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19-P-1306 Appeals Court

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 356315 vs. SEX OFFENDER REGISTRY BOARD.

No. 19-P-1306.

Essex. October 15, 2020. - March 12, 2021.

Present: Milkey, Blake, & Henry, JJ.

Sex Offender. Sex Offender Registration and Community Notification Act. Practice, Civil, Sex offender, Judgment on the pleadings. Administrative Law, Agency's interpretation of regulation. Regulation. Evidence, Sex offender. Statute, Construction.

Civil action commenced in the Superior Court Department on June 27, 2017.

The case was heard by John T. Lu, J., on a motion for judgment on the pleadings.

Fred J. Burkholder for the plaintiff.
Nicole M. Nixon for the defendant.

HENRY, J. The plaintiff, John Doe, appeals from a Superior Court judgment affirming his final classification by the Sex Offender Registry Board (SORB or board) as a level three sex offender. Doe's primary argument is that the board exceeded its

authority in promulgating 803 Code Mass. Regs. § 1.33(2) (2016) by substituting temporal distance between episodes of repetitive sexual conduct for the statutory prerequisite of compulsive behavior. Doe contends that SORB has thereby functionally eliminated the compulsiveness factor contained in G. L. c. 6, § 178K (1) (a) (ii). He also argues that the hearing examiner committed an abuse of discretion by failing to consider a scholarly article and in applying the required factors as well as failing to make separate findings about whether Internet publication of Doe's information will "effectively serve to protect the public." We affirm.

Background. After an evidentiary hearing, a SORB hearing examiner found the following: On or about August 12, 2007, Doe invited a friend to his apartment. When the friend arrived, Doe pushed her into the bathroom, got on top of her, covered her mouth, and attempted to rape her. When the victim screamed, Doe let her leave. During this incident, Doe's brother was present at the apartment, though not in the same room. Doe was charged with assault with intent to rape, G. L. c. 265, § 24; indecent assault and battery on a person age fourteen or over, G. L. c. 265, § 13H; and assault and battery, G. L. c. 265, § 13A (a). While these charges ultimately were nol prossed, the hearing examiner found "that the police report and the

statements made by [the victim] were detailed and specific enough to be considered."

On November 26, 2010, Doe sexually assaulted a stranger in the computer lab at a college in Boston. Doe "strangle[d] [the victim] with a piece of blue fabric. [The victim] lost consciousness briefly, and as she regained her senses, [Doe] was attempting to take her jeans off." Doe punched the victim in the face and head "several times" but the victim continued to scream and Doe fled. Doe pleaded guilty to assault with intent to rape, G. L. c. 265, § 24; assault and battery by means of a dangerous weapon, G. L. c. 265, § 15A (c); and assault and battery, G. L. c. 265, § 13A (a). Doe was sentenced to from four years to four years and one day in State prison on the assault with intent to rape charge and five-year probation terms from and after the prison sentence for the other two convictions, to be served concurrently. In 2013, prior to his release from prison, SORB classified Doe as a level three sex offender, a classification that Doe challenged.

The SORB hearing was held on June 8, 2017, at which time Doe was twenty-eight years old. In his decision, the hearing examiner applied one high-risk factor, factor 2, repetitive and compulsive behavior, with "increased aggravating weight," because Doe was criminally charged for sexually assaulting the first victim in 2007 and was convicted of sexually assaulting

the second victim in 2010. See G. L. c. 6, § 178K (1) (a) (ii). See also 803 Code Mass. Regs. § 1.33(2).

The hearing examiner applied five risk-elevating factors. He gave "full aggravating weight" to two factors: factor 7, relationship between offender and victim, because the first victim was extra-familial and the second victim was a stranger; and factor 8, weapons, violence, or infliction of bodily injury, because Doe used a "serious display of force" in assaulting the second victim. See G. L. c. 6, § 178K (1) (b) (i), (ii). See also 803 Code Mass. Regs. § 1.33(7), (8) (2016). The hearing examiner gave "aggravating consideration" to the factors that Doe committed his assault of the second victim in a public place (factor 16); that Doe assaulted two types of victims, extra-familial and stranger (factor 21); and that Doe committed sexual assaults against two victims (factor 22). See G. L. c. 6, § 178K (1) (b). See also 803 Code Mass. Regs. § 1.33(16), (21), (22) (2016). The hearing examiner further found "applicable" that Doe had prior contact with the criminal justice system (factor 10) and had been convicted of multiple violent crimes (factor 11). See G. L. c. 6, § 178K (1) (b). See also 803 Code Mass. Regs. § 1.33(10), (11) (2016). The hearing examiner gave "minimal aggravating weight" to the fact that Doe had received disciplinary reports while incarcerated (factor 12) and gave "increased aggravating weight" to the fact

that Doe had a history of noncompliance with probation (factor 13). See G. L. c. 6, § 178K (1) (c), (i). See also 803 Code Mass. Regs. § 1.33(12), (13) (2016).

The hearing examiner considered mitigating factors and assigned "moderate mitigating weight" to the fact that Doe was on probation (factor 28) and "minimal mitigating weight" to the existence of a support system for Doe (factor 33), given the fact that Doe did not submit any letters of support. See G. L. c. 6, § 178K (1) (c). See also 803 Code Mass. Regs. § 1.33(28), (33) (2016). The hearing examiner found that "the nature and extent of the risk aggravating factors in this matter outweigh the few mitigating considerations" and "that [Doe] presents a high risk of re-offense and high degree of dangerousness" and therefore classified Doe as a level three sex offender. A judge of the Superior Court upheld the hearing examiner's classification, and judgment entered on June 6, 2019. Doe timely appealed that decision.

Discussion. 1. Compulsiveness. SORB is statutorily required to consider as a factor "relative to the risk of reoffense . . . whether the sex offender's conduct is characterized by repetitive and compulsive behavior." G. L. c. 6, § 178K (1), (1) (a) (ii) (factor 2). SORB regulations apply factor 2 when

> "a sex offender engages in two or more separate episodes of sexual misconduct. To be considered separate episodes there must be time or opportunity, between the episodes, for the offender to reflect on the wrongfulness of his conduct. The Board may give increased weight to offenders who have been discovered and confronted (by someone other than the victim) or investigated by an authority for sexual misconduct and, nonetheless, commit a subsequent act 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) (2016). Doe contends that SORB exceeded its authority, or acted ultra vires, in promulgating § 1.33(2)(a), claiming that the regulation "substitut[es] temporal distance between episodes of repetitive sexual conduct for the statutory prerequisite [of] compulsive behavior."[1] Rather than challenging § 1.33(2)(a) as applied to him, Doe challenges the regulation on its face, relying on the concurrence in Doe, Sex Offender Registry Bd. No. 22188 v. Sex

[1] To the extent that Doe also intended to argue that his SORB classification was in violation of constitutional provisions, his brief does not sufficiently raise that issue. See Kellogg v. Board of Registration in Med., 461 Mass. 1001, 1003 (2011) (appellant "failed to support his claims of error with sufficient legal argument or factual detail, and fail[ed] to cite to sufficient supporting authority"). As Doe does not challenge this regulation on constitutional grounds, he was not required to bring a declaratory judgment action in the Superior Court and his argument concerning factor 2 is properly before us. Compare Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 631 (2011), with Doe, Sex Offender Registry Bd. No. 151564 v. Sex Offender Registry Bd., 456 Mass. 612, 619-621 (2010).

Offender Registry Bd., 96 Mass. App. Ct. 738, 745-747 (2019) (Doe No. 22188) (Milkey, J., concurring).[2]

Doe bears a heavy burden, as "[a] highly deferential standard of review governs a facial challenge to regulations promulgated by a government agency." Massachusetts Fed'n of Teachers, AFT, AFL-CIO v. Board of Educ., 436 Mass. 763, 771 (2002).

To assess the facial legality of a regulation,

> "[a court] employ[s] sequentially two well-defined principles. First, [it] determine[s], using conventional tools of statutory interpretation, whether the Legislature has spoken with certainty on the topic in question, and if [it] conclude[s] that the statute is unambiguous, [the court] give[s] effect to the Legislature's intent. . . . Second, if the Legislature has not addressed directly the pertinent issue, [the court] determine[s] whether the agency's resolution of that issue may be reconciled with the governing legislation" (quotations and citations omitted).

Goldberg v. Board of Health of Granby, 444 Mass. 627, 632-633 (2005). See New England Power Generators Ass'n v. Department of Envtl. Protection, 480 Mass. 398, 405 (2018) ("At the second stage, we afford substantial deference to agency expertise, and will uphold a challenged regulation unless a statute unambiguously bars the agency's approach" [quotations and citations omitted]).

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[2] Doe does not claim that he was denied the right to introduce expert evidence on whether his behavior was compulsive.

A person challenging the validity of a regulation must "establish 'the absence of any conceivable grounds upon which [the rule] may be upheld.'" Massachusetts Fed'n of Teachers, 436 Mass. at 771, quoting Purity Supreme, Inc. v. Attorney Gen., 380 Mass. 762, 776 (1980). See Student No. 9 v. Board of Educ., 440 Mass. 752, 762-763 (2004), and cases cited ("An administrative agency . . . has considerable leeway in interpreting a statute it is charged with enforcing"). A reviewing court "must apply all rational presumptions in favor of the validity of the administrative action" (citations omitted). NextEra Energy Resources, LLC v. Department of Pub. Utils., 485 Mass. 595, 603-604 (2020).

Furthermore, when reviewing a regulation, "a court cannot substitute [its] judgment as to the need for a regulation, or the propriety of the means chosen to implement the statutory goals, for that of the agency, so long as the regulation is rationally related to those goals" (quotations and citations omitted). Massachusetts Fed'n of Teachers, 436 Mass. at 772. "A court will not declare a regulation void unless its provisions cannot, in any appropriate way, be interpreted in harmony with the legislative mandate." Student No. 9, 440 Mass. at 763. Regulations must only be "within the ambit of the enabling statute" to be valid; they need not perfectly reflect the statute. Commonwealth v. Racine, 372 Mass. 631, 635 (1977).

While SORB is statutorily required to consider "whether the sex offender's conduct is characterized by repetitive and compulsive behavior," compulsive behavior is not defined in the statute. G. L. c. 6, § 178K (1) (a) (ii). The Legislature therefore has not "spoken with certainty on the topic in question." Goldberg, 444 Mass. at 633. We must then "determine whether the agency's resolution of th[e] issue may be reconciled with the governing legislation" (quotation and citation omitted). Id.

We conclude that this regulation is rationally related to the goals of the statute and therefore may be reconciled with the governing legislation. First, we note that the regulation requires either "time or opportunity . . . to reflect on the wrongfulness of his conduct" (emphasis added). 803 Code Mass. Regs. § 1.33(2)(a). The regulation thus provides two distinct measures for compulsiveness: time and opportunity, which stand in for the difficult task of obtaining objective evidence of a perpetrator's thoughts, impulses, and desires.

Second, time or the opportunity to reflect on the wrongfulness of one's actions bears a reasonable relation to the purpose of the statute. We accept, arguendo, that "compulsive" is defined as "of, having to do with, caused by, or suggestive of psychological compulsion or obsession" (citation omitted). Doe No. 22188, 96 Mass. App. Ct. at 745 (Milkey, J.,

concurring). Compulsion is defined in turn as "an irresistible impulse to perform an . . . act." Webster's Third New International Dictionary 468 (2002). We therefore read the regulation as consistent with the statutory requirement of compulsiveness: having had the time or opportunity to reflect on the wrongfulness of one's actions and not doing so suggests the persistence of the compulsion or impulse to offend.[3] We therefore hold that 803 Code Mass. Regs. § 1.33(2)(a) is "in harmony with the legislative mandate," Student No. 9, 440 Mass. at 763, and does not exceed SORB's statutory authority.

2. Failure to consider scholarly article. Doe next argues that the hearing examiner committed an abuse of discretion in failing to adequately consider the information in the scholarly article Hanson & Bussière, Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies, J. Consult. & Clin. Psychol. 66(2): 348-362 (1998). Where an offender presents evidence relevant to an offender's risk of recidivism, the

[3] The regulation also requires that the greatest weight be given to factor 2 when an offender "engages in sexual misconduct after having been charged with or convicted of a sex offense," 803 Code Mass. Regs. § 1.33(2)(a), in other words, where, as here, an offender has already been confronted with the wrongfulness of a prior act and nevertheless reoffends. See Doe No. 22188, 96 Mass. App. Ct. at 743 n.8, quoting testimony of Dr. R. Karl Hanson, an authority cited throughout SORB's regulations ("If a person offends, gets caught and then goes on to reoffend again, that's trouble. It means that the criminal justice system or whatever thing doesn't inhibit them").

hearing examiner must at least consider the evidence. See Doe, Sex Offender Registry Bd. No. 151564 v. Sex Offender Registry Bd., 456 Mass. 612, 622-623 (2010). Here, the hearing examiner's decision states that he gave this article and others submitted "little consideration in this decision." Little consideration is plainly some consideration rather than none, although it may be more accurate for the hearing examiner to state that he or she accorded the articles little evidentiary weight. It is for the hearing examiner to weigh the evidence presented. See Doe No. 22188, 96 Mass. App. Ct. at 742, citing Doe, Sex Offender Registry Bd. No. 68549 v. Sex Offender Registry Bd., 470 Mass. 102, 109-110 (2014) (Doe No. 68549). On the record before us, the hearing examiner exercised his discretion in conformity with applicable law, to give the articles slight weight. Contrast Doe No. 22188, supra at 739, 744.

Moreover, the article, as Doe concedes, is cited multiple times in 803 Code Mass. Regs. § 1.33 (2016). Therefore, merely by applying the required regulatory factors, the hearing examiner incorporated this article into his decision.

3. Application of the required factors. Doe contends that the hearing examiner's decision should be overturned as it was an abuse of discretion and was not supported by substantial evidence pursuant to G. L. c. 30A, § 14 (7). "A reviewing court

may set aside or modify SORB's classification decision where it determines that the decision is in excess of SORB's statutory authority or jurisdiction, violates constitutional provisions, is based on an error of law, or is not supported by substantial evidence." Doe, Sex Offender Registry Bd. No. 496501 v. Sex Offender Registry Bd., 482 Mass. 643, 649 (2019) (Doe No. 496501), citing G. L. c. 30A, § 14 (7). "We 'give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.'" Doe, Sex Offender Registry Bd. No. 523391 v. Sex Offender Registry Bd., 95 Mass. App. Ct. 85, 88 (2019) (Doe No. 523391), quoting Doe, Sex Offender Registry Bd. No. 356011 v. Sex Offender Registry Bd., 88 Mass. App. Ct. 73, 76 (2015).

Doe alleges that the hearing examiner abused his discretion by applying any weight to factor 2; "unwarranted" weight to factors 8, 10, and 11; and insufficient weight to factor 33 and in balancing the factors. However, "[a] hearing examiner has discretion . . . to consider which statutory and regulatory factors are applicable and how much weight to ascribe to each factor." Doe No. 68549, 470 Mass. at 109-110. "[A] reviewing court is required to give due weight to [the examiner's] experience, technical competence, and specialized knowledge" (quotation and citation omitted). Id. at 110. An abuse of

discretion occurs where the hearing examiner makes "a clear error of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives" (quotation and citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

It is apparent from the hearing examiner's careful weighing of the factors, as set forth above, including his decision to not give full weight to some aggravating factors, that "the classification is based on a sound exercise of informed discretion rather than the mechanical application of a checklist or some other reflex." Doe, Sex Offender Registry Bd. No. 136652 v. Sex Offender Registry Bd., 81 Mass. App. Ct. 639, 651 (2012). Doe points to no clear error of judgment in weighing the factors and, on the record before us, the outcome is within the range of reasonable alternatives. See L.L., 470 Mass. at 185 n.27. We therefore discern no abuse of discretion.

We also conclude that the hearing examiner's decision is supported by substantial evidence. "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 632 (2011), quoting G. L. c. 30A, § 1 (6). "We review the examiner's finding that clear and convincing evidence supported the classification to determine whether it was supported by

substantial evidence." Doe No. 523391, 95 Mass. App. Ct. at 94. Review "does not turn on whether, faced with the same set of facts, we would have drawn the same conclusion [as an agency] . . . but only 'whether a contrary conclusion is not merely a possible but a necessary inference.'" Doe, Sex Offender Registry Bd. No. 3839 v. Sex Offender Registry Bd., 472 Mass. 492, 500-501 (2015), quoting Doe No. 68549, 470 Mass. at 110. The weight given to the regulatory factors is within the hearing examiner's discretion and we do not substitute our judgment for that of an agency where there is substantial evidence supporting the agency decision. See Doe, Sex Offender Registry Bd. No. 3844 v. Sex Offender Registry Bd., 447 Mass. 768, 775 (2006). Here, as discussed above, the hearing examiner explained how much weight he ascribed to each applicable aggravating and mitigating factor and weighed some factors more heavily than others. As such, we cannot say that the evidence before the hearing examiner and his weighing of the applicable regulatory factors necessitate a contrary conclusion.

4. Publication of Doe's information. Doe contends that remand is necessary for the hearing examiner to make explicit findings regarding public access to his registry information, as the failure to make such findings violates his due process rights. As part of this argument, Doe also disputes the adequacy of the hearing examiner's findings on his

dangerousness. Citing Doe No. 496501, 482 Mass. 643 (2019), Doe argues that SORB "failed to consider 'what type of crime Doe would likely commit if he were to reoffend' and 'the severity and extent of harm that would result' if Doe were to commit a new crime." See id. at 651. However, one of Doe's offenses was against an extra-familial victim and the more recent offense was "highly violent" and against a stranger in a public place. In addition, as Doe has multiple convictions for "non-sexual violence" and a history of noncompliance with probation, the hearing examiner concluded that Doe "presents a . . . high degree of dangerousness." Here, therefore, as in Doe, Sex Offender Registry Bd. No. 23656 v. Sex Offender Registry Bd., 483 Mass. 131 (2019) (Doe No. 23656), there were "sufficient factors to merit a determination that Doe posed a [high] degree of dangerousness." Id. at 144.

Doe also argues that the hearing examiner did not make explicit findings about publication of Doe's information, and therefore we should remand to require such findings. See 803 Code Mass. Regs. § 1.20(2) (2016). However, Doe's hearing was conducted prior to the requirement that hearing examiners make explicit findings on "whether and to what degree public access to the offender's personal and sex offender information . . . is in the interest of public safety." 803 Code Mass. Regs. § 1.20(2)(c) (2016). See Doe No. 496501, 482 Mass. at 656-657.

Accordingly, we have the discretion whether to remand for an explicit finding. Doe No. 496501, 482 Mass. at 657-658. Based on the factors identified in the hearing examiner's decision and as discussed above, we are satisfied that "the underlying facts of the case . . . so clearly dictate the appropriate classification level that . . . a remand for explicit findings is not necessary." Id. at 657 n.4. We conclude that, given the nature of Doe's crimes, "public availability of Doe's name, photograph, address, and offenses would enable members of the public to take precautions to avoid encountering Doe in situations in which the members of the public are vulnerable." Doe, Sex Offender Registry Bd. No. 23656, 483 Mass. at 145.[4]

Judgment affirmed.

[4] Doe also perfunctorily argues that no remedial purpose is served by Internet publication of his registry information and that this requirement is therefore punitive. In light of our above conclusion that Doe's designation as a level 3 sex offender was not an abuse of discretion and was supported by substantial evidence, this argument is unavailing. See G. L. c. 6, § 178K (2) (c). See also Doe No. 496501, 482 Mass. at 655 ("Where a sexually violent offender presents [at least] a moderate risk to reoffend and a moderate degree of dangerousness, Internet publication will almost invariably serve a public safety interest").

MILKEY, J. (dissenting in part). By statute, the Sex Offender Registry Board (SORB) is required to consider a list of factors that are "indicative of a high risk of reoffense and degree of dangerousness posed to the public." G. L. c. 6, § 178K (1) (a). Among those mandatory high-risk factors is one that has become known as "factor 2": whether a "sex offender's conduct is characterized by repetitive and compulsive behavior" (emphasis added). G. L. c. 6, § 178K (1) (a) (ii). SORB has promulgated a regulation under which factor 2 applies when "a sex offender engages in two or more separate episodes of sexual misconduct." 803 Code Mass. Regs. § 1.33(2)(a) (2016). Episodes are deemed "separate" so long as there is "time or opportunity, between the episodes, for the offender to reflect on the wrongfulness of his conduct." Id. The majority holds, inter alia, that this regulation constitutes a valid exercise of the agency's rulemaking authority. I disagree and -- to that extent -- respectfully dissent.

It is axiomatic that "an agency does not have the authority to promulgate a regulation for the . . . administration of a statute that is contrary to the plain language of the statute and its underlying purpose" (quotation omitted). Dinkins v. Massachusetts Parole Bd., 486 Mass. 605, 607 (2021), quoting Buckman v. Commissioner of Correction, 484 Mass. 14, 23 (2020). Although the statute does not define the word "compulsive," that

term has a plain meaning, namely, "driven by psychological compulsions." See Doe, Sex Offender Registry Bd. No. 22188 v. Sex Offender Registry Bd., 96 Mass. App. Ct. 738, 745 & n.1 (2019) (Doe No. 22188) (Milkey, J., concurring), and dictionary definitions cited therein. We are bound to accept that meaning absent a sound reason to conclude that the Legislature intended a different meaning. See Worcester v. College Hill Props., LLC, 465 Mass. 134, 138 (2013), quoting Martha's Vineyard Land Bank Comm'n v. Assessors of W. Tisbury, 62 Mass. App. Ct. 25, 27–28 (2004) ("Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent").

By limiting factor 2's application to sex offenders whose behavior is both "repetitive and compulsive," the Legislature has stated its intent that this mandatory high-risk factor apply only where SORB has provided actual proof that a sex offender's behavior is driven by psychological compulsions.[1] For the reasons set forth in my concurring opinion in Doe No. 22188, 96 Mass. App. Ct. at 745-747, which I will not repeat here, a

[1] In upholding SORB's approach, the majority highlights its view that it would be "difficult" for SORB to marshal proof that a sex offender's actions were driven by psychological compulsions. Ante at . Putting aside that any such difficulties do not justify ignoring a Legislative mandate, SORB is free to engage experts to opine on the issue. In addition, the administrative records in SORB classification proceedings often include existing psychological reports that may bear on the issue.

showing that a sex offender reoffended after having had adequate "time or opportunity . . . to reflect on the wrongfulness of his conduct" hardly equates to proof of compulsive behavior.[2] Even if the precise boundaries of what constitutes "compulsive behavior" may be open to some regulatory refinement, SORB effectively has written that term out of the statute.[3]

[2] It bears noting that the Legislature separately has authorized SORB to consider the number of past violations as a discretionary risk-elevating factor. See G. L. c. 6, § 178K (1) (b) (iii) (authorizing SORB to consider "the number, date and nature of prior offenses"). Factor 2 has to mean something different from this.

[3] Dr. R. Karl Hanson, who authored studies on which SORB purportedly relied in adopting its factor 2 regulation, has questioned SORB's approach. See Doe No. 22188, 96 Mass. App. Ct. at 743 ("Hanson testified that SORB misunderstood and misapplied his research, and that of other researchers, in formulating its regulations regarding repetitive and compulsive behavior"). Specifically, commenting on an earlier version of SORB's regulation which also considered time to reflect as a proxy for compulsiveness, Hanson testified that "these studies of mine [cited in the regulations], actually none of the studies here . . . actually support the interpretation provided for this do it twice and you're compulsive or that increases your risk [to re-offend]." Id. at 743 n.8, quoting testimony regarding 803 Code Mass. Regs. § 1.40 (2013). In the case currently before us, Doe did not raise this separate fact-based challenge to the current regulation, and I do not rely on it.