OAH 65-1100-40079

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Risk Level Determination of Frederick Dujuane Thompson	**ORDER ON MOTION FOR SUMMARY DISPOSITION**

This matter is pending before Administrative Law Judge Ann C. O'Reilly pursuant to a Notice and Order for Hearing filed with the Office of Administrative Hearings on June 20, 2024.

Lisa Jones, Assistant Attorney General, appears on behalf of the End-of-Confinement Review Committee (ECRC) of the Minnesota Correctional Facility at Faribault (MCF-FRB). Frederick Dujuane Thompson (Petitioner) represents himself and appears without legal counsel.

On June 26, 2024, the ECRC filed a Motion for Summary Disposition (Motion). The ECRC personally served Petitioner on July 3, 2024.[1] Petitioner did not reply to the ECRC's Motion. The record closed on July 18, 2024, the due date for Petitioner's response.[2]

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 **DENIED**.

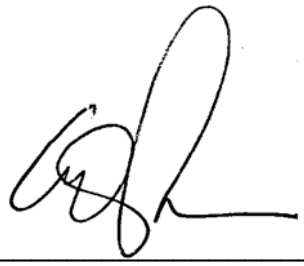
2. This matter shall proceed to an evidentiary hearing on the issue of whether the ECRC's risk level assignment is erroneous. A hearing will be scheduled in a Prehearing Order to be served under separate cover.

3. The ECRC shall provide the Office of Administrative Hearings with a current address, telephone number, and email address (if applicable) for Petitioner and continue

[1] *See* Affidavit of Personal Service (Jul. 3, 2024).
[2] *See* Minn. R. 1400.6600 (2023).

to update the OAH with any changes to Petitioner's contact information during the pendency of this case.

Dated: October 2, 2024



ANN C. O'REILLY
Administrative Law Judge

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).

MEMORANDUM

I. Introduction

Petitioner appeals the ECRC's Risk Level 3 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 its risk level assignment.

Based upon a review of the Motion and the record, the Administrative Law Judge concludes that a genuine issue of material fact exists as to whether the ECRC erred in its risk level assessment. As a result, Petitioner is entitled to an evidentiary hearing and the ECRC's Motion is **DENIED**.

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 purpose of community awareness and

[3] Minn. Stat. § 244.052 (2024).
[4] Minn. Stat. §§ 243.166-.167 (2024); 244.052.

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 offenders living, working, or found within the state.[8]

The Minnesota Community Notification Act, in turn, provides for community notification about 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 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, or upon their release from a correctional facility in another state if the offender intends to reside in Minnesota.[16]

---

[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).
[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).

Risk level assignments are made by end-of-confinement review committees 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 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

[17] Minn. Stat. § 244.052, subd. 3(b).
[18] *Id.*, subd. 3(a).
[19] *Id.*
[20] *Id.* at subds. 2, 3(d)(i).
[21] *Id.* at subd. 3(g).
[22] Exhibit (Ex.) 5 (MnSOST-4.0 Coding Rules).
[23] Department of Corrections Policy 205.220 (Aug. 5, 2022) (DOC Policy 205.220).
[24] Ex. 5 (MnSOST-4.0 Coding Rules); DOC Policy 205.220.

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 of, and date of release for, the offender; and (16) whether the offender's release is supervised or unsupervised by probation.[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]

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

[25] *See* Ex. 5 at 3 (MnSOST-4.0 Coding Rules). 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 id.* at 4.
[27] *Id.* at 8-36.
[28] *Id.*
[29] *Id*. at 4.
[30] *Id.*

	Presumptive Risk Level 1	Presumptive Risk Level 2	Presumptive Risk Level 3
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]

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

[31] DOC Policy 205.220.
[32] *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).
[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 (Special Concerns for MnSOST-4.0); Ex. 7 (Mitigating Factors for MnSOST-4.0).
[36] Ex. 3 (2023 Risk Assessment Recommendation).
[37] *See id.*

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 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 46-year-old male who is required to register as a predatory offender as a result of a 1995 juvenile delinquency adjudication and a 2019 conviction for second-degree criminal sexual conduct.[44]

In approximately 1994, Petitioner was charged with two counts of first-degree criminal sexual conduct arising out of alleged sexual contact with his sister and two female cousins.[45] According to available records, Petitioner's seven-year-old cousin reported that Petitioner (then 15 years old) touched the child's vagina with his penis, removed his pants, laid on top of her, and put his penis in her vagina three times.[46] Petitioner's five-year-old sister reported that Petitioner put his penis in her mouth and on her chest.[47]

Petitioner pleaded guilty to one count of second-degree criminal sexual conduct for the sexual assault on his cousin, and the charge involving Petitioner's sister was

[38] *See generally* Minn. Stat. § 244.052; DOC Policy 205.220; Ex. 5 (MnSOST-4.0 Coding Rules).
[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] Minn. Stat. § 243.166, subd. 3.
[43] Minn. Stat. § 244.052, subd. 3(i).
[44] Ex. 3 (Risk Assessment Recommendation).
[45] Ex. 4 at 116 (Presentence Investigation).
[46] Id.
[47] Id.

dismissed.[48] Petitioner was adjudicated delinquent, placed on probation, and ordered to complete a juvenile sex offender program.[49]

In 2017, Petitioner was charged with second-degree criminal sexual conduct.[50] According to the criminal complaint, Petitioner inappropriately groped the eight-year-old daughter of his pregnant girlfriend.[51] The child reported that Petitioner touched her underneath her clothing, over her underwear, and on her buttocks. The child considered Petitioner her stepfather.[52] Petitioner pleaded guilty to the offense and was sentenced to 120 months in prison.[53]

Petitioner has a lengthy criminal history dating back to the juvenile sex offense. The following is a summary of Petitioner's relevant adult criminal history:[54]

Conviction Date	**Offense**	**Level**
January 1995	2nd Degree Crim. Sex. Conduct	**Felony***
October 1997	5th Degree Assault	Misdemeanor*[55]
December 1997	Predatory Offender Reg. Viol.	Gross Misdemeanor
November 1998	Indecent Exposure	Misdemeanor[56]
November 1998	Predatory Offender Reg. Viol.	Misdemeanor
September 2005	Terroristic Threats	**Felony***
October 2005	Violate No Contact Order	Misdemeanor
December 2005	5th Degree Poss. Drugs	**Felony**
December 2008	Predatory Offender Reg. Viol.	**Felony**
September 2013	Possession of Pistol/Assault Weapon	**Felony**
January 2019	2nd Degree Crim. Sex. Conduct	**Felony***

*denotes violent offense

[48] Id.
[49] Id.
[50] Ex. 4 at 81-82 (Criminal Complaint).
[51] Id.
[52] Id.
[53] Ex. 4 at 76-78 (Warrant of Commitment).
[54] Ex. 4 at 30-42 (Criminal Record Report); 116 (Presentence Investigation Report).
[55] Apparently, this was continued for dismissal and dismissed November 30, 1998, but the ECRC includes no documentation of this offense.
[56] Indecent exposure at any level is deemed a "predatory offense" for purposes of scoring on the MnSOST-4.0. However, only felony level indecent exposure convictions under Minn. Stat. § 617.23, subd. 3 are deemed offenses requiring predatory offender registration under Minn. Stat. § 244.166, subd. 1b(a)(1)(iv). Thus, Petitioner's misdemeanor conviction for indecent exposure counts as a "predatory offense sentence" under the MnSOST-4.0 Coding Rules but does not require him to register as a predatory offender.

Bold denotes felony offense sentence

In addition to these convictions, which are relevant to the scoring of the MnSOST-4.0, Petitioner has numerous misdemeanor and gross misdemeanor convictions for disorderly conduct (7), theft, false name to police officer, trespassing (12), loitering (2), possession of drug paraphernalia, and contempt.[57] As well as many more dismissed cases for trespassing and disorderly conduct.[58]

With respect to Petitioner's 1998 convictions for misdemeanor indecent exposure and misdemeanor failure to register as a predatory offender, it is notable that Petitioner was originally charged with felony fifth-degree criminal sexual conduct and felony failure to register as a predatory offender.[59] However, the charges were amended to misdemeanor indecent exposure and misdemeanor failure to register as a predatory offender, and Petitioner was convicted of both of those misdemeanor offenses.[60]

According to the criminal complaint in that 1998 case, Petitioner approached a 15-year-old girl outside of her home, asked for a cigarette, began making sexual comments to her, and then exposed his penis to her.[61] The child went inside the home to get away from Petitioner, but Petitioner entered the home uninvited.[62] The child's adult sister was at home and confronted Petitioner.[63] At that point, Petitioner asked the adult female if he could perform oral sex on her or if she would perform oral sex on him.[64] The adult female was able to get Petitioner out of the home without further incident.[65]

Petitioner's 2005 felony terroristic threats conviction arose out of an altercation between Petitioner and an ex-girlfriend.[66] According to the criminal complaint, Petitioner hit the female victim and threatened to stab her with a butcher knife.[67] Petitioner was originally charged with felony second-degree assault and felony terroristic threats.[68] He

[57] Ex. 4 at 30-42 (Criminal Record Report).
[58] Id.
[59] Ex. 4 at 180-182 (Criminal Complaint).
[60] Register of Actions, Hennepin County Court File No. 27-CR-98-077547, publicly available at https://publicaccess.courts.state.mn.us/CaseSearch.
[61] Ex. 4 at 180-182 (Criminal Complaint).
[62] Id.
[63] Id.
[64] Id.
[65] Id.
[66] Ex. 4 at 175-178 (Criminal Complaint).
[67] Id.
[68] Id.

pleaded guilty to the felony terroristic threats offense and the second-degree assault charge was dismissed.[69]

The ECRC did not provide information regarding the 1997 fifth-degree assault offense or the 2005 violation of a no-contact order conviction.

In approximately 2000 or 2002, Petitioner was shot in the back, rendering him a paraplegic.[70] He is confined to a wheelchair for mobility.[71]

B. MnSOST-4.0 and Recommendation to ECRC

In preparation for Petitioner's release from prison for his most recent criminal offense (second-degree criminal sexual conduct), Shelley Leutschaft, Ph.D., L.P., a licensed psychologist and sex offender treatment professional with the DOC, prepared a risk assessment recommendation for Petitioner.[72] A memorandum dated April 29, 2024, was provided to the ECRC detailing Dr. Leutschaft's assessment and recommendation.[73]

As part of the risk assessment, Dr. Leutschaft conducted a MnSOST-4.0 on Petitioner.[74] Dr. Leutschaft scored Petitioner's MnSOST-4.0 as follows:[75]

MnSOST-4.0 Inventory Item	Score
Total Violent Offense Sentences	4
Felony Offense Sentences	8
Offenses for Harassment, Stalking, VOFP/No Contact	1
Predatory Offense Sentences	3
Number of Stranger Victims (0 = No; 1 = Yes)	1
Male Victims (0 = No; 1 = Yes)	0
Whether sex offenses occurred in public places (0 = No; 1 = Yes)	1

[69] Register of Actions, St. Louis County District Court File No. 69-K4-5-600018, publicly available at https://publicaccess.courts.state.mn.us/CaseSearch.
[70] Ex. 4 at 124, 154, 169, 170.
[71] *Id.*
[72] Ex. 3 (Risk Assessment Recommendation Apr. 2024); Ex. 8 (Leutschaft Curriculum Vitae).
[73] Ex. 3 (Risk Assessment Recommendation Apr. 2024).
[74] Ex. 3a (MnSOST-4.0 Scoring Sheet).
[75] *Id.*

MnSOST-4.0 Inventory Item	Score
Victims in multiple age groups (0 = No; 1 = Yes)	1
History of suicidal concerns (0 = No; 1 = Yes)	0
History of stable employment (0 = No; 1 = Yes)	1
Married (0 = No; 1 = Yes)	0
Obtained a post-secondary degree (0 = No; 1 = Yes)	0
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	46
Unsupervised Release (0= No; 1 = Yes)	0

Petitioner's score on the MnSOST-4.0, as scored by Dr. Leutschaft, predicted a probability of sexual recidivism of 4.37 percent within four years, placing him in the 88th percentile of sexual offenders for risk of re-offense.[76] This score placed Petitioner in the presumptive Risk Level 3 category.[77]

Dr. Leutschaft did not apply any special concerns or mitigating factors.[78]

In describing Petitioner's criminal history, Dr. Leutschaft erroneously stated in her report that Petitioner's juvenile sex offense adjudication was "for the repeated sexual assault of his minor-aged sister," when the charges against Petitioner involving his sister were dismissed.[79]

Dr. Leutschaft also erred by stating that Petitioner's 1998 convictions for indecent exposure and predatory offender registration violation were adult felony sentences.[80] A

[76] *Id.*
[77] Ex. 5 at 4 (MnSOST-4.0 Coding Rules).
[78] Ex. 3 (Risk Assessment Recommendation, Apr. 2024).
[79] *Id.*
[80] *Id.*

review of Petitioner's criminal history indicates that these were misdemeanor offenses and sentences.[81]

Based upon Dr. Leutschaft's scoring of the MnSOST-4.0 and her analysis of the statutory risk factors, Dr. Leutschaft recommended that the ECRC assign Petitioner to Risk Level 3, the presumptive risk level indicated by Dr. Leutschaft's scoring of the MnSOST-4.0.[82]

C. ECRC Meeting and Petitioner's Appeal

The ECRC convened on May 13, 2024, to address Petitioner's risk level assignment.[83] Petitioner appeared at the meeting and had the opportunity to be heard.[84] Petitioner spoke for nearly an hour.[85] He first explained that the indecent exposure offense involved an ex-girlfriend, not a stranger minor female, as set forth in the criminal complaint.[86] Accordingly, Petitioner disputes the score he received on the "stranger victims" factor on the MnSOST-4.0.

Next, Petitioner questioned where Dr. Leutschaft obtained her information about Petitioner's criminal history, claiming that many of the facts and convictions Dr. Leutschaft noted in her report were incorrect.[87] Petitioner asserted that his juvenile sex offense should not be "held against him," because he was young and did not understand that he was pleading guilty to a criminal offense and how it would affect his adult life.[88]

Petitioner specifically disputed the facts of the juvenile sex offense, as described by Dr. Leutschaft in her report and recommendation.[89] Petitioner clarified that while he was initially charged with first-degree criminal sexual conduct, involving alleged sexual abuse of his younger sister, that charge was ultimately dismissed.[90] Instead, Petitioner pleaded guilty to a second-degree criminal sexual conduct offense involving his younger female cousin.[91] Petitioner denies that he offended against his sister, and blames his

---

[81] *See* Register of Actions, Hennepin County District Court File No. 27-CR-98-077547, publicly available at https://publicaccess.courts.state.mn.us/CaseSearch.
[82] *Id.*
[83] Ex. 2 (ECRC Risk Assessment Report).
[84] Ex. 9 (audio recording of ECRC meeting).
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*

stepfather for convincing his mother that Petitioner committed acts against his female relatives.[92]

Learning that Petitioner's juvenile conviction did not involve Petitioner's sister as the victim, Dr. Leutschaft agreed to amend her Risk Level Recommendation Memorandum to correct the facts.[93]

Petitioner also disputed his adult second-degree criminal sexual conduct conviction in 2019 involving the 8-year-old child of his ex-girlfriend.[94] Petitioner asserts that the ex-girlfriend was pressured by child protection to make false claims against Petitioner and that she was upset with Petitioner for removing her as his personal care attendant (PCA), a job that she was being paid to perform.[95] Petitioner noted that the charges involving the 8-year-old child were initially dismissed and then re-charged several months later.[96] Petitioner claims that he did not plead guilty to the second-degree criminal sexual conduct charge, but rather, that he missed a court date, was taken into custody on a warrant, and received credit for time served on the sex charge.[97]

Finally, Petitioner asserts that the committee should have considered the fact he has been confined to a wheelchair for the last 24 years and remains disabled.[98] Petitioner asserts that his "penis hasn't worked in 14 years."[99] Consequently, Petitioner asserts that the ECRC should have applied Mitigating Factor #2 (inhibiting or incapacitating physical illness or condition) and statutory risk factor #6 (physical condition that minimizes the risk of re-offense).

At the conclusion of the meeting, the ECRC voted by unanimous decision to assign Petitioner a Risk Level 3.[100] The committee based its decision on risk level recommendation made by Dr. Leutschaft and the presumptive risk level indicated by Petitioner's score on the MnSOST-4.0.[101] The ECRC did not apply any special concerns or mitigating factors.[102]

After the meeting, Dr. Leutschaft amended her Risk Level Assessment Recommendation Memorandum to clarify that Petitioner was charged as a juvenile with

---

[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id*
[97] *Id.*
[98] *Id.*
[99] Ex. 9 (audio recording of ECRC meeting).
[100] Ex. 2 (ECRC Risk Assessment Report).
[101] *Id.*
[102] *Id.*

first-degree criminal sexual conduct involving his sister, but that the charges were dismissed.[103]

On May 17, 2024, Petitioner served a timely Notice of Appeal and this contested case ensued.[104] The ECRC subsequently filed their Motion for Summary Disposition on June 26, 2024.

IV. Summary Disposition Standard of Review

Summary disposition is the administrative law equivalent of summary judgment.[105] A motion for summary disposition may 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.[106] 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.[107]

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.[108] In other words, 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.[109]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[110] A fact is material if its resolution will affect the outcome of the case.[111] 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.[112] A genuine issue is not a "sham or frivolous" one, and it cannot rely on mere allegations or denials.[113] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[114]

---

[103] Ex. 3 (Amended Risk Assessment Recommendation, May 13, 2024).
[104] Ex. 1 (Notice of Appeal).
[105] *Pietsch v. Minn. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2023).
[106] *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).
[107] Minn. R. 1400.6600 (2023).
[108] *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[109] *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[110] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[111] *O'Malley v. Ulland Bros*., 549 N.W.2d 889, 892 (Minn. 1996).
[112] *Thiele,* 425 N.W.2d at 583.
[113] *Highland Chateau, Inc. v. Minn. Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).
[114] *See* Minn. R. Civ. P. 56.05.

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[115] Thus, summary disposition is only proper when no factual issues need to be resolved.[116]

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 affirming the Risk Level 3 assignment.[117] The ECRC further asserts that Petitioner's MNSOST-4 score is supported by the records and that the risk level assigned by the committee is appropriate.[118]

Because Petitioner did not respond to the ECRC's Motion, Petitioner's arguments are taken from his Notice of Appeal and his statements at the ECRC meeting. Petitioner's arguments are summarized as follows: (1) Dr. Leutschaft erred in the scoring of the MnSOST-4.0; (2) the ECRC failed to consider mitigating factors related to Petitioner's physical disabilities; (3) Petitioner's sexual offenses are old and should not be considered; (4) Dr. Leutschaft erred by describing Petitioner's juvenile sex offense adjudication as involving his sister as a victim; and (5) he was denied a trial on the most recent offense for which he is serving prison time (2019 second-degree criminal sexual conduct offense).[119] The Judge will address each of these arguments by grouping them into applicable categories.

A. Scoring of MnSOST-4.0 and Criminal History Discrepancies

Petitioner's arguments and the records submitted by the ECRC present three issues indicating that Dr. Leutschaft may have erred in the scoring of the MnSOST-4.0: (1) counting Petitioner's 1998 convictions for indecent exposure and predatory offender registration violation as felony offense sentences; (2) counting the 1997 fifth-degree assault charge as a violent offense sentence; and (3) counting the indecent exposure offense as involving a stranger victim. Because the evidence in the record submitted by the ECRC is lacking, and because there is a genuine issue of material fact as to whether Dr. Leutschaft erred in her scoring of the MnSOST-4.0, summary disposition must be **DENIED.**

The ECRC failed to include sufficient documents in the record to determine the level of Petitioner's 1998 convictions for indecent exposure and predatory offender registration violation. Dr. Leutschaft deems them both as felony sentences. However, the criminal history summary prepared by the DOC identifies the registration offense as a

---

[115] *Sauter*, 70 N.W.2d at 353.
[116] *Id*.
[117] Memo. In Support of ECRC's Motion for Summary Disposition, at 6.
[118] *Id.*
[119] Ex. 1 (Petitioner's Notice of Appeal); Ex. 9 (audio recording of ECRC meeting).

misdemeanor and the criminal complaint identifies the indecent exposure as a misdemeanor. Similarly, the Register of Actions documents that Petitioner received misdemeanor sentences on both offenses. Because there is a dispute of material fact, an evidentiary hearing is required to determine if Dr. Leutschaft erroneously scored the MnSOST-4.0, upon which the ECRC relied in reaching its decision. On this basis alone, the ECRC's Motion must be **DENIED.**

With respect to the 1997 fifth-degree assault offense, Dr. Leutschaft counts this as a violent offense sentence. However, the DOC's criminal history summary notes that this charge was dismissed. The ECRC presents no documentation to show whether Petitioner was convicted and sentenced on this offense, other than Dr. Leutschaft's conclusion that the case was "continued for dismissal." Accordingly, a genuine issue of material facts exists as to whether Dr. Leutschaft erred in scoring the number of violent offense sentences in the MnSOST-4.0.

At the ECRC meeting, Petitioner asserted that the victim in the indecent exposure offense was his ex-girlfriend and not a stranger. As a result, Petitioner claims that Dr. Leutschaft erred by scoring the "stranger victims" factor on the MnSOST-4.0. Because Petitioner has presented a genuine issue of material fact, this matter can also proceed to an evidentiary hearing.

Finally, the ECRC presented no direct documentation or evidence of Petitioner's juvenile adjudication for second-degree criminal sexual conduct. Instead, Dr. Leutschaft appears to rely on statements in a 2013 presentence investigation (PSI) for a firearms conviction. Dr. Leutschaft then erred in her report by stating that Petitioner's sister was the victim in that offense – a fact that is expressly contradicted by the same PSI upon which Dr. Leutschaft appeared to rely. While Dr. Leutschaft later amended her report to correct her mistakes, that correction did not occur until after the ECRC rendered its decision. Accordingly, Petitioner is entitled to an evidentiary hearing on this issue as well.

B. Application of Mitigating Factors

At the ECRC meeting, Petitioner explained that he is confined to a wheelchair due to a traumatic injury and that his "penis hasn't worked in 14 years." Put differently, Petitioner asserts that his physical condition decreases his ability to sexually re-offend. While impotent men may still offend sexually, Petitioner's medical condition does present a dispute of fact as to whether the ECRC properly considered a mitigating factor.

The mitigating factors that can be considered as part of the MnSOST-4.0 include Mitigating Factor #2: inhibiting or incapacitating physical illness or condition. In addition, the statutory risk factors set forth in Minn. Stat. § 244.052, subd. 3(g), specifically require an ECRC to consider whether the offender has a physical condition that would minimize a risk of reoffence.

Here, Dr. Leutschaft's report and recommendation notes that Petitioner is a paraplegic has been confined to a wheelchair since suffering a gunshot wound in 2000 or 2002. Dr. Leutschaft notes, however, that Petitioner sexually reoffended in 2016, many years after his back injury.

Petitioner has presented evidence that, in addition to his mobility issues, he suffers from impotence, which reduces his sexual drive. Because Petitioner offered this information at the ECRC meeting, and because there is no evidence in the record that the ECRC considered any mitigating factors in reaching its decision, there is a genuine issue of material fact as to whether the ECRC erred in its risk level assignment.

C. Petitioner's Other Arguments

Petitioner's final arguments are that the ECRC erred in relying upon sex offenses from many years ago and an offense for which he never received a criminal trial. Both of these arguments fail.

First, the ECRC is legally able to consider Petitioner's juvenile second-degree criminal sexual conduct adjudication, as it is an offense for which predatory offender registration is required and it is a significant factor in Petitioner's risk level assessment. Predatory offenses committed by juveniles can be subject to predatory offender registration requirements and are relevant to any risk level assessment. In addition, the fact that the indecent exposure offense occurred in 1998 does not negate its relevance - it is still a sexually-related offense contributing to risk. Finally, Petitioner was most recently incarcerated for the 2019 conviction of second-degree criminal sexual conduct. Thus, Petitioner's predatory offense history is not old, but rather, spanning over the course of 30 years.

Second, Petitioner is correct that he did not receive a trial on his 2019 second-degree criminal sexual conduct offense. Records indicate that he pleaded guilty to the charge in 2018, absconded after his plea, was picked up on a warrant, and was sentenced in 2019. Regardless of why Petitioner decided to plead guilty, he remains convicted for that offense and the ECRC did not err in considering this predatory offense conviction for which Petitioner remains subject to registration.

VI. Conclusion

Because there is a genuine issue of material fact as to whether the ECRC erred in its risk level assessment, the ECRC's Motion for Summary Disposition is **DENIED.** Petitioner's appeal shall proceed to an evidentiary hearing. As set forth in Minn. Stat. § 244.052, subd. 6(b), at the hearing, Petitioner carries the burden of proof to show, by a preponderance of the evidence, that the ECRC's risk level determination was erroneous. If Petitioner is successful in establishing that the ECRC erred, then the Administrative Law Judge will consider the evidence and determine the risk level assignment *de novo*, meaning "anew."

A. C. O.