CAH 21-1100-40805

STATE OF MINNESOTA
COURT OF ADMINISTRATIVE HEARINGS

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| In the Matter of the Risk Level Determination of Jeffery Thomas Fossum | **ORDER DENYING MOTION TO DISMISS** |

This matter is pending before Administrative Law Judge Kimberly Middendorf pursuant to a Notice and Order for Hearing filed with the Court of Administrative Hearings on May 5, 2025.

Angela Helseth Kiese, Assistant Attorney General, appears on behalf of the Minnesota Department of Corrections' (DOC) End-of-Confinement Review Committee (ECRC). Jeffery Thomas Fossum (Petitioner) represents himself and appears without legal counsel.

On May 7, 2025, the ECRC filed a Motion to Dismiss the Risk Level Appeal as Moot (Motion).[1] The ECRC personally served Petitioner on May 15, 2025.[2] Petitioner did not reply to the ECRC's Motion. The record closed on May 29, 2025, the due date for Petitioner's response.[3]

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

**ORDER**

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

2. A prehearing conference is scheduled for **September 8, 2025**, at **10:00 a.m**. At that time, the parties are directed to call **(651) 395-7448** and, when prompted, enter conference code **632 122 197#**.

3. Pursuant to Minn. R. 1400.6000, the judge, where authorized, may dispose of a contested case adverse to a party which defaults. Upon default, the allegations of or the issues set out in the notice of and order for hearing or other pleading may be taken as true or deemed proved without further evidence. A default occurs when a party fails to appear without the prior consent of the judge at a prehearing conference, settlement

[1] ECRC's Motion to Dismiss as Moot (May 7, 2025) (Motion).
[2] *See* Affidavit of Personal Service (May 15, 2025).
[3] *See* Minn. R. 1400.6600 (2025).

conference, or a hearing or fails to comply with any interlocutory orders of the judge. If the Petitioner defaults, the ECRC's risk level assignment may be upheld.

Dated: August 12, 2025

KIMBERLY MIDDENDORF
Administrative Law Judge

## MEMORANDUM

## I. Introduction

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 public safety: the Minnesota Predatory Offender Registration Act, and the 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] Registration seeks to ensure that law enforcement can locate offenders living, working, or found within the state.[7]

The Minnesota Community Notification Act, in turn, provides for community notification about predatory offenders who are registered in the state of Minnesota.[8] 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 . . . ."[9] 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."[10]

[4] Minn. Stat. §§ 243.166-.167; 244.052 (2024).
[5] *Id*.
[6] Minn. Stat. § 243.166, subd. 1b(a).
[7] *See generally* Minn. Stat. § 243.166.
[8] Minn. Stat. § 244.052.
[9] Minn. Stat. § 244.052, subd. 4(a).
[10] Minn. Stat. §§ 244.052, subd. 4(a), 243.166, subd. 1b.

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.[11] Each risk level is associated with a different degree of community notification.[12] Risk Level 3 is the highest risk level and requires the broadest degree of notification.[13] In contrast, Risk Level 1 is the lowest risk level and provides for the least extensive degree of notification.[14]

Risk level assignments are made by ECRCs composed of five individuals with varied sex offender experience.[15] ECRCs are established by the DOC at each state correctional facility or state treatment facility where predatory offenders are confined.[16] 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.[17]

To assist an ECRC in assigning risk level, a report is prepared by a psychologist, which takes into account a broad range of relevant information – including application of objective risk-assessment tools such as the MnSOST-4.0.[18] The final 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 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.[19]

The ECRC must convene a meeting before assigning a risk level to an offender. Minn. Stat. § 244.052, subd. 3(d)(i) provides:

> [. . .] the commissioner of corrections shall convene the appropriate end-of-confinement review committee for the purpose of assessing the risk presented by the offender and determining the risk level to which the offender shall be assigned under paragraph (e). The offender and the law enforcement agency that was responsible for the charge resulting in confinement shall be notified of the time and place of the committee's meeting. **The offender has a right to be present and be heard at the meeting** (emphasis added).

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[11] Minn. Stat. § 244.052, subd. 4(a).
[12] Minn. Stat. § 244.052, subd. 3(e).
[13] *Id.*
[14] *Id.*
[15] Minn. Stat. § 244.052, subd. 3(b).
[16] *Id.*, subd. 3(a).
[17] *Id.*
[18] *See, e.g.* Motion at Ex. 3 (2025 Risk Assessment Recommendation) (details and background regarding the MnSOST-4 are beyond the scope of this order).
[19] *See id.*

Petitioner is a 36-year-old male who is subject to community notification requirements as a predatory offender.[20] Petitioner was released from Minnesota Correctional Facilities – Rush City on May 22, 2025.[21] Because Petitioner's convictions constitute predatory offenses, he is required to register and is subject to the Minnesota Community Notification Act.

Petitioner did not waive his right to be present and heard at the meeting the ECRC convened on February 27, 2025, to assign Petitioner a risk level.[22] However, the DOC did not call Petitioner down for the meeting.[23] The Risk Assessment Report, signed by the Committee Chair Erik Rasmussen, states that "Mr. Fossum elected not to appear before the committee and the signed waiver is on file."[24] The ECRC unanimously assigned Petitioner to Risk Level 3.[25]

On March 7, 2025, Petitioner requested an administrative review of the initial risk assignment.[26] Petitioner did not identify the DOC's failure to make him available for the ECRC meeting among the grounds for his appeal.[27] ECRC staff, however, subsequently "realized that [Petitioner] may not have been called down for his ECRC meeting," and scheduled a second risk level assignment meeting for March 27, 2024.[28] Petitioner was present for this second meeting, where he was again assigned Risk Level 3 by the ECRC, based on the same assessment and recommendation prepared for the February 27, 2025 meeting.[29] According to the ECRC, Petitioner did not submit a second request for review.[30]

On May 5, 2025, the ECRC commenced this contested case.[31] The ECRC moved to dismiss the contested case as moot. According to the ECRC, Petitioner was required to appeal a second time following the ECRC's correction of its clear violation of Petitioner's statutory rights by failing to make Petitioner available for the meeting on February 27, 2025.[32]

The Minnesota Supreme Court has explained that "mootness can be described as the doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence

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[20] Memorandum in Support of the ECRC's Motion to Dismiss Risk Level Appeal as Moot (ECRC Mem.) at 1 (May 30, 2025).
[21] Motion at Exhibit (Ex.) 1.
[22] Ex. 3 at 1.
[23] *See* ECRC Mem.
[24] No such waiver has been submitted with the Motion, nor has any affidavit been offered to attest to the ECRC's version of events.
[25] Ex. 2 at 3.
[26] Ex. 1.
[27] *Id.*
[28] ECRC Mem. at 1.
[29] ECRC Mem. at 1.
[30] *See* ECRC Mem.
[31] Notice and Order for Hearing (May 5, 2025).
[32] *See* ECRC Mem.

(mootness)."[33] Claims are dismissed as moot "when a decision on the merits is no longer necessary or an award of effective relief is no longer possible."[34]

The ECRC argues that once it completed its second Risk Level Assignment on March 27, 2025, the first assignment was "no longer valid" and thus effectively unappealable, as no "effectual relief" can be granted by a court.[35] No authority is cited to support the ECRC's position that its actions constitute a second assessment or nullify Petitioner's appeal as a matter of law.

The ECRC's claims that it can effectively deny an offender his right to challenge a risk level assignment in this fashion are not persuasive. The ECRC's attempt to correct its oversight as it did here does not constitute a new risk level assessment or create an obligation for an offender to appeal again. As the ECRC has done one assessment, only one appeal is necessary. The ECRC should be cautious about placing this kind of obstacle between offenders and the minimal due process afforded them under the statutory scheme.

The better question posed by these circumstances is whether the ECRC has authority to undertake a second risk level assignment once the offender has invoked his right to a review. An agency's express authority depends on "whether the relevant statute unambiguously grants authority for an administrative agency to act in the manner at issue."[36] "While express statutory authority need not be given a cramped reading, any enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature."[37] Importantly, silence in statutory language alone is not enough to establish implied authority.[38] The fact that an action would be *useful* to an agency is similarly insufficient.[39] Finally, if an agency "acts outside the bounds of its statutory authority, its action is generally void."[40]

The statute establishing an ECRC's legal obligations following an offender's request for review states:

> Upon receiving the request for administrative review, the chair shall notify: (1) the offender; (2) the victim or victims of the offender's offense who have requested disclosure or their designee; (3) the law enforcement agency that investigated the offender's crime of conviction or, where relevant, the law

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[33] *Kahn v. Griffin* 701 N.W.2d 815, 821 (Minn. 2005) (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)).
[34] *State ex rel. Ford v. Schnell*, 933 N.W.2d 393, 401 (Minn. 2019).
[35] ECRC Mem. at 2.
[36] *In re Hubbard*, 778 N.W.2d 313, 320 (Minn. 2010).
[37] *Minnegasco, a Div. of NorAm Energy Corp. v. Minnesota Public Utilities Com'n*, 549 N.W.2d 904, 907 (Minn. 1996).
[38] *See In re Qwest's Wholesalle Service Quality Standards*, 702 N.W.2d 246 (Minn. 2005).
[39] *Hibbing Taconite Co. v. Minnesota Dep't of Nat. Res.*, 17 N.W.3d 160, 169 (Minn. Ct. App. 2025) (citing *Minnegasco v. Minn. Pub. Utils. Comm'n*, 369 N.W.2d 530, 535 (Minn. 1985)).
[40] *Minnesota Internship Ctr. v. Minnesota Dep't of Educ.*, 996 N.W.2d 34, 47 (Minn. Ct. App. 2023), review granted (Jan. 31, 2024), aff'd, 10 N.W.3d 178 (Minn. 2024).

> enforcement agency having primary jurisdiction where the offender was committed; (4) the law enforcement agency having jurisdiction where the offender expects to reside, providing that the release plan has been approved by the hearings and release unit of the Department of Corrections; and (5) any other individuals the chair may select. The notice shall state the time and place of the hearing.

Upon receipt of an offender's appeal, the legislature's charge to the ECRC is clear – commence a contested case hearing. Nothing in the statute expressly authorizes the ECRC's attempt to correct its error instead. While an agency may have some implied authority to mitigate its denial of due process, it would be a plainly unjust result to conclude that the ECRC's efforts moot an offender's appeal. This is particularly true where, as here, the denial of the right to be present and heard at the meeting is not among the Petitioner's stated grounds for appeal. The ECRC's action is likely void and Petitioner's appeal is not moot.

For these reasons, the Motion is denied and this matter will proceed to a prehearing conference.

**K. J. M.**