COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-928

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 239639

vs.

SEX OFFENDER REGISTRY BOARD.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Plaintiff John Doe appeals from a judgment of the Middlesex County Superior Court affirming his reclassification as a level three sex offender. He raises six arguments. As we describe below, five are without merit. However, because we agree that the hearing examiner committed legal error in refusing to consider scholarly articles relevant to his risk of reoffense that were presented by Doe during the reclassification hearing, we conclude that his reclassification must be vacated and the case remanded so that the hearing examiner may properly consider those articles in the first instance.

Background. In August of 2008, Doe, then seventeen, molested a thirteen year old girl on two separate occasions. On the first, the girl and Doe were in a wooded area together. Doe attempted to kiss, grope, and spank the girl. Although the girl

resisted, Doe left her with four small hickeys on her neck and one large bruise on her left thigh. On the second occasion, the girl had attended an outdoor event with numerous individuals, including Doe, and when everyone else left Doe sexually assaulted her, touching and sucking her breast and placing his penis in her mouth before ejaculating on her chest. Doe was charged in December of 2008. He pleaded guilty to three counts of indecent assault and battery on a child. In 2009, the Sex Offender Registry Board ("SORB" or "Board") classified Doe as a level two sex offender.

Four years later, in July of 2013, a twenty year old woman reported that Doe had raped her. In a written statement provided to the local police department, the woman recounted, step by step, her encounter with Doe. They met online through a dating platform. After about three weeks of texting, they decided to meet in person. Doe asked that the woman come to his house to pick him up for dinner. When she got there, Doe introduced the woman to his parents. Doe and the woman left to pick up food for dinner, returning to his bedroom to eat. After dinner, Doe grabbed the woman and pulled her onto himself. The woman got off him and said "no." This happened several more times, at which point the woman said she wanted to leave.

Doe became angry and the woman became scared. The woman asked instead that she be allowed to retrieve her anxiety

medicine from the car. Doe followed her outside. After the woman took her medicine, they returned to Doe's bedroom, at which point Doe pushed the woman onto his bed. The woman again told him no. But Doe continued. He stripped off her clothes, put on a condom, raped her vaginally, raped her anally, and ejaculated on her back.

Doe was tried in 2014. There, the woman testified under oath in similar detail and was subject to cross-examination. The jury found Doe guilty of two counts of rape.

Though a different panel of this court vacated Doe's convictions in February of 2018 -- concluding that the trial judge had erred by ruling that the Commonwealth could impeach Doe with his prior felony convictions if he were to testify -- Doe was reclassified, following a hearing in June of 2019, as a level three sex offender.

In his decision, the examiner credited the 2013 allegations. Discussing the woman's written statement and a transcript of her trial testimony, the examiner noted the consistency and plausibility of the two statements and concluded that it was more probable than not that Doe had vaginally and anally raped the woman.

At the reclassification hearing, Doe submitted three scholarly articles for consideration by the hearing examiner.[1] The hearing examiner allowed their admission, but declined to consider them. He wrote, "The Petitioner also submitted three articles regarding sex offender treatment, particularly with regard to denial and recidivism (Petitioner Exhibits 9, 10, and 11). One of these articles (Petitioner Exhibit 9) is already cited in the Board's regulations. Information in the other two articles is interesting, however, since the topic of sex offender treatment is already covered in Factors 24 and 32 of the Board's regulations, I am required to base my analysis on that information. Based on the above reasons, I give no weight to these submissions within my overall analysis." Factor 24 is "Less than Satisfactory Participation in Sex Offender Treatment." Factor 32 is "Sex Offender Treatment." See 803 Code Mass. Regs. § 1.33 (2016).

Balancing several risk-elevating factors -- related to the nature of Doe's sexual offenses as well as his behavior while

[1] Petitioner Exhibit 9 was Levenson, "'But I didn't Do It!': Ethical Treatment of Sex Offenders in Denial," Sexual Abuse: A Journal of Research and Treatment, Vol. 23(3) (2011). Petitioner Exhibit 10 was Grady, Edwards, and Pettus-Davis, "A Longitudinal Outcome Evaluation of a Prison-Based Sex Offender Treatment Program," Sexual Abuse: A Journal of Research and Treatment, Vol. 29(3) (2017). Petitioner Exhibit 11 was Schmucker and Losel, "The Effects of Sexual Offender Treatment on Recidivism: An International meta-analysis of sound quality evaluations," J. Experimental Criminology, Vol. 11 (2015).

incarcerated -- against several risk-mitigating factors, the examiner reclassified Doe as a level three sex offender. He found by clear and convincing evidence that Doe posed a high risk of reoffense and a high degree of danger, and that the degree of dangerousness posed to the public was such that a substantial public safety interest would be served through the Internet dissemination of Doe's sex offender registry information.

Discussion. Doe argues that the final decision was unfair, not based on substantial evidence, and not proved by clear and convincing evidence. See Doe, Sex Offender Registry Bd. No. 3177 v. Sex Offender Registry Bd., 486 Mass. 749, 753 (2021) (Doe No. 3177); Doe, Sex Offender Registry Bd. No. 10216 v. Sex Offender Registry Bd., 447 Mass. 779, 787 (2006).[2] To this end, he raises six distinct arguments. We address each argument in turn.

1. Doe first argues that the hearing examiner's determination that the victim of his 2013 crimes (victim) was credible was not supported by substantial evidence because the examiner failed to give full weight to vacatur of his 2014 convictions. Doe insists that the "inescapable inference" from

[2] Contrary to SORB's assertion that Doe is arguing that there was an "insufficient basis for the Board to bring a reclassification action," Doe admits that he "does not here challenge the SORB's jurisdiction to initiate re-classification proceedings."

the vacatur "is that the victim's credibility was, in fact, weakened and/or compromised." We disagree.

Doe correctly notes that the decision to vacate his convictions stemmed from the trial judge's improper admission of evidence for impeachment purposes that, the panel concluded, effectively prevented Doe from testifying. However, while the panel's decision acknowledged the potential for Doe's testimony to have influenced the outcome of trial, at no point did it suggest that the victim's credibility had in fact been weakened. Instead, the panel wrote that the case on appeal was a close one because the defendant made no offer of proof as to the content of his testimony and had not insisted that he would have testified in the absence of the ruling at issue. Nothing in the opinion prevented the hearing examiner from concluding that the victim was credible. See Doe No. 3177, 486 Mass. at 757 ("[T]he board may consider subsidiary facts that are proved by a preponderance of the evidence, including subsidiary facts resulting in acquittals, where those facts are nonetheless proved by a preponderance of the evidence"). The hearing examiner properly analyzed the consistency of the victim's two accounts of the incident as well as the plausibility of what she described, and we see no abuse of discretion or other error of law in the hearing examiner's conclusion that she was credible.

2. Doe next argues that hearing examiner's reliance on the victim's police report required the examiner to rely on unreliable hearsay. "A hearing examiner is not bound by the rules of evidence applicable to court proceedings. Instead, the examiner may admit and give probative effect to evidence 'if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.' In the context of administrative proceedings, hearsay evidence bearing indicia of reliability constitutes admissible and substantial evidence" (citations omitted). Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 638 (2011) (Doe No. 10800), quoting G. L. c. 30A, § 11 (2). "Such indicia include 'the general plausibility and consistency of the victim's or witness's story, the circumstances under which it is related, the degree of detail, the motives of the narrator, the presence or absence of corroboration and the like.'" Doe, Sex Offender Registry Bd. No. 339940 v. Sex Offender Registry Bd., 488 Mass. 15, 26-27 (2021), quoting Doe, Sex Offender Registry Bd. No. 10304 v. Sex Offender Registry Bd., 70 Mass. App. Ct. 309, 313 (2007). "When reviewing an examiner's determination that hearsay evidence is substantially reliable, we ask whether 'it was reasonable for the examiner to admit and credit' the facts described in the hearsay evidence." Doe, Sex Offender Registry Bd. No. 523391 v. Sex Offender Registry Bd., 95 Mass.

App. Ct. 85, 89 (2019), quoting Doe, Sex Offender Registry Bd. No. 356011 v. Sex Offender Registry Bd., 88 Mass. App. Ct. 73, 77 (2015).

Here, the hearing examiner properly concluded that the hearsay evidence was reliable. The examiner compared the police report with the victim's trial testimony, which was given under oath and subject to cross-examination. The examiner found a high degree of consistency in the sequence of events, the description of sexual acts, and the things Doe was alleged to have said or done. The examiner found the victim's story to be plausible, noting that Doe likely had plans to have sex with the victim and assumed she would go along with it, given that this was the first time that he was alone with a woman he had recently met online. The examiner found that the victim had no motive to lie about being raped.

Doe argues that in a case based entirely on hearsay evidence, the examiner's decision as to credibility cannot be anything but subjective. To begin with, it is not clear that this case is based entirely on hearsay. The hearing examiner relied on a transcript of the victim's testimony given under oath at trial where she was subject to cross-examination by the same counsel who represented Doe before SORB. If the victim was not available at the time of the reclassification hearing, this would fall within an exception to the hearsay rule, and her

testimony would have been admissible even under the rules of evidence for the truth of its content. See Commonwealth v. Cyr, 425 Mass. 89, 97 (1997). In any event, even if we treat the transcript as well as the police report as hearsay, the level of factual detail included in both the transcript and the report provided objective indicia of the reliability of the hearsay, comparable to that which we have accepted in other cases when offered at SORB and other nonjudicial proceedings. See, e.g., Doe No. 10800, 459 Mass. at 638-639.

3. Doe's third argument is that because his convictions were vacated, the hearing examiner should not have applied Factors 12 (behavior while incarcerated) or 24 (less than satisfactory participation in sex offender treatment), both of which involved his behavior while incarcerated.[3] But inmates whose cases are on appeal are required to comply with prison rules, and their failure to do so (and their other conduct while incarcerated) remains relevant under the guidelines even if their convictions are subsequently vacated.

[3] Doe's claim that he stopped going to sex offender treatment in order to protect his Fifth Amendment right against compelled self-incrimination is not supported by the record, as, at the time, he merely wrote a letter to treatment staff stating that he was leaving treatment because "at this time I feel I'm not ready for intense treatment. I am under appeal and I don't feel ready to be here yet."

4. Fourth, Doe argues that the hearing examiner erroneously replaced the clear and convincing evidence standard with a preponderance of the evidence standard. See Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 473 Mass. 297, 298 (2015) ("SORB is constitutionally required to prove the appropriateness of an offender's risk classification by clear and convincing evidence"). Doe argues that the hearing examiner's reclassification of Doe as a level three sex offender relied solely on the examiner's determination that, by a preponderance of the evidence, Doe had vaginally and anally raped the 2013 victim. We disagree. In determining whether Doe's reclassification was warranted by clear and convincing evidence, the hearing examiner could "consider subsidiary facts that ha[d] been proved by a preponderance of the evidence." Doe, Sex Offender Registry Bd. No. 496501 v. Sex Offender Registry Bd., 482 Mass. 643, 656 (2019) (Doe No. 496501). The hearing examiner's decision relied on all the evidence presented. The examiner's discussion of the risk factors associated with Doe's sex offenses involved discussion of the 2013 offenses in conjunction with Doe's 2008 offenses. The examiner also considered other factors, including Doe's contact with the criminal justice system, violence unrelated to sexual assaults, behavior while incarcerated, and noncompliance with community supervision. It was based on all these considerations

that the examiner found by clear and convincing evidence that Doe posed a high risk of reoffense and degree of danger. The examiner applied the correct standard.

5. Doe argues fifth that his classification was made against the weight of the evidence. Based on the discussion above, however, we conclude that Doe's classification as a level three sex offender was supported by substantial evidence and not against the weight of the evidence.[4]

6. Notwithstanding these conclusions, because we agree with Doe's argument that the hearing examiner, in applying Factor 24, should have considered three scientific articles Doe submitted, we conclude that the decision of the Board must be vacated and the case remanded to allow the hearing examiner to consider at least two of those articles in the first instance.

As described above, Doe submitted three articles that he asserted reinforced his argument that his participation in sex offender treatment while he was incarcerated should not have been considered or weighed as a risk-elevating factor. As

[4] Doe also argues that the hearing examiner failed to make explicit findings as to why Internet dissemination was in the interest of public safety. See Doe No. 496501, 482 Mass. at 657. SORB concedes the point. The hearing examiner did not have the benefit of Doe No. 496501, which issued one month after the hearing in this case, and, in light of our conclusion related in the text below, that we must remand the matter, we will allow the hearing examiner to make in the first instance on remand the determinations required by Doe No. 496501.

described above, in his discussion of the three articles, the hearing examiner wrote, "The Petitioner also submitted three articles regarding sex offender treatment, particularly with regard to denial and recidivism (Petitioner Exhibits 9, 10, 11). One of these articles (Petitioner Exhibit 9) is already cited in the Board's regulations. Information in the other two articles is interesting, however, since the topic of sex offender treatment is already covered in Factors 24 and 32 of the Board's regulations, I am required to base my analysis on that information. Based on the above reasons, I give no weight these submissions within my overall analysis."

To the extent the hearing examiner declined to consider any of the proffered articles about sex offender treatment because the topic was already covered in the enumerated risk-elevating and risk-mitigating factors, that decision was error except with respect to Petitioner Exhibit 9, which was known to the Board when it promulgated the regulations (though it was cited in reference only to Factor 32 and not to Factor 24). Thus, it was not an abuse of discretion to decline to consider this article on that basis.

The two other articles, however, contain information that the Board did not address when promulgating Factors 24 and 32. The first, Petitioner Exhibit 10, tracked 3,865 sex offenders who exited a North Carolina prison between January 1, 1999, and

December 31, 2009, and found no difference in recidivism rates for sexual crimes based on participation in the program. This was published after the promulgation of the regulations, and thus, as a matter of fact, could not have been known to the Board at the time it enumerated Factor 24.

The second, Petitioner Exhibit 11, provides an update on Schmucker and Losel's 2005 study, which is cited in Factor 24. In Petitioner Exhibit 11, their 2015 meta-analysis, Schmucker and Losel found that participation in sex offender treatment programs resulted in a statistically significant difference in recidivism rate of 3.6 percentage points, 2.4 percentage points lower than what they had found in 2005. This article may have been available to the Board when it promulgated its regulations, though we have no information about where in the process of promulgation the Board may have been at the time of the article's publication. What is clear is that it is not mentioned in Factor 24, and, indeed, that it may provide information more favorable to Doe than what was contained in the Schmucker and Losel article that provided some support for enumerated Factor 24.

Apart from the factual point that two of the three proffered articles were not, as the hearing officer stated, "already covered" by the Board's regulations, the examiner's conclusion was an error of law because Factor 37, "Other

Information Related to the Nature of the Sexual Behavior," provides with respect to adult males that "Pursuant to M.G.L. c. 6, § 178L (1), the Board shall consider any information that it deems useful in determining risk of reoffense and degree of dangerousness posed by any offender." The Supreme Judicial Court has construed this mandate to include scholarly articles on subjects already covered by the enumerated regulatory factors. As the court explained, "The ability to consider other useful information not specifically contemplated by the guidelines is an important safety valve protecting a sex offender's due process rights." Doe, Sex Offender Registry Bd. No. 205614 v. Sex Offender Registry Bd., 466 Mass. 594, 604 (2013). There, despite the fact that "the regulations specifically provide that the risk factors are to apply with equal force to both males and females," id. at 605, the court concluded that the examiner was required to take in account scholarly articles submitted by the petitioner that described "recent research on females' lower rates of sexual recidivism." Id. Indeed, the court explained that "the development of evolving research is among the reasons that a hearing examiner is empowered to consider 'any information useful' beyond the enumerated risk factors. The ability to consider other information provides the flexibility to respond to authoritative research as it is published, where it is relevant in a given

case" (citations omitted). Id. at 605-606. The court held that in refusing to consider what was proffered, the hearing examiner "arbitrarily and capriciously failed to evaluate evidence" bearing on "the potency of existing risk factors in predicting reoffense" in the case before the Board. Id. at 608. The court vacated the classification decision and remanded the case. Id. at 611.

So too here, the determination not to consider the articles proffered by Doe because they addressed a topic covered by the enumerated factors was arbitrary and capricious.

None of this is to say that these articles will or should alter the Board's final classification. That is a question on which we express no opinion. It may be the case that on remand, after considering the information contained in these two articles, the examiner's weighing of Factor 24 remains the same. But the examiner's failure to consider the information contained in the articles in conducting his assessment was error, and Doe is entitled to a remand for a proceeding in which it is properly considered.

Conclusion. The judgment of the Superior Court, affirming SORB's reclassification of Doe as a level three sex offender, is therefore vacated and set aside. The matter is remanded for

entry of a new judgment vacating SORB's decision and remanding the case to SORB for further proceedings consistent with this opinion.

So ordered.

By the Court (Rubin, Englander & Hand, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: February 1, 2023.

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