COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-368

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 5447

vs.

SEX OFFENDER REGISTRY BOARD.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Doe, appeals from a Superior Court judgment affirming his classification by the Sex Offender Registry Board (board) as a level three sex offender. Doe claims that the hearing examiner's decision was unsupported by substantial evidence, and that the case must be remanded for further findings as to whether Internet dissemination of Doe's personal information serves a public interest. We affirm.

1. Substantial evidence. Doe claims that there is a lack of substantial evidence supporting his classification as a level three sex offender. He claims that the hearing examiner misapplied a number of the board's statutory and regulatory factors, and relied on factors made applicable by his sex offenses over twenty years ago which do not support a finding

that he currently poses a high risk of danger. We disagree with both claims.

"Substantial evidence" is "such evidence as a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1 (6). Importantly, in reviewing the hearing examiner's decision, we give "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G. L. c. 30A, § 14 (7).

Doe claims that the hearing examiner misapplied factor 9 (alcohol and substance abuse) because he had been sober for twenty years. However, Doe's substance abuse was a factor in his sexual misconduct. 803 Code Mass. Regs. § 1.33(9)(a) (2016) (factor applies when substance use was "a contributing factor in the sexual misconduct"). The hearing examiner did not abuse her discretion in applying moderate weight to this factor in light of Doe's encouraging sobriety, yet recognizing that he was no longer attending substance abuse treatment programs despite telling his treatment providers he would be doing so.

Doe also claims that the hearing examiner should have applied full mitigating weight to factor 32 (sex offender treatment) due to his completion of a sex offender treatment program. Although "[i]n general, offenders who have successfully completed a treatment program have lower rates of

reoffense," the hearing examiner's decision was based on the concerns of the treatment review panel and Doe's failure to continue the treatment. 803 Code Mass. Regs. § 1.33(32)(a)(1) (2016). Furthermore, Doe claims that the hearing examiner should have applied full mitigating weight to factor 33 (home situation and support systems). However, the hearing examiner expressed concerns about Doe's support system. Doe's aunt had been unaware of his probation status and his mother has set a boundary with what she was comfortable discussing. Doe's relationship with his girlfriend was also new. In that light, there was no abuse of discretion in applying moderate weight to these factors.

Contrary to Doe's claim, the hearing examiner's decision was based on a sound application of the relevant factors. Doe's sexual misconduct on two separate occasions against two female strangers[1] implicated factors 2 (repetitive and compulsive behavior) and 7 (relationship between offender and victim). See Doe, Sex Offender Registry Bd. No. 496501 v. Sex Offender Registry Bd., 482 Mass. 643, 651 (2019) (Doe No. 496501) (board can consider older sexual offenses where "the offender has not had recent opportunity to commit sexual offenses because he or

[1] The hearing examiner was not required to credit Doe's testimony that he mistakenly thought the first victim was someone he knew. See Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 633 (2011) (credibility of witnesses is in province of board).

she has been in custody"). Both of those factors are associated with a higher risk of reoffense. 803 Code Mass. Regs. § 1.33(2)(a), (7)(a)(3) (2016). Doe's misconduct occurred in public, implicating factor 16 (public place) and shows his lack of impulse control.[2] One of the acts involved violence, threats, and penile penetration.[3] Doe's lifestyle, behavior while incarcerated, and history, which includes extensive contact with the criminal justice system and substance abuse, also increased his high risk and danger. The evidence was more than sufficient to support the classification.[4]

2. Internet dissemination. Doe claims that the hearing examiner failed to make explicit findings to support her conclusion that a substantial public interest is served by public dissemination of Doe's registration information. The hearing examiner's decision precedes Doe No. 496501, 482 Mass.

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[2] Doe claims the hearing examiner should have afforded minimal weight to factor 16 (public place) because of his age. However, Doe committed both offenses in public, implicating this factor. 803 Code Mass. Regs. § 1.33(16) (2016).

[3] The factors implicated by this act, factor 8 (weapon, violence or infliction of bodily injury), factor 16 (public place), and factor 19 (level of physical contact), are applicable regardless of time that has elapsed. See 803 Code Mass. Regs. § 1.33(8), (16), (19) (2016).

[4] For the first time on appeal, Doe claims that the hearing examiner failed to consider scientific research about juvenile development when she applied a high risk factor, factor 2 (repetitive and compulsive behavior), to Doe. Because Doe failed to raise this below, this issue is waived.

at 655-658, where the Supreme Judicial Court held that, prospectively, the board would be required to make an explicit finding as to Internet dissemination. Here, where "'the underlying facts of the case . . . so clearly dictate the appropriate classification level,' we do not exercise our discretion to remand . . . on this element." Doe, Sex Offender Registry Bd. No. 23656 v. Sex Offender Registry Bd., 483 Mass. 131, 145 (2019), quoting Doe No. 496501, supra at 657.

As explained above, the hearing examiner's decision that Doe poses a high risk of reoffense and a high degree of dangerousness is supported by the evidence. Doe had sexually assaulted two stranger victims in public. In one encounter, Doe employed violence in the assault. Furthermore, Doe committed his offenses while on probation, which increases his risk of danger as well. 803 Code Mass. Regs. § 1.33(13) (2016). It is likely that if Doe were to reoffend, it would be against a female stranger and would include violence. Accordingly, active

dissemination, including Internet publication, serves a public safety interest. See Doe No. 496501, 482 Mass. at 646, 655.[5]

Judgment affirmed.

By the Court (Meade, Rubin & Henry, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: June 30, 2020.

[5] Doe also claims that there are no free community-based treatment programs for sex offenders. The hearing examiner was not required to credit this claim, particularly because Doe offered no details of efforts he made to find such treatment, did not indicate whether he attempted to sign up for community-based therapy, and also chose not to avail himself of free substance use disorder community program options. "Other points, relied on by the [petitioner] but not discussed [here], have not been overlooked. We find nothing in them that requires discussion." Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

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