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

21-P-105

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 523722

vs.

SEX OFFENDER REGISTRY BOARD.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Doe appeals from a Superior Court judgment affirming a Sex Offender Registry Board (board) decision to classify him as a level two sex offender. He argues that the board's decision is not supported by substantial evidence and violated his right to due process because the hearing examiner improperly applied the regulatory risk factors. We affirm.

Background. We summarize the facts found by the hearing examiner, supplemented where necessary with undisputed facts from the record. Doe was arrested and charged with several offenses, as a juvenile and then as an adult, while living in New Jersey. In June 1987, Doe, then seventeen years old, approached two nine year old boys and convinced them to follow him to a stairwell in a nearby school. When they got to the stairwell, Doe ordered one of the boys (victim one) to undress.

Doe fled the scene when he heard someone approaching. Doe was later arrested and charged with criminal restraint, aggravated sexual assault, sexual assault, and assault. He was ultimately adjudicated delinquent on the criminal restraint charge and sentenced to one year of probation and psychiatric counselling.

Doe committed his governing offense after he turned eighteen and while he was still on probation for assaulting victim one. On March 1, 1988, Doe approached two boys, aged ten and eleven years old (victims two and three), who were out riding their bicycles. Doe told the boys that he knew of a better place to ride and led the boys to a dead-end street, over some railroad tracks, and down to an area near a railroad trestle. Once there, Doe pulled out a knife and ordered the boys to remove their clothes and lie face down on top of each other. Doe then fondled one of the boy's genitals and inserted something into the other boy's anus.

Doe was arrested shortly thereafter, and on July 15, 1988, he pleaded guilty to the following offenses: two counts of criminal restraint, one count of aggravated sexual assault, one count of sexual assault, two counts of terroristic threats, one count of possession of a weapon for unlawful purposes, and two counts of endangering the welfare of a child. Doe was sentenced to an aggregate term of forty years in prison.

Doe was released from prison in December 2008 and moved to Massachusetts in 2015. On May 25, 2016, the board notified Doe that he was required to register as a level three sex offender. Doe challenged the level three classification and received a de novo evidentiary hearing on July 11, 2017. Following the hearing, Doe's classification level was reduced to level two. Doe sought judicial review of the board's decision pursuant to G. L. c. 30A, § 14. A Superior Court judge remanded the case for a new de novo hearing, concluding that the hearing examiner failed to make explicit findings about Doe's current risk of reoffending and dangerousness.

Following a new de novo hearing on July 24, 2019, the board issued a decision once again classifying Doe as a level two offender. In his decision, the hearing examiner applied two high risk and nine risk elevating factors under 803 Code Mass. Regs. § 1.33 (2016): factor 2, repetitive and compulsive behavior; factor 3, adult offender with child victim; factor 7, extrafamilial victim; factor 8, use of weapon; factor 12, behavior while incarcerated; factor 13, noncompliance with community supervision; factor 16, public place; factor 17, male offender against male victim; factor 19, level of physical contact; factor 22, number of victims; and factor 27, child victim.

The hearing examiner also considered the following mitigating factors: factor 29, offense free time in the community; factor 30, advanced age; factor 32, sex offender treatment; factor 33, home situation and support systems; factor 34, stability in the community; and factor 35, psychological profile. In the end, the hearing examiner found that Doe continued to present a moderate risk to reoffend, and a moderate degree of dangerousness. He further concluded that "offending against multiple stranger prepubescent boys on different occasions justifies disclosure of [Doe's] presence in the community via Internet publication and will help protect minors and other vulnerable persons from becoming victims of sex crimes."

Doe again sought judicial review of the board's decision in the Superior Court and filed a motion for judgment on the pleadings. A judge denied Doe's motion and affirmed his level two classification. This appeal followed.

Discussion. 1. Standard. "We review a judge's consideration of an agency decision de novo." Doe, Sex Offender Registry Bd. No. 523391 v. Sex Offender Registry Bd., 95 Mass. App. Ct. 85, 89 (2019). Our review of the board's decision is limited, and we will not disturb the board's classification unless "we determine that the decision is unsupported by substantial evidence or is arbitrary or capricious, an abuse of

discretion, or not in accordance with law." Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 633 (2011). In reviewing the board's decision, "we give due weight to [its] experience, technical competence, and specialized knowledge." Doe, Sex Offender Registry Bd. No. 496501 v. Sex Offender Registry Bd., 482 Mass. 643, 649 (2019) (Doe No. 496501), quoting Doe, Sex Offender Registry Bd. No. 205614 v. Sex Offender Registry Bd., 466 Mass. 594, 602 (2013).

2. Substantial evidence. Doe argues that the hearing examiner's decision was not supported by substantial evidence because the hearing examiner did not consider the entirety of Doe's history and personal circumstances when applying each high risk and risk elevating regulatory factor. Although the board's regulations require that an offender's final classification level is based on "a qualitative analysis of the individual sex offender's history and personal circumstances," 803 Code Mass. Regs. § 1.33, the regulations do not require a hearing examiner to conduct a similar analysis when determining the mere applicability of individual risk factors. Each factor is only a single component of a decision that is based on the totality of the circumstances. See Doe, Sex Offender Registry Bd. No. 24341 v. Sex Offender Registry Bd., 74 Mass. App. Ct. 383, 388 (2009) (hearing examiner must "balance[] and weigh[]" predictive value, if any, of offender's prior offense "against the totality of the

other circumstances"). Here, each high risk and risk elevating factor that the hearing examiner applied in this case was justified by the circumstances of Doe's prior misconduct. See Doe No. 496501, 482 Mass. at 651 (offender's past conduct informs board's assessment of future risk).

Doe argues that the hearing examiner should have applied mitigating weight based on the amount of time that had elapsed since Doe committed his index offenses. However, he provides no support for his suggestion that the passage of thirty-one years reduced his dangerousness or risk of reoffending where twenty of those years were spent in prison. Factor 29 states that "[t]he likelihood of sexual recidivism decreases the longer the sex offender has had access to the community without committing any new sex offense" (emphasis added). 803 Code. Mass. Regs. § 1.33(29). In applying factor 29, the hearing examiner gave Doe full mitigating weight based on Doe's eleven years of offense free time in the community. Doe also received mitigating weight for his successful completion of treatment, his age at the time of the hearing (forty-nine), and his stable and supportive home environment.

Doe's crimes when he was seventeen and eighteen years old against stranger children were horrific. Someone at risk of reoffending in that way would present a serious, even grave, danger to society. But the statute governing sex offender

registration reserves level two classification for those situations where "the board determines that the risk of reoffense is moderate and the degree of dangerousness posed to the public is such that a public safety interest is served by public availability of registration information" (emphasis added). G. L. c. 6, § 178K (2) (b). This court hears literally dozens of appeals from board classification decisions each year. In the experience of the members of this panel, we have never seen a record with respect to sex offender treatment, offense free time in the community, and a support system, as strong as that of Doe. Doe underwent sex offender treatment for eighteen and one-half years while incarcerated. At the time of his release, one of his treatment providers opined that Doe

> "presented as highly motivated to understand and change his deviant sexual behavior. He has worked on gaining insight into the motivation for committing his crimes, sexual orientation issues, becoming more mature, personal abuse issues, [and] understanding the development and progression of his deviant sexual arousal pattern . . . He has put forth a considerable amount of effort toward his therapy and has made significant therapeutic gains . . . .
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> ". . .
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> "Over the past [eighteen and one-half] years, he has been involved in sex offender treatment, and over [fourteen] years ago he ceased his sexual acting out behaviors and focused more of his energy on his treatment. [He] has matured considerably over the past [twenty] years, and has made significant therapeutic gains in terms of increased insight and awareness of himself and his sexually assaultive dynamics, of relapse prevention techniques, and of positive coping strategies. He has

> demonstrated improved self-control, increased frustration tolerance, and behavioral consistency over the past [fourteen] years, which suggests that he possesses and uses the ability to manage his aggressive and sexual impulses appropriately."

Since his release, Doe has married his wife and lived offense free for, as of the time of his classification hearing, over eleven years. As the hearing examiner correctly noted, factor 29 states, "The risk of re-offense decreases for most offenders after living in the community offense-free for five to ten years. The risk of re-offense lowers substantially after ten years of offense-free time in the community."

Finally, Doe lives with his wife and his wife's fifteen year old daughter. As the hearing examiner found, Doe's wife "is aware of [Doe's] crimes and is supportive of his efforts to remain offense free."

The hearing examiner was aware of all this and took it into consideration. He gave "full mitigating weight" to factors 29 (offense free time in the community), 32 (sex offender treatment), and 33 (home situation and support system). Yet he nonetheless concluded that Doe presents a "moderate risk of reoffense."

If these circumstances warrant such a conclusion, we have a hard time conceiving of a circumstance in which one who has committed violent sex crimes against children like those at

issue here, even in the distant past, can ever be found to have anything lower than a moderate risk of reoffense, and thus warrant a level 2 classification, barring perhaps attaining extreme advanced age. The board has not announced that this is its conclusion, but logic suggests that is the import of its decision here.

That conclusion may be warranted. We are not expert in the dynamics of sexual impulse motivated crime or in determining the risk of recidivism among sex offenders. And we are instructed to defer to the board in these matters because it has specialized knowledge and technical competence. Although we are reluctant to do so without a more comprehensive explanation by the board of the reasoning by which it reached its conclusion, we are constrained by the standard of review and the rule of deference articulated in our case law to affirm the board's classification.

We also reject Doe's argument that the application of factor 16 was error because there was no evidence that Doe assaulted victims two and three in a public place.[1] Factor 16

[1] In applying factor 16, the hearing examiner found that Doe took the boys to a "wooded area." However, according to the police reports from the time of the incident, Doe initially took one of the boys into a wooded area, but they came out shortly thereafter. Doe then led the boys to another area where they crossed over railroad tracks and went "down by the water" near a train trestle.

provides that "a 'public place' includes any area maintained for or used by the public and any place that is open to the scrutiny of others or where there is no expectation of privacy." 803 Code Mass. Regs. § 1.33(16)(a). The record contains police reports that indicate Doe assaulted victims two and three on the other side of railroad tracks that were easily accessed at the end of a road. Based on that information, the hearing examiner could properly infer that this area was accessible to any member of the public who traveled down the same road and chose to cross over the railroad tracks or anyone on board a train passing by. Accordingly, Doe has failed to show that applying factor 16 was improper.

In finding that Doe presents a moderate risk of reoffending and dangerousness, the hearing examiner analyzed the relevant factors and explicitly stated that the determinations were supported by clear and convincing evidence. "[O]ur review of [the] hearing examiner's decision does not turn on whether, faced with the same set of facts, we would have drawn the same conclusion, but only whether a contrary conclusion is not merely a possible but a necessary inference." Doe, Sex Offender Registry Bd. No. 23656 v. Sex Offender Registry Bd., 483 Mass. 131, 143-144 (2019), quoting Doe, Sex Offender Registry Bd. No. 3839 v. Sex Offender Registry Bd., 472 Mass. 492, 500-501 (2015). Although we recognize Doe's extraordinary success with

sex offender treatment, we cannot say that a contrary conclusion was required by the evidence of this case and conclude that substantial evidence supports the hearing examiner's classification of Doe as a level two offender.

3. Due process. Lastly, Doe contends that the hearing examiner applied factor 2 in a "mechanical" fashion, thereby depriving him of his right to an individualized hearing and violating his right to due process. As previously noted, factor 2 concerns repetitive and compulsive behavior and "is applied when a sex offender engages in two or more separate episodes of sexual misconduct. . . The most weight shall be given to an offender who engages in sexual misconduct after having been charged with or convicted of a sex offense." 803 Code. Mass. Regs. § 1.33(2)(a). In this case, the hearing examiner applied factor 2 with the most weight based on his finding that Doe assaulted victims two and three less than one year after he was adjudicated delinquent for committing sexual misconduct against victim one. However, even though the presence of factors 2 (and 3) indicate "a high risk of reoffense and degree of dangerousness" (emphasis added), 803 Code Mass. Regs. § 1.33, the examiner ultimately found Doe presents a moderate risk of reoffending and dangerousness. Given this conclusion, we are not persuaded that Doe was deprived of an individualized hearing.

Nor are we persuaded that Doe's right to due process was violated. To satisfy due process, "sex offender risk classifications must be established by clear and convincing evidence." Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 473 Mass. 297, 314 (2015). As we have already found that Doe's level two classification is supported by clear and convincing evidence, the hearing examiner's application of factor 2 did not violate Doe's right to due process.

Judgment affirmed.

By the Court (Vuono, Rubin & Walsh, JJ.[2]),

Joseph F. Stanton

Clerk

Entered: June 17, 2022.

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