c).
[39] Ex. 1.
[40] *Id.*
[41] Ex. 1 at 2–3.
[42] DOC Policy No. 205.220, at 7.

ii. Special Concern #2: History of Prior Supervision Failure, A Recent History of Engaging in High-Risk or Grooming-Type Behaviors, or Other Behaviors Suggesting Increased Potential to Reoffend

Special Concern #2 applies when an individual has a 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.[43] This special concern clearly applies to Petitioner's circumstances and is not accounted for in his risk-assessment-tool score and presumptive risk-level assignment.

Petitioner denies "several alleged reoffense acts," particularly the occasion in 2016 that resulted in his termination from sex-offense-specific treatment.[44] However, Petitioner was, in fact, terminated from sex-offense-specific treatment, in significant part because his account of events on the date of the alleged conduct were not credible. He was deceptive regarding his activities at the relevant time. His termination from treatment constituted a supervision failure.

Petitioner asserts that the conclusion that he was untruthful in 2016 inappropriately relies on the results of a polygraph examination.[45] But his accounts of where he was on October 1, 2016, when he was alleged to have followed an 11-year-old girl, were inconsistent, unreliable, and false—a polygraph examination was not necessary to doubt Petitioner's version of events. Petitioner's failure to complete sex-offense-specific treatment was accounted for in his MnSOST-4 score, but the ECRC did not err when it considered the circumstances of his termination from the treatment program in 2016 and concluded that those circumstances support application of Special Concern #2.

iii. Special Concern #4: Predatory offense behavior

Special Concern #4 applies when an offense includes predatory behavior, which "includes breaking into a house, stalking a victim, or abducting or attempting to abduct a victim." The ECRC did not err when it applied this Special Concern in evaluating Petitioner's risk level assignment. The ECRC could reasonably conclude from the record that the incident resulting in Petitioner's second-degree criminal sexual conduct conviction included stalking behavior. Petitioner followed his victim through a store before grabbing her buttock.[46]

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[43] Ex. 6.

[44] Ex. 1; Test. of Nathan W. C. Jones.

[45] Test. of Nathan W. C. Jones.

[46] Although there is evidence that Petitioner has engaged in similar behavior on other occasions, the special concern applies because Petitioner engaged in the behavior "during the sex-related offense." DOC Policy No. 205.220, at 8.

B. The ECRC's Risk Level Determination Was Not Erroneous

Application of one special concern can be sufficient to support an upward departure from a presumptive risk level assignment.[47] Here, two Special Concerns apply. Although Special Concern #1 does not apply to Petitioner, Petitioner has not met his burden to show that the ECRC's risk level determination was erroneous.

The ECRC reasonably assigned Petitioner a Risk Level 3 because two special concerns justify broader community notification than the presumptive risk level assignment indicated by Petitioner's MnSOST-4 results. Petitioner has a history of supervision failures and of stalking young girls—even while on supervised release and while ostensibly participating in sex-offense-specific treatment. These aspects of elevated concern are not accounted for in the MnSOST-4 and support an upward departure to Risk Level 3.

Additionally, Petitioner did not identify a mitigating factor the ECRC should have applied. Petitioner cites protective factors identified in his release plan, including that he has a support network including a fiancée. However, the specifics of Petitioner's release plan do not obviate the need for broader public notification in light of the special concerns affecting his risk level assignment.

For these reasons, the Administrative Law Judge concludes that Petitioner failed to show by a preponderance of the evidence that the ECRC erred when it assigned him a Risk Level 3.

Ideally, the protective elements of Petitioner's release plan will help him to avoid re-offending. Petitioner may request that the ECRC reassess his risk level assignment after three years have elapsed since the ECRC's meeting on May 13, 2024.[48] If the request is denied, the Petitioner may renew the request once every two years following subsequent denials.[49] Demonstrating success after his release could result in a reduction in his risk-level assignment in the future.

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[47] An ECRC has authority to consider individual circumstances not taken into account by a risk-assessment-tool score and discretion to determine an offender's appropriate risk level. *In the Matter of the Risk Level Determination of R.B.P.*, 640 N.W.2d 351, 356 (Minn. Ct. App. 2002).
[48] Minn. Stat. § 244.052, subd. 3(i).
[49] *Id.*