

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-1596

PHILIP POE, SEX OFFENDER REGISTRY BOARD NO. 2883

vs.

SEX OFFENDER REGISTRY BOARD

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff (Poe) appeals from a Superior Court judgment upholding his classification as a level two sex offender. Poe argues that (1) the evidence was insufficient to support his level two classification; (2) the Sex Offender Registry Board (SORB) hearing examiner (examiner) improperly disregarded the testimony of Poe's expert witness; and (3) the examiner erroneously concluded that Poe had refused sex offender treatment. We affirm.

Background. Poe committed his first sex offense in 1988, at the age of thirty-one. After drinking heavily while on a family camping trip, Poe touched the breast of his eleven year old daughter underneath her shirt. In 1990, Poe was convicted of one count of indecent assault and battery on a child under

fourteen. In addition to prison time, Poe's sentence included mandatory "alcohol evaluation and treatment."

In 2010, Poe was convicted of a second sex offense stemming from incidents occurring in 1998, which also involved a young child in his family. Poe was accused of exposing himself to the five or six year old daughter of his girlfriend, whom Poe lived with, and of forcing her to touch his penis. Poe was forty-two years old at the time of the 1998 incidents. These incidents were not reported for many years, during which Poe apparently continued living with the girlfriend and the child without engaging in further sexual misconduct. In 2010, Poe was convicted of one count of indecent assault and battery on a child under fourteen for one of the incidents, and acquitted of a second count. Alcohol evaluation and sobriety were conditions of his probation sentence.

In addition to the two sex offenses, Poe also has a sizable criminal record, including several offenses involving violence. Between 1974 and 2013, Poe faced approximately 130 criminal charges, several of which related to assault. These charges resulted in various dispositions, including both convictions and acquittals. As recently as 2013 Poe was charged with assault with a dangerous weapon and resisting arrest. While the 2013 charges were ultimately dismissed, the charges led to a finding that Poe had violated his probation for the 2010 sex offense

conviction, and he was incarcerated for six months. Relatedly, Poe has been the subject of seven abuse prevention orders granted to six different women for violent and abusive conduct.

Since Poe's release from prison in early 2014 he has lived with and cared for his eighty-five year old mother while working at times as a carpenter. He has attended weekly therapy sessions. In the past decade, Poe has participated in various substance abuse treatment programs, including some while incarcerated, though at the time of the hearing he was not attending Alcoholics Anonymous meetings, according to Poe's expert witness.

Procedural history. After his second sex offense conviction, SORB classified Poe as a level three sex offender. In 2017, reclassification hearings were held, at which an expert witness testified on Poe's behalf. In October 2017, the examiner classified Poe at level two. A Superior Court judge affirmed the examiner's decision. Poe appealed.

Discussion. On appeal Poe raises three related arguments seeking to overturn his level two classification. This court will only disturb the examiner's decision if it is arbitrary and capricious, an abuse of discretion, not supported by substantial evidence, or not in accordance with law. Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass.

603, 633 (2011) (Doe No. 10800). Poe has not met his burden to show that he is entitled to relief.

A level two classification must be based upon clear and convincing evidence that the offender's "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), quoting G. L. c. 6, § 178K (2) (b).<sup>1</sup> On review we examine the record for substantial evidence to support the examiner's decision -- in other words, evidence that "a reasonable mind might accept as adequate to support" the examiner's conclusion. Doe No. 10800, 459 Mass. at 632. Our review is deferential -- it "does not turn on whether, faced with the same set of facts, we would have drawn the same conclusion . . . but only whether a contrary conclusion is not merely a possible but a necessary inference" (quotation and citation omitted). Doe, Sex Offender Registry Bd. No. 3839 v. Sex Offender Registry Bd., 472 Mass. 492, 500-501 (2015).

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<sup>1</sup> Although SORB generally publishes the registry information of level two offenders online, Poe's information is not subject to Internet publication because he was initially classified before July 12, 2013, when level two offenders' information was not published online. See Doe, Sex Offender Registry Bd. No. 326573 v. Sex Offender Registry Bd., 477 Mass. 361, 367 (2017). Poe's information remains accessible to the public through police departments. See G. L. c. 6, § 178K (2) (b).

Poe primarily targets the weight the examiner afforded to the evidence. He asserts that instead of engaging in a "true evaluation of the evidence," the examiner simply settled on a level two classification as a "compromise" of the parties' positions. The thrust of Poe's argument is that the classification was based on two sex offenses, each of which was committed over twenty years ago, and that the examiner should have found those offenses to be offset by contemporary mitigating evidence, such as Poe's advanced age and positive focus on self-improvement. In particular, Poe emphasizes that alcohol intoxication was a factor in both sex offenses, but that he is no longer drinking excessively, as a result of treatment for his substance abuse and mental health.

We discern no error in the examiner's thoughtful and detailed analysis. The thirty-three page decision explains why the evidence warranted the application of several regulatory factors against Poe, many of which Poe does not contest. For example, Poe does not challenge the application of Factor 2, regarding repetitive and compulsive behavior (defined as two or more separate episodes). See 803 Code Mass. Regs. § 1.33(2) (2016). Nor does Poe challenge that his offenses involved underage (Factor 3) and extravulnerable (Factor 18) victims, respectively. See 803 Code Mass. Regs. § 1.33(3), (18).

Moreover, Poe's brief does not address his extensive history of hostility toward women and contact with the criminal justice system -- factors that the examiner found very significant. See 803 Code Mass. Regs. § 1.33 (10), (15). Poe has been the subject of abuse prevention orders granted to several women, spanning a period of approximately fifteen years; the most recent abuse prevention order issued in 2012. The examiner pointed to a number of incidents that illustrate Poe's tendency to become violent or abusive after drinking, and his inability to control his behavior. In 1994, for example, after drinking and then arguing with his wife, Poe struck her in the back with a golf club, resulting in a violation of his probation stemming from his first sex offense. Years later in 1998, after separating, Poe entered his wife's home multiple times without permission at night while intoxicated. Additionally, Poe's history of contact with law enforcement persisted over decades. Over a forty-year period beginning in his teens and ending in 2013, Poe faced approximately 130 criminal charges. As with the facts underlying the abuse prevention orders, this history tends to show Poe's inability to self-regulate. See 803 Code Mass. Regs. § 1.33(10) (a) ("Lawlessness" correlates with risk of reoffense; examiner must consider criminal charges and their dispositions, as well as abuse prevention orders).

Regarding the critical evidence of Poe's alcohol use, both past and present, Poe challenges both the examiner's factual analysis and her treatment of Poe's expert witness. The expert testified that Poe's current level of alcohol consumption does not elevate his risk of reoffense from low to moderate. Accordingly, Poe argues, the examiner afforded too much weight to the evidence concerning alcohol, and erred in rejecting the expert's recommendation of a level one classification.

The examiner did not err in assigning substantial weight to Poe's abuse of alcohol. The evidence demonstrated the strong disinhibiting effect of Poe's drinking. Poe began drinking as a teen -- he was almost sixty at the time of the hearing -- and the examiner stated that Poe has been sober only during periods of incarceration, despite participation in treatment programs. Critically, intoxication contributed to much of his criminal and abusive conduct, including his first sex offense. Today, however, Poe continues to consume alcohol, at a level the expert referred to as "moderated." The expert testified that Poe drinks "occasionally," perhaps once per week, but admitted that he lacked certainty about the frequency. When Poe does drink, according to the expert, he has "about three to four beers at a time." Moreover, the expert testified that Poe does not currently participate in a substance abuse treatment program, although he does receive therapy and psychiatric treatment. In

sum, there was no error in the examiner's consideration of Poe's past and present relationship to alcohol. See 803 Code Mass. Regs. § 1.33(9)(a) (alcohol is "behavioral disinhibitor," and examiner must consider substance abuse history, active substance abuse, and history of "treatment, abstinence and relapse").

Nor did the examiner err by failing to consider the expert's characterization of the evidence or by rejecting his ultimate conclusion. The expert testified to his view that there is a new "school of thought" on substance abuse that does not require complete abstinence, and instead regards "moderate[]" consumption to be manageable in circumstances like Poe's. These circumstances include the fact that Poe now receives treatment for bipolar disorder, rendering excessive drinking unnecessary as a form of "self-medication." However, the examiner satisfied her duty to give "careful consideration" to the expert's testimony. Doe, Sex Offender Registry Bd. No. 23656 v. Sex Offender Registry Bd., 483 Mass 131, 137 (2019) (Doe No. 23656). The examiner did not disregard the expert's evidence. To the contrary, she afforded the expert's overall opinion some mitigating weight, but ultimately reached a different conclusion.<sup>2</sup>

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<sup>2</sup> Relatedly, the examiner identified problems with the expert's proof. For instance, the expert administered two diagnostic tools that predicted a five to seven percent risk of reoffense. However, one of the diagnostic tools gave credit for three years

Poe's citation to Doe, Sex Offender Registry Bd. No. 205614 v. Sex Offender Registry Bd., 466 Mass. 594 (2013) (Doe No. 205614), which reversed an examiner for failing to consider the relevance of gender to a woman's recidivism risk, is also unavailing. Poe analogizes Doe No. 205614 to this case, arguing that here, too, the examiner failed to consider certain relevant studies -- specifically, the expert's testimony that there was new research on alcoholism. Doe No. 205614, however, involved "a distinct risk factor" -- gender -- that the SORB regulations did not at that time take into account. Id. at 607. Such is not the case here; the SORB regulations do address alcohol abuse, and the examiner was not required to accept the expert's views on that issue. See 803 Code Mass. Regs. § 1.33(9).

As to the third and final issue Poe raises, the examiner may have erred in giving weight to the claim that Poe refused sex offender treatment (Factor 24), but any such error does not warrant reversal. The examiner stated that Poe once refused sex offender treatment, and accordingly weighed Factor 24 against him. See 803 Code Mass. Regs. § 1.33(24). The examiner apparently relied on a handwritten notation by a prison

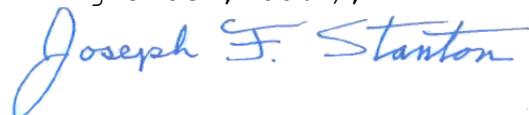
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of offense-free time in the community, whereas SORB's regulations require at least five years before this factor can be given mitigating weight. See 803 Code Mass. Regs. § 1.33(29)(a). At the time of the hearing, Poe had not been offense free for five years, due to the 2013 assault that resulted in an adjudication that Poe had violated probation.

official, which appears on a document in the hearing record. Poe asserts that reliance on the document was factual error, as sex offender treatment was not available to him at that time at the prison he was in. Our review does not lead us to conclude that the examiner was incorrect, but even if she were, the examiner's application of Factor 24 was not significant to her decision, which references Factor 24 in but two sentences. The references did not render the decision as a whole arbitrary and capricious or without substantial evidence. See Doe No. 23656, 438 Mass. at 142 n.14 (reliance on Factor 24 was error, but examiner "did not significantly rely" on it, according it only four sentences in thirty-five page decision).

Judgment affirmed.

By the Court (Green, C.J.,  
McDonough &  
Englander, JJ.<sup>3</sup>),



Clerk

Entered: February 10, 2020.

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<sup>3</sup> The panelists are listed in order of seniority.