

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-977

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 523288

vs.

SEX OFFENDER REGISTRY BOARD.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, John Doe, appeals from a judgment affirming a decision of the Sex Offender Registry Board (SORB) classifying him as a level two sex offender. On appeal, Doe argues (1) that the examiner improperly and reflexively applied several risk factors by relying on an incident of sexual misconduct that occurred when Doe was thirteen; (2) that the examiner erred in failing to give greater weight to Doe's expert's unrebutted testimony; and (3) that the examiner did not make a finding whether Internet publication was appropriate in Doe's case. See Doe, Sex Offender Registry Bd. No. 496501 v. Sex Offender Registry Bd., 482 Mass. 643 (2019) (Doe No. 496501). For the reasons stated below, we vacate the Superior Court judgment

affirming the hearing examiner's classification decision and remand the matter for further proceedings.

Background. We summarize the facts as set forth in the hearing examiner's decision, "supplemented by undisputed facts from the record." Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 606 (2011). On October 20, 2004, at age thirteen, Doe "dropped his pants and exposed himself to" a female classmate.<sup>1</sup> The next day, Doe spoke to the victim by telephone and threatened that "if he got in trouble with either the court or the school that he and his brother would come over and stab" the victim. Doe was charged with indecent exposure and threatening. In March of 2005, those charges were continued without a finding; Doe was placed on community supervision for six months and the charges were dismissed.

"[A]round the time [Doe] graduated from high school," Doe experienced the "onset of major mental illness," since diagnosed as schizophrenia.

In July of 2011, Doe, then aged twenty, attacked a woman he was dating, "accusing [her] of cheating, throwing [her] across

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<sup>1</sup> While such indecent exposure is sexual misconduct, it is not a qualifying sex offense under the statute. See G. L. c. 6, § 178C. See also Doe No. 496501, 482 Mass. at 647; Commonwealth v. Spring, 94 Mass. App. Court. 310, 322-323 (2018).

the room, punching [her] . . . [and] attempt[ing] to run [her] over." The victim obtained an abuse prevention order against Doe.

In March of 2013, Doe committed an act of violence against a different woman with whom he was in a relationship, again resulting in the entry of an abuse prevention order. On April 9, 2013, the day after this restraining order expired, Doe assaulted this woman on a public sidewalk, pulling her hair, threatening to kill her, and spitting in her face.

On April 20, 2013, while Doe was subject to a no trespass order at the University of Massachusetts Lowell campus for a prior incident "regarding larceny and drug allegations," he approached one woman in a way that she understood meant his intention was to be invited to sleep at her house. He also approached multiple other women in the university library and asked for their phone numbers. After several women reported that Doe was making them uncomfortable, a staff member called university police and Doe was arrested for trespassing.

On October 2, 2013, an adult woman reported that, while she was in a Lowell public library, she observed a man, later identified as Doe, staring at her long enough "to make her very uncomfortable." Doe then "came downstairs to the mezzanine level and walked behind her[,] . . . up close to her[,] and grabbed her buttocks with his hands." After the victim reported

the incident, Doe fled the library, but was stopped and held until police arrived. In connection with this incident, Doe later pleaded guilty to indecent assault and battery and was placed on probation for one year.

Shortly before Doe's probation ended, he experienced a series of mental health crises and self-reported that he was "not doing well and [needed] the hospital." The clinicians' notes reflect that Doe was homeless, exhibited paranoia and unusual behaviors, had poor concentration, heard voices, and experienced visual hallucinations. Doe's family reportedly had "very little understanding" of his mental illness at that time. In November 2015, a clinician observed that Doe was "not engaged in treatment[,] . . . has disorganized thoughts and behaviors and seems unable to follow up with treatment. His non-compliance has . . . to do with his disorganized thoughts and behaviors and mental illness." In November 2015 Doe was homeless. In 2015 and early 2016, Doe knew he had mental health issues but multiple hospital notes indicate that he "ha[d] been unwilling or unable to follow through with services."

By spring 2017, Doe's situation had improved. At that time, Doe was evaluated by Dr. Paul Zeizel. Dr. Zeizel noted that Doe was twenty-six years old, was receiving medication that controlled his mental illness and inappropriate behavior, and was employed. Doe was also living alone, in a subsidized

apartment, and had the support of his mother and two brothers. According to Dr. Zeizel, Doe was receiving mental health services through the Program of Assertive Community Treatment (PACT), "a psychiatric treatment team that does home visits . . . to increase the likelihood of success in the community" and was compliant with his medication (an injection that lasts for about four months). The hearing examiner, however, did not find any record of verification that medication was administered by a medical facility. In his March 2017 report, Dr. Zeizel opined that Doe presented at a low risk to reoffend.

The hearing examiner "disagree[d]" with Dr. Zeizel's opinion and so gave it "minimal" weight, providing two reasons: (1) that Dr. Zeizel did not consider Doe's age thirteen offense in his evaluation and (2) that the hearing examiner was "concern[ed]" that Doe's "mental health issues were not being adequately addressed" given the medical events in 2015 and 2016, and that it was "too soon" to tell whether his compliance could be maintained in the community.<sup>2</sup>

Discussion. To classify an offender as a level two sex offender a hearing examiner must make

"three explicit determinations on clear and convincing evidence: (1) that the risk of reoffense is moderate; (2) that the offender's dangerousness, as measured by the severity and extent of harm the offender would present to

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<sup>2</sup> The hearing examiner did not indicate if these were two interdependent reasons or two separate and independent reasons.

the public in the event of reoffense, is moderate; and (3) that a public safety interest is served by Internet publication of the offender's registry information." Doe No. 496501, 482 Mass. at 644.

Since Doe's hearing before SORB predated Doe No. 496501, it is not surprising that the hearing examiner did not make specific findings regarding the need for Internet publication. In such circumstances, we have the discretion to decide whether it is necessary to remand for such a finding. Id. at 657 n.4. The "facts of [this] case" do not "so clearly dictate the appropriate classification level that . . . a remand for explicit findings is not necessary." Id. In light of the lack of a record of further offenses between 2013 and 2017, including a period when he was having significant mental health issues, and the progress that Doe made when stabilized, medicated, and housed, we conclude that it is prudent to vacate his classification and remand the matter for a new hearing. On remand, Doe is free to again argue that his conduct in the intervening years demonstrates that he now poses a low risk of reoffense. Id. at 644.

We are also concerned that the hearing examiner did not adequately address Dr. Zeizel's expert opinion. As Doe concedes, SORB is not required to "reach the same conclusion as his expert." Doe, Sex Offender Registry Bd. No. 23656 v. Sex Offender Registry Bd., 483 Mass. 131, 137 (2019) (Doe No.

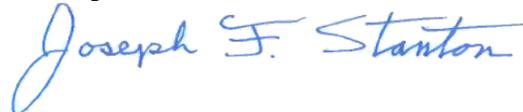
23656). Indeed, a hearing examiner may reject expert evidence, even if unrebutted, provided the hearing examiner articulates an "explicit and objectively adequate reason" for doing so (quotation omitted). Id. However, it is essential that a hearing examiner's findings clearly delineate what is a summary of testimony and what the hearing examiner's findings are. That line was not always clearly demarcated here. For example, at one point in the decision in discussing Dr. Zeizel's testimony, the hearing examiner states that Doe is being treated with a particular medication and is mandated to have the medication administered by a medical professional, but at another point the hearing examiner states that he did "not find in the record any verification that medication is administered to [Doe] by a medical facility." This leaves a record that is at best unclear and at worst internally inconsistent on a matter that is determinable through objective third party evidence. It is likely that the first statement was just a summary of Dr. Zeizel's testimony, but that was not stated. As a stand-alone sentence, it appears to be a finding. In addition, the decision does not state whether the two reasons stated for rejecting Zeizel's opinion are separate and independent bases.

We recognize the passage of almost four years since the SORB hearing, which may mean that there is significant additional evidence available. Accordingly, the judgment of the

Superior Court affirming Doe's classification as a level two sex offender is vacated, and the matter is remanded to SORB for further proceedings consistent with this decision.

So ordered.

By the Court (Henry, Sacks &  
Englander, JJ.<sup>3</sup>),



Clerk

Entered: April 7, 2021.

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