NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-578

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 17938

vs.

SEX OFFENDER REGISTRY BOARD.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A judge in the Superior Court granted the Sex Offender Registry Board (SORB) judgment on the pleadings and affirmed the final classification of John Doe as a level two sex offender. On appeal, Doe argues that the SORB hearing examiner (1) abused his discretion in rejecting Doe's uncontradicted expert testimony; (2) erred in finding that SORB's classification determination was supported by substantial evidence; and (3) erred, abused his discretion, and violated Doe's due process right to fair classification in failing to make subsidiary findings explaining why Internet access to Doe's information was in the interests of public safety. We affirm.

Background. Doe's obligation to register as a sex offender was a consequence of his 2002 guilty pleas to three counts of

indecent assault and battery on a person fourteen years of age or older.[1] G. L. c. 6, § 178C.

In response to Doe's challenge to SORB's preliminary level three classification determination in his case, see G. L. c. 6, § 178L (1), SORB held an evidentiary hearing to determine Doe's final classification. See G. L. c. 6, § 178L (1) (a). At the hearing, both SORB and Doe introduced documentary evidence. Additionally, in support of his argument for a level one classification, Doe offered an expert witness, Dr. Angela Johnson, a clinical and forensic psychologist, who opined that Doe was at a "very low" risk to reoffend, Doe was not then dangerous, and public dissemination of his registry information was unwarranted.[2] See G. L. c. 6, § 178D.

After the hearing, and in a memorandum documenting his reasoning, the hearing examiner classified Doe as a level two sex offender. Doe sought judicial review of that decision, see G. L. c. 30A, § 14, and a Superior Court judge affirmed SORB's classification. This appeal followed.

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[1] At the same time, Doe also pleaded guilty to related charges of burglary, assault and battery by means of a dangerous weapon, and assault and battery. The longest of the concurrent sentences imposed in connection with these pleas was sixteen to eighteen years on the burglary charge. Additionally, Doe is subject to a ten-year probationary period from and after the committed sentences.

[2] SORB did not offer its own expert opinion.

Discussion. 1. Hearing standards. In order to support a level two sex offender classification, SORB bears the burden of showing, by clear and convincing evidence, see Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 473 Mass. 297, 300 (2015), "that the risk of reoffense is moderate and the degree of dangerousness posed to the public is such that a public safety interest is served by public availability of registration information." Doe, Sex Offender Registry Bd. No. 496501 v. Sex Offender Registry Bd., 482 Mass. 643, 646 (2019) (Doe No. 496501), quoting G. L. c. 6, § 178K (2) (b). In making that determination, SORB is required to consider a nonexhaustive list of twelve statutory factors, see G. L. c. 6, § 178K (1) (a)-(l), as well as any other information "useful" to its determinations of risk and dangerousness. G. L. c. 6, § 178L (1). See Doe, Sex Offender Registry Bd. No. 68549 v. Sex Offender Registry Bd., 470 Mass. 102, 105 (2014) (Doe No. 68549). SORB's guidelines govern the application of each statutory factor, setting out thirty-eight relevant aggravating and mitigating considerations. See Doe, Sex Offender Registry Bd. No. 23656 v. Sex Offender Registry Bd., 483 Mass. 131, 134 (2019) (Doe No. 23656), citing 803 Code Mass. Regs. § 1.33 (2016). SORB is required to make express findings as to each of

the three required elements of risk, dangerousness, and Internet dissemination.[3] See Doe No. 496501, supra at 656-657.

2. Standard of review. "A reviewing court may set aside or modify SORB's classification decision where it determines that the decision . . . violates constitutional provisions, is based on an error of law, or is not supported by substantial evidence. See G. L. c. 30A, § 14 (7) (listing these and other reasons for vacating decision of agency). In reviewing SORB's decisions, we 'give due weight to the experience, technical competence, and specialized knowledge of the agency.'" Doe No. 496501, 482 Mass. at 649, quoting Doe, Sex Offender Registry Bd. No. 205614 v. Sex Offender Registry Bd., 466 Mass. 594, 602 (2013). "We review a judge's consideration of an agency decision de novo." Doe, Sex Offender Registry Bd. No. 523391 v. Sex Offender Registry Bd., 95 Mass. App. Ct. 85, 89 (2019).

3. Classification determination. a. Doe's expert opinion. The hearing examiner was not required to accept Johnson's opinion on Doe's risk of reoffense, dangerousness, or on the benefit to the public or to Doe of requiring Internet dissemination of Doe's registry information, see Doe No. 68549, 470 Mass. at 112, and did not abuse his discretion in rejecting

[3] Although, as we discuss infra, the requirement that the examiner make express findings concerning Internet publication is prospective as it applies to this case. See Doe No. 496501, 482 Mass. at 657.

it. The hearing examiner did not, as Doe suggests, ignore Johnson's low risk assessment, nor did the hearing examiner fail to explain adequately his reasons for reaching a different conclusion. In his memorandum, the examiner explicitly took into account both the expert's opinion and the key factors highlighted within it, including the consideration at the heart of Johnson's opinion: Doe's age at the time of offense and at the time of classification. See 803 Code Mass. Regs. § 1.33(30)(a) (2016) (advanced age is mitigating factor for adult male offenders, but alone "does not outweigh other risk-elevating factors present in an individual offender"). The basis of the hearing examiner's deviation from Johnson's opinions is expressly documented in his report, despite the inartful wording of his summary of those reasons:[4] his memorandum clearly explains where and why his assessment of the evidence differed from Johnson's analysis.

In particular, we note that the hearing examiner applied four factors that Johnson either explicitly declined to apply or appears not to have applied in reaching her opinion,[5] and gave

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[4] Although the hearing examiner said he "part[ed] ways" with Johnson's low risk opinion as a result of his consideration of "the high-risk and risk-elevating factors of [Doe's] case," it is clear from his memorandum that he did not apply any of the statutory high risk factors in Doe's case. See G. L. c. 6, § 178K (1) (a).

[5] Factor eight: weapon, violence, or infliction of bodily injury; factor ten: contact with criminal justice system;

greater weight than Johnson gave to a fifth factor.[6] Doe No. 23656, 483 Mass. at 137 ("Doe is not entitled to a guarantee that SORB will reach the same conclusion as his expert; he is entitled only to careful consideration of his expert's testimony"). The hearing examiner acted within his discretion in making these determinations. See Doe No. 68549, 470 Mass. at 109-110 ("A hearing examiner has discretion . . . to consider which statutory and regulatory factors are applicable and how much weight to ascribe to each factor").

b. Risk of reoffense and dangerousness. The hearing examiner found that, although incarcerated for the sixteen years preceding the classification hearing, Doe had a lengthy criminal history including multiple convictions over many years of crimes of violence and breaking and entering, and a history of noncompliance with conditions both in and outside of prison. The hearing examiner also considered that the index crime involved his breaking into a neighboring apartment through the window at night; beating the victim and leaving her with visible injuries; sexually assaulting her by fondling her breasts, putting his tongue in her mouth and vagina, and licking her anus; and then instructing his girlfriend to provide him with a

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factor eleven: violence unrelated to sexual assaults; and factor thirty-eight: victim impact statement.

[6] Factor nine: alcohol and substance abuse.

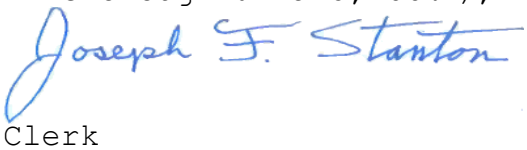
false alibi. This was "such evidence as a reasonable mind might accept as adequate to support [the] conclusion," Doe, Sex Offender Registry Bd. No. 3839 v. Sex Offender Registry Bd., 472 Mass. 492, 498 (2015), quoting G. L. c. 30A, § 1 (6), that Doe presented a moderate risk of reoffense, see Doe No. 496501, 482 Mass. at 651 (offender's past conduct informs SORB's assessment of future risk); 803 Code Mass. Regs. § 1.33(7)(a)(2) (2016) (fact that victim is "[e]xtrafamilial" is "empirically related to an increased risk of reoffense"), and danger, dictating classification as a level two sex offender. See G. L. c. 6, § 178K (2) (b); Doe No. 68549, 470 Mass. at 110 (level of physical contact between offender and victim during sex offense an "important element" in determining dangerousness). Cf. Doe No. 496501, supra at 660 (offenders whose "noncontact offenses . . . do not put a victim in fear of bodily harm by reason of a contact sex offense" unlikely to qualify as level two sex offenders).

4. Internet dissemination. Doe's level two classification implicitly includes a finding, by clear and convincing evidence, that a public safety interest would be served by Internet publication of Doe's registry information. See Doe No. 496501, 482 Mass. at 656. The hearing examiner's findings of the facts on the index offense, discussed supra, provide substantial evidence supporting the examiner's implicit conclusion that

Internet publication is required. Cf. id. at 662 (finding absence of substantial evidence to support Internet publication where SORB determination rested on publication's effect of causing offender's neighbors to be "more modest in [their homes]," preventing repetition of offender's exhibitionism). Acknowledging that in Doe No. 496501, the Supreme Judicial Court held that level two and three classifications must be accompanied by express findings on each of the three required elements of risk, danger, and Internet dissemination, see id. at 657, we note that the holding was explicitly prospective.[7] Id. In light of our conclusion that, in this case, the hearing examiner's memorandum supported his implicit finding that public safety would be served by Internet publication of Doe's registry information, we decline to exercise our discretion to remand the case to the hearing examiner for express findings on this element. See id.

Judgment affirmed.

By the Court (Blake, McDonough & Hand, JJ.[8]),



Clerk

Entered: November 27, 2019.

[7] This appeal was pending in July 2019, when Doe No. 496501 was decided.

[8] The panelists are listed in order of seniority.