NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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-1238

MAC S. HUDSON

vs.

BRIAN LUSSIER[1] & another.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The pro se plaintiff, Mac S. Hudson, is an inmate in the custody of the Department of Correction (department). He brought an action in the Superior Court seeking review of the department's decision that he remain classified as a medium security risk as well as various declarations related to that decision and the calculation of his parole eligibility date. He now appeals from a judgment on the pleadings dismissing his verified complaint.[3] In light of the Supreme Judicial Court's

[1] In his official capacity as the director of classification of Massachusetts Correctional Institution at Concord (MCI-Concord).

[2] Matthew Divris, in his official capacity as the deputy superintendent of MCI-Concord.

[3] Following the course discussed with the parties at the hearing, the Superior Court judge declined to act on the plaintiff's motion to supplement his complaint, which was filed after the parties' cross motions for judgment on the pleadings, until she resolved the latter motions. Given the disposition of the cross motions, the Superior Court judge never acted on the motion to

recent decision in Dinkins v. Massachusetts Parole Bd., 486 Mass. 605 (2021), we reverse and remand.

Background. The plaintiff was convicted of murder in the second degree, assault and battery by means of a dangerous weapon and several other offenses.[4] He received a sentence of life with the possibility of parole on the murder conviction and a sentence of from eight to ten years on the assault and battery conviction to be served consecutive to the life sentence. His remaining sentences were imposed to be served concurrently with the life sentence.

The plaintiff was committed to the custody of the department in 1990. In determining the plaintiff's parole eligibility date, the parole board did not aggregate the plaintiff's consecutive sentence with his life sentence, meaning that the plaintiff would only begin to serve his consecutive sentence after he is granted parole on his life sentence. He became parole eligible on his life sentence in 2004; however, the parole board has denied the plaintiff's requests for parole on that sentence.

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supplement; therefore, for the purposes of this appeal we treat the plaintiff's verified complaint, and not his proposed verified amended complaint, as the operative complaint.

[4] Specifically, the plaintiff also was convicted of a second count of assault and battery by means of a dangerous weapon, three counts of armed assault with intent to rob or murder, two counts of possession of a firearm, armed robbery, armed assault in a dwelling, and manslaughter.

The plaintiff is presently housed in MCI-Concord, a medium security facility. On January 30, 2018, a correctional program officer conducted a review of the plaintiff's custody level as required annually pursuant to 103 Code Mass. Regs. § 420.08 (2017). She ultimately recommended that the plaintiff remain in a medium security setting at MCI-Concord.

In reaching that recommendation, the officer first calculated the plaintiff's objective point base score (OPBS) which reflected a preliminary custody level of minimum security or below. The officer then considered, as required, whether any nondiscretionary restrictions or discretionary overrides applied. Nondiscretionary restrictions apply when "a [department] policy prevents an inmate from placement in lower custody, regardless of their total score." The officer found that nondiscretionary code B applied.[5] As a result, the officer recommended a medium security setting.

[5] Code B provides that "[i]nmates whose data critical to decision making is outstanding and inmates with unresolved/non-permissible legal issues are to remain in medium or above until the legal issue is resolved." The defendants concede that the officer's reference in the classification report to code B's application based on "loss of life" was error. The defendants argue that code B nevertheless applied, because the plaintiff had not yet begun to serve his consecutive sentence, leading to uncertainty about his earliest release date. That in turn implicated another nondiscretionary restriction, code A, which provides that "inmates with more than [five] years to their earliest release date are not to be considered for minimum [security classification] or below."

The plaintiff unsuccessfully appealed from the classification decision to the defendant Matthew Divris, as designee of the commissioner of correction, pursuant to 103 Code Mass. Regs. § 420.08(3) (2017). Thereafter, the plaintiff brought an action in the Superior Court seeking certiorari review of the department's classification decision pursuant to G. L. c. 249, § 4, and asserting claims for declaratory relief concerning that decision and the calculation of his parole eligibility date. The parties cross-moved for judgment on the pleadings pursuant to Mass. R. Civ. P. 12 (c), 365 Mass. 754 (1974). After a hearing, a Superior Court judge allowed the defendants' motion and denied the plaintiff's motion; judgment subsequently entered dismissing the plaintiff's complaint.

Discussion. 1. Security classification and parole eligibility. Because we examine the conclusions of law on the same record as the Superior Court judge, our review of the order allowing the motion for judgment on the pleadings under rule 12 (c) is de novo. See Professional Fire Fighters of Mass. v. Commonwealth, 72 Mass. App. Ct. 66, 73 (2008). The crux of the plaintiff's argument is that the department was required to aggregate his life sentence with his consecutive sentence for the purposes of calculating his earliest release date -- here, a single date on which he would become parole eligible on all his sentences. If the plaintiff is correct, the department's

application of code B in its review of the plaintiff's classification would have been error because it was premised on the plaintiff's outstanding consecutive sentence.

The defendants take the position that the parole board, and not the department, is exclusively responsible for determining parole eligibility and suitability. See G. L. c. 127, § 133. See also Dinkins, 486 Mass. at 608-610 (discussing statutory framework governing parole). Therefore, the department defers to the parole board's calculation of an inmate's parole eligibility. Given the parties' arguments, we stayed this appeal pending the Supreme Judicial Court's decision in Dinkins, supra. In that case, two inmates challenged 120 Code Mass. Regs. § 200.08(3)(c) (2017), the regulation promulgated by the parole board which sets forth the nonaggregation rule applied to the plaintiff's sentences. Specifically, the regulation provides: "A sentence for a crime committed on or after January 1, 1988 which is ordered to run consecutive to a life sentence shall not be aggregated with the life sentence for purposes of calculating parole eligibility on the consecutive sentence." Dinkins, supra at 610, quoting 120 Code Mass. Regs. § 200.08(3)(c) (2017). The Supreme Judicial Court held that the regulation was contrary to the plain language of the statutory framework governing parole and, therefore, is invalid. Dinkins, supra at 610-615.

Given the department's reliance on the board-calculated parole eligibility date to determine earliest release date for classification purposes, the defendants concede that the decision in Dinkins is dispositive on the aggregation issue presented by the plaintiff in this appeal. The plaintiff is entitled to have the department recalculate his earliest release date consistent with Dinkins, and to have a new classification review forthwith in light of the change to his earliest release date.[6] On remand, judgment shall enter for the plaintiff to that effect.

2. Ex post facto claim. The plaintiff also alleges an ex post facto violation premised on the alleged retroactive application of the rule set forth in 120 Code Mass. Regs. § 200.08(3)(c), to his sentences. He argues that he was adversely affected by the application of this rule in three ways: (1) he was not given a single, definite parole eligibility date on which he could be released into the community; (2) his earned good time credit was not applied to

[6] The defendants represent that the plaintiff is scheduled for a classification review on March 12, 2021. We decline the defendants' suggestion that the review await a determination by the parole board of how it intends to implement Dinkins. If the board decides to implement Dinkins in a manner that might affect the plaintiff's department-determined classification, questions regarding such effect may be raised at that time.

his parole eligibility date; and (3) he was rendered ineligible for certain rehabilitation and reintegration programs.

"To prevail on an ex post facto claim, a litigant 'must show both [(1)] that the law he challenges operates retroactively (that it applies to conduct completed before its enactment) and [(2)] that it raises the penalty from whatever the law provided when he acted.'" Clay v. Massachusetts Parole Bd., 475 Mass. 133, 136 (2016), quoting Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 618 (2011). As the Superior Court judge properly concluded, although the nonaggregation policy was not formally promulgated as a regulation until 1990, the policy was in place since 1988. See Hamm v. Commissioner of Correction, 29 Mass. App. Ct. 1011, 1013 (1991) (discussing 1988 policy change). Here, where the plaintiff committed the offenses in 1989, the policy was not applied retroactively to him. See Van Arsdale v. Van Arsdale, 477 Mass. 218, 221 (2017), quoting Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994) (law retroactive where "new provision attaches new legal consequences to events completed before its enactment"). Therefore, this claim fails.[7]

[7] As discussed above, the Superior Court judge -- with the parties' agreement -- did not act on the plaintiff's motion to supplement his complaint, choosing first to resolve the cross motions and then, if necessary, to act on the later-filed motion. See note 3, supra. In the plaintiff's proposed verified amended complaint, the plaintiff sought -- for the

Conclusion. The plaintiff is entitled, for the department's classification purposes, to recalculation of his earliest release date consistent with Dinkins, 486 Mass. 605, and to a new classification review forthwith. The judgment dismissing the plaintiff's complaint is reversed and the matter is remanded to the Superior Court for proceedings consistent with this memorandum and order.

So ordered.

By the Court (Henry, Sacks & Englander, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: February 22, 2021.

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first time -- a declaration concerning the inclusion of his earned good time credit when calculating his parole eligibility date. To the extent that issue or any others first raised in the proposed verified amended complaint remain, nothing in this memorandum and order is meant to preclude the Superior Court judge from considering whether to act on the motion to supplement on remand.

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