

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

19-P-370

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 523925

vs.

SEX OFFENDER REGISTRY BOARD.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, John Doe, appeals from a Superior Court judgment affirming his final classification by the Sex Offender Registry Board (SORB) as a level three sex offender. He appeals contending that the decision is not supported by substantial evidence, and that the evidence failed to establish that Internet dissemination of and public access to his sex offender registry information serves a substantial public safety interest. We affirm.

1. Governing offenses. In 2014, the victim, the daughter of Doe's then live-in girlfriend, disclosed to a family member that Doe had sexually assaulted her multiple times from 2008 to 2013. The victim was seven to eleven years of age when Doe assaulted her. She reported that Doe touched her vagina and breasts, digitally penetrated her, and forced her to perform

oral sex on him. Doe was charged with two counts of rape and abuse of a child. In November 2015, the rape charges were dismissed, and Doe pleaded guilty to two counts of indecent assault and battery on a child under the age of fourteen. He was sentenced to two years of incarceration, followed by three years of probation, to be served after his release.

2. Hearing examiner's decision. The examiner held a hearing pursuant to G. L. c. 6, § 178L, and applied the regulatory risk factors as promulgated in 803 Code Mass. Regs. § 1.33 (2016). He concluded that Doe must register as a level three sex offender.

a. High-risk factors. The examiner found two of the six regulatory high-risk factors applicable to Doe. He gave aggravating weight to factor 2, repetitive and compulsive behavior, and increased aggravating weight to factor 3, adult offender and prepubescent victim.

b. Risk-elevating factors. The examiner next considered risk-elevating factors that demonstrate Doe's risk of reoffense and dangerousness. He gave factor 18, extra-vulnerable victim, aggravating consideration. The examiner gave factor 10, contact with the criminal justice system, full aggravating weight based on Doe's lengthy criminal history dating back to 1996.¹ The

¹ Doe was convicted in New York (between 1996 and 1997) of petit larceny, intent to obtain transportation without paying, and

examiner gave moderate aggravating weight to factor 11, violence unrelated to sexual assaults. The examiner applied factor 13, noncompliance with community supervision, based on Doe's numerous probation violations,² as well as factor 9, alcohol and substance abuse, based on Doe's lengthy substance abuse history. The examiner gave factor 12, behavior while incarcerated, minimal aggravating weight, because the only evidence of this was presented by Doe's expert witness, Dr. Leonard Bard, who reported that Doe received several "disciplinary tickets for fighting" while incarcerated; SORB did not present any evidence on this factor; nor did SORB explain why it failed to present such evidence. The examiner considered factor 35, psychological or psychiatric profiles regarding risk to reoffend. He was not persuaded by Dr. Bard, who opined that Doe demonstrated a low risk to reoffend.

c. Risk-mitigating factors. The examiner considered risk-mitigating factors. He applied factor 33, home situation and

criminal sale of a controlled substance. In Massachusetts, Doe was convicted of numerous drug, motor vehicle, and stolen property offenses from 1997 to 1999. In 2004, he was convicted of assault and battery upon his former girlfriend; she was reportedly struck in the face and kicked by Doe with a boot. Between 2005 and 2013, Doe was convicted of carrying a dangerous weapon, motor vehicle offenses, shoplifting, and breaking and entering in the nighttime.

² Doe has a history of probation violations resulting in incarceration. He is on probation on the governing offenses until September, 2020.

support, as Doe was living at the Springfield Rescue Mission and meeting with his probation officer and a therapist. The examiner also considered factor 28, supervision by probation or parole, but gave it minimal mitigating weight based on Doe's history of probation violations. He also gave minimal mitigating weight to factor 32, sex offender treatment, as Doe had met with the treatment provider only once. The examiner ultimately concluded that the high-risk factors outweighed the mitigating factors and finally classified Doe as a level three offender.

3. Discussion. An agency decision may be set aside only if a court determines that the decision is "unsupported by substantial evidence or is arbitrary or capricious, an abuse of discretion, or not in accordance with law" (quotation omitted). Doe, Sex Offender Registry Bd. No. 523391 v. Sex Offender Registry Bd., 95 Mass. App. Ct. 85, 88 (2019) (Doe No. 523391). Our review of the Superior Court judge's decision is de novo, but our review of the underlying agency decision is more limited. See id. at 88-89. We "give due weight to the experience, technical competence, and specialized knowledge of the agency" (quotation omitted). Doe, Sex Offender Registry Bd. No. 496501 v. Sex Offender Registry Bd., 482 Mass. 643, 649 (2019) (Doe No. 496501). The classification decision must be supported by clear and convincing evidence; however, "subsidiary

facts need be proved only by a preponderance of the evidence." Doe No. 523391, 95 Mass. App. Ct. at 86. The underlying evidence must bear "sufficient indicia of reliability" such that "it was reasonable for the examiner to admit and credit the facts described in the [challenged] evidence" (quotation omitted). Id. at 89.

The crux of Doe's contention is that the evidence presented by SORB did not prove, by clear and convincing evidence, that he met the requirements for classification as a level three sex offender. The examiner found that Doe sexually assaulted his then girlfriend's prepubescent daughter over a period of five years. As a result, the examiner applied factor 2 and factor 3, and concluded that Doe presented a heightened risk of sexual recidivism and dangerousness to the public. However, the parties agree with the Superior Court judge that the examiner applied factor 2 incorrectly because, as the Superior Court judge noted, Doe did not commit "another episode of sexual misconduct after having been discovered and confronted or investigated by authorities," see 803 Code Mass. Regs. § 1.33(2)(a), and the examiner did not indicate at what threshold (increased, high, medium, or minimal) he applied the factor. Notwithstanding, as Doe concedes, factor 2 is applicable to at least some extent because Doe abused the victim repeatedly over a long period of time.

Excising the high aggravating weight applied to factor 2 by the examiner, there is still substantial evidence to support the classification decision. Doe sexually assaulted a prepubescent girl over a period of five years and, despite pleading guilty to the governing offenses, continues to deny that he assaulted her. In addition, Doe has an extensive criminal record, including crimes of violence. He has a lengthy history of substance misuse and, as noted by Dr. Bard, resumption of alcohol or drugs would increase Doe's risk to reoffend. Moreover, Doe's long term success in the community is speculative; at the time of the hearing he had only recently been released from incarceration, and he has a significant history of probation violations.

Doe also contends that the examiner disregarded Dr. Bard's expert evidence. See Doe, Sex Offender Registry Bd. No. 23656 v. Sex Offender Registry Bd., 483 Mass. 131, 135 (2019) (Doe No. 23656). His contention is not borne out by the record. Like Dr. Bard, the examiner considered Doe's current living situation and his meetings with his probation officer and sex offender treatment provider. While the examiner considered Dr. Bard's evaluation and opinion, he did not agree with Dr. Bard's opinion that Doe was at a low risk to reoffend, nor was he required to. Id. at 137. Notably, despite his conclusion, Dr. Bard acknowledged that he relied on Doe's self-reporting, and ultimately agreed that Doe's ability to control his impulses and

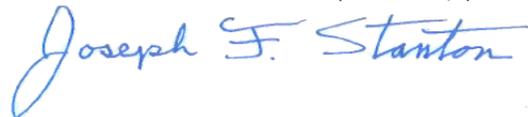
remain substance free was untested due to Doe's recent release from incarceration. Dr. Bard also concluded that Doe's risk to reoffend would increase if he resumed using drugs or alcohol, failed in sex offender treatment, or failed to successfully complete probation. There was no error.

The examiner did not expressly address whether public safety is served by Internet publication of Doe's sex offender registration information. In the absence of such findings, remand may not be required if "the underlying facts of the case . . . clearly dictate the appropriate classification level." Doe No. 496501, 482 Mass. at 657 n.4. Here Doe's extensive criminal record is indicative of lawlessness and antisocial behavior. See 803 Code Mass. Regs. § 1.33(10)(a). In addition to the governing contact sex offenses against a prepubescent victim, Doe has been convicted of, among other things, domestic assault and battery, drug distribution offenses, weapon possession, and breaking and entering in the nighttime with the intent to commit a felony. Coupled with his history of substance abuse and continued denial of culpability, his history of domestic assault and other criminal behavior is suggestive of an individual either unable or unwilling to conform his conduct to the requirements of the law, and who may present a danger of sexual offense to girls or women with whom he comes in contact. Dissemination of Doe's sex offender registration information

would allow the public to take precautions to avoid encountering Doe in situations where members of the public are vulnerable to a sexual offense. Doe No. 23656, 483 Mass. at 145-146. A remand is not warranted on this record.

Judgment affirmed.

By the Court (Sullivan,
Blake & Ditkoff, JJ.³),



Clerk

Entered: June 29, 2020.

³ The panelists are listed in order of seniority.