COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1580

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 2704

vs.

SEX OFFENDER REGISTRY BOARD.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following an evidentiary hearing before the Sex Offender Registry Board (SORB), a hearing examiner classified Doe as a level one (low-risk) offender. A Superior Court judge affirmed the hearing examiner's decision. On appeal, Doe argues that the hearing examiner erred in (1) finding that he was convicted of the index sex offense; and (2) improperly applying and balancing the regulatory factors. We affirm.

Background.[1] Between 1991 and July 1994 Doe was in a relationship with a woman (mother) who had a young daughter (victim). At that time, Doe was in his early to mid-fifties, and the victim was between the ages of nine or ten and thirteen. Doe and mother maintained separate residences, but mother

[1] We summarize the facts as set forth by the hearing examiner in his decision.

regularly attended church on Tuesday and Thursday nights, during which times Doe sexually abused the victim, in her home, by touching her buttocks, breasts, and vaginal area. Doe also attempted, on some occasions, to insert his tongue into the victim's mouth to kiss her, which she refused. In 1995, Doe pleaded guilty to one count of indecent assault and battery on a child under age fourteen, G. L. c. 265, § 13B, and was sentenced to a period of supervised probation.

After a hearing,[2] and considering the applicable high-risk,[3] risk-elevating,[4] and risk-mitigating[5] factors delineated in 803 Code Mass. Regs. § 1.33 (2015), the hearing examiner classified Doe as a level one sex offender, documenting his reasoning in a thirteen-page memorandum. As noted, a Superior Court judge affirmed the hearing examiner's decision.

Discussion. 1. Finding of a conviction. Doe contends that the hearing examiner erroneously found that he was

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[2] The SORB first notified Doe of his duty to register as a sex offender in 2012, but, for reasons we need not detail, the presently relevant de novo hearing did not take place until May 2018, when Doe was aged seventy-seven.

[3] See 803 Code Mass. Regs. § 1.33(2) (repetitive and compulsive behavior, factor applied); 803 Code Mass. Regs. § 1.33(3) (adult offender with child victim, factor given increased weight).

[4] See 803 Code Mass. Regs. § 1.33(7) (extrafamilial victim, factor applied).

[5] See 803 Code Mass. Regs. § 1.33(29) (offense-free time, factor found "fully applicable"); 803 Code Mass. Regs. § 1.33(30) (advanced age, factor given "full weight"); 803 Code Mass. Regs. § 1.33(33) (home situation and support systems, factor given "moderate mitigation").

convicted of indecent assault and battery on a child, claiming that the docket shows that the offense was continued without a finding, and therefore does not qualify as a conviction under G. L. c. 6, § 178C. See Doe, Sex Offender Registry Bd. No. 496501 v. Sex Offender Registry Bd., 482 Mass. 643, 650 (2019) (Doe No. 496501). To qualify as a conviction, there must be "a finding of guilty . . . entered on the docket." Commonwealth v. Berquist, 51 Mass. App. Ct. 53, 56 (2001).

On the docket form, in the space captioned "FINDING," the word "Guilty" is handwritten, with the disposition "probation until 12-20-96." However, immediately below that, a box is checked before the printed words "Cont. w/o finding until:" but no date is written in the blank space after those words. Both the hearing examiner and the Superior Court judge considered that ambiguity on the docket and concluded, in essence, that the checkmark next to the words "Cont. w/o finding until:" was a mistake. "It is the province of the board, not this court . . . to resolve any factual disputes." Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 633 (2011) (Doe No. 10800).

We conclude that the hearing examiner's determination that Doe was "convicted" of indecent assault and battery on a child under age fourteen is supported by substantial evidence. Id. at 632, quoting G. L. c. 30A, § 1 (6) ("Substantial evidence is

'such evidence as a reasonable mind might accept as adequate to support a conclusion'"). The handwritten notation "Guilty" on the docket constituted substantial evidence. See Doe No. 496501, 482 Mass. at 650 (SORB had jurisdiction where docket contained "G" finding; "if [Doe's] case had been continued without a finding, one would expect a check mark in the box indicating that the case against Doe was dismissed at the request of probation . . . but there [was] no such check"). Neither the docket nor Doe's criminal history record indicates that the charge was at any time dismissed, as would be expected if the case had been continued without a finding and the probationary term completed. See Berquist, 51 Mass. App. Ct. at 56. Accordingly, we discern no error.

2. Application of the regulatory factors. Doe contends that the hearing examiner failed to make specific subsidiary findings supporting his application of factor two (repetitive and compulsive behavior), and failed to specify the degree to which that factor applied. Factor two applies when the offender "engages in two or more separate episodes of sexual misconduct" after having had sufficient "time or opportunity, between the episodes, for the offender to reflect on the wrongfulness of his conduct." 803 Code Mass. Regs. § 1.33(2)(a).

Here, the hearing examiner found that factor two "applies" because the victim "told police that she was assaulted multiple

times . . . for a period of three years, twice per week." Thus, the hearing examiner properly found that Doe engaged in multiple episodes of sexual misconduct after having had the opportunity, over a three year period, to reflect on the wrongfulness of his misconduct. Further, the hearing examiner properly weighed this factor by finding that it "applies," but not allocating it increased weight.[6] Nothing more was required.

Doe also argues that the hearing examiner improperly weighed the remaining factors, and failed to articulate how Doe's level one classification was supported by clear and convincing evidence. It is within a hearing examiner's discretion "to consider which statutory and regulatory factors are applicable and how much weight to ascribe to each." Doe, Sex Offender Registry Bd. No. 68549 v. Sex Offender Registry Bd., 470 Mass. 102, 109-110 (2014). Our review is limited to determining whether the hearing examiner's findings are "unsupported by substantial evidence or [are] arbitrary or

[6] Doe argues that it is unclear how much weight the hearing examiner gave to factor two. However, we note the hearing examiner only found that "[factor two] applies" in accordance with 803 Code Mass. Regs. § 1.33(2). In contrast, where the hearing examiner was allocating increased weight to a factor, he explicitly stated so. For example, in evaluating factor three, he explicitly noted "this factor applies with increased weight"; and in evaluating factor thirty, he stated, "I find full weight under this mitigating factor."

capricious, an abuse of discretion, or not in accordance with law." Doe No. 10800, 459 Mass. at 633.

In his decision, the hearing examiner expressly considered the applicable regulatory factors, including high-risk factors two (repetitive and compulsive behavior) and three (adult offender with child victim); and risk-elevating factor seven (extrafamilial relationship). The hearing examiner also considered several mitigating factors, giving factors twenty-nine (time offense-free in the community) and thirty (advanced age) considerable weight in ultimately finding "under the clear and convincing standard that [Doe's] risk and danger is low" and warrants a level one classification. It is for the hearing examiner, not for us, to consider and weigh the multiple factors in rendering a classification decision. Doe, Sex Offender Registry Bd. No. 23656 v. Sex Offender Registry Bd., 483 Mass. 131, 143-144 (2019).

We are satisfied that substantial evidence supports the hearing examiner's decision to classify Doe as a level one sex offender, and he is not entitled to relief from registration. Although Doe is now elderly and has been offense-free since the index offense, the hearing examiner's decision is supported by substantial evidence. When he was in his mid-fifties, Doe repeatedly indecently assaulted a young girl, between the ages of nine or ten and thirteen, by touching her buttocks, breasts,

and vaginal area twice per week over the course of a three year period. On the record before us, we are satisfied that the hearing examiner properly considered and weighed the applicable regulatory factors in concluding that Doe is a low-risk offender, and that the hearing examiner's choice fell well within the range of reasonable alternatives. See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

Judgment affirmed.

By the Court (Massing, Singh & Grant, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: November 20, 2020.

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