SJC-13274

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 6729 vs. SEX OFFENDER REGISTRY BOARD.

Middlesex. September 9, 2022. - November 7, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Sex Offender. Sex Offender Registration and Community Notification Act. Practice, Civil, Sex offender. Evidence, Sex offender. Regulation. Administrative Law, Substantial evidence, Agency's interpretation of regulation.

Civil action commenced in the Superior Court Department on May 10, 2019.

The case was heard by Camille F. Sarrouf, Jr., J., on motions for judgment on the pleadings.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Ashley M. Green for the plaintiff.
David L. Chenail for the defendant.

KAFKER, J. This case concerns the reclassification of John Doe, Sex Offender Registry Board No. 6729 (Doe), from a level

two to a level three sex offender. The Sex Offender Registry Board (board) initiated an upward reclassification of Doe when he was charged with additional sex offenses. After an evidentiary hearing, the board ordered Doe to register as a level three offender. Doe challenges the board's determination, arguing that it was unsupported by substantial evidence, based on legal error, and arbitrary and capricious. Doe argues that the board hearing examiner erred in applying factor two of the regulations governing classification in the absence of a finding of compulsive behavior and failed to assign a specific weight to eight other factors, while erroneously relying on factor twenty-four, which addresses the failure to participate in sex offender treatment.

Upon review of the hearing examiner's decision, we conclude that there was clear and convincing evidence supporting the level three classification. Specifically, the element of compulsive behavior in factor two was satisfied by Doe's continuing to engage in sex offenses while being investigated for such offenses with another victim and having been convicted and imprisoned for sex offenses previously. We also conclude that the hearing examiner properly applied the other factors on which she relied, except for factor twenty-four, which should not have been considered. Considering this factor, however, was not prejudicial error, given the overwhelming evidence

supporting the level three classification. We therefore affirm the board's decision to upwardly reclassify Doe.

1. Background. a. Sex offenses and allegations. There are multiple reported instances of Doe's sexual misconduct involving three different victims. First, on August 19, 1998, Doe sexually assaulted an eight year old girl (victim one),[1] looking up her shorts at her vagina when she was not wearing underwear, rubbing her back and legs, pushing his penis against her buttocks while she sat on his lap, and suggesting to her that she could see his penis if she asked. On October 29, 1998, Doe pleaded guilty to this first sex offense, indecent assault and battery on a child under the age of fourteen, which required him to register as a sex offender. On July 30, 2003, the board classified the plaintiff as a level two sex offender.

Second, a fourteen year old girl (victim two) alleged that, from June to November of 2005, Doe sexually assaulted her on numerous occasions when she babysat for him and his wife. Doe began by touching her legs, groin, and breasts and by kissing her. He then penetrated her vagina digitally. In late October or early November of 2005, Doe had sexual intercourse with the

[1] Victim one is described as eight years old by her mother in her mother's statement to police but described as nine years old by the detective who interviewed her. We refer to victim one as eight years old at the time of the incident, based on her mother's statement.

victim. The victim's mother reported these incidents to the police on March 7, 2007, after the victim disclosed the rape to her. On March 12, 2009, a jury found Doe guilty on two counts of rape and abuse of a child without force and three counts of indecent assault and battery on a person age fourteen or older.[2]

Third, after police in April of 2007 questioned Doe about the allegations brought by victim two, a fourteen year old girl (victim three) reported to police that Doe, then thirty-four, sexually assaulted her at a house party in July of 2007. While sleeping in a bed alongside victim three, her friend, and another man, Doe kissed the victim, rubbed her breasts over her clothes, and "dry hump[ed]" her before having intercourse with her. He then had intercourse with her in the shower. On January 20, 2010, a jury found Doe guilty of two counts of rape of a child, and a judge sentenced him to from twelve to fifteen years of incarceration on each count, to run concurrently to one another but after his sentences for his convictions with regard to victim two. In 2012, the Appeals Court reversed the convictions with regard to victim three and set aside the verdicts for failure to prosecute within the time frame set

[2] Doe was sentenced to from ten to fifteen years of incarceration with credit for 529 days served, to run concurrently, on the rape convictions and from four to five years with credit for 529 days served, to run concurrently with the rape sentences, on the indecent assault and battery convictions.

forth by Mass. R. Crim. P. 36 (b) (1), 378 Mass. 909 (1979). The hearing officer nonetheless determined, regarding victim three, "I find there to be substantial evidence, including the [v]ictim's detailed account, told consistently to police at the hospital and during a later [sexual abuse intervention network] interview, . . . to conclude that [Doe] did commit the rapes of [v]ictim [three] as alleged." See Soe, Sex Offender Registry Bd. No. 252997 v. Sex Offender Registry Bd., 466 Mass. 381, 396 (2013) (explaining that conviction is not required for board to find that sex offense has occurred, as lower standard of proof and different evidentiary requirements apply).

b. Procedural history. In January of 2008, the board notified Doe of his duty to register as a level three sex offender after he was charged with the additional sex offenses related to victims two and three. Doe requested a hearing challenging the recommendation, and following the hearing, the examiner found "by clear and convincing evidence . . . that [Doe] presents a high risk to reoffend and danger, and the degree of dangerousness posed to the public is such that a substantial public safety interest is served by active dissemination of his sex offender registry information." In addressing factor two, the hearing examiner explained that Doe had engaged in additional sexual assaults after being convicted of one sexual assault and while being investigated for another.

The hearing examiner also considered factor twenty-four -- Doe's failure to engage in sex offender therapy -- despite Doe's concerns about confidentiality and the use of this information against him in civil commitment proceedings. The hearing examiner ordered Doe to register as a level three sex offender on May 6, 2019.[3]

Doe sought judicial review, pursuant to G. L. c. 30A, § 14, and G. L. c. 6, § 178M, and a Superior Court judge upheld the board's decision on July 30, 2020. Doe appealed from the Superior Court's decision, and the Appeals Court affirmed the board's decision. See Doe, Sex Offender Registry Bd. No. 6729 v. Sex Offender Registry Bd., 100 Mass. App Ct. 1124 (2022). Although the Appeals Court found that the hearing examiner applied risk factor twenty-four in error, the court determined that "the record adequately supports Doe's classification even in the absence of this factor," and this error resulted in "no prejudice" to Doe. Id. We allowed Doe's application for further appellate review to address uncertainty in the case law regarding the application of factor two's requirement of repetitive and compulsive behavior.

[3] The hearing was continued from January to June of 2008 to accommodate Doe's jury trial. The record, including the hearing examiner's decision, is silent as to what caused the delay from 2008 to 2019.

2. Discussion. a. Standard of review. "A reviewing court may set aside or modify the board's classification decision where it determines that the decision is in excess of the board's statutory authority or jurisdiction, is based on an error of law, is not supported by substantial evidence,[4] or is an arbitrary and capricious abuse of discretion." Doe, Sex Offender Registry Bd. No. 339940 v. Sex Offender Registry Bd., 488 Mass. 15, 30 (2021) (Doe No. 339940), quoting Doe, Sex Offender Registry Bd. No. 3177 v. Sex Offender Registry Bd., 486 Mass. 749, 754 (2021) (Doe No. 3177). When evaluating the board's decision, however, 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 No. 339940, supra, quoting Doe No. 3177, supra. See G. L. c. 30A, § 14 (7).

b. Sex offender classification and reclassification. Per the board's enabling statute, the board must "promulgate guidelines for determining the level of risk of reoffense and the degree of dangerousness posed to the public" that then inform the "three levels of notification depending on such risk . . . and . . . dangerousness." G. L. c. 6, § 178K (1). The

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[4] "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" Doe, Sex Offender Registry Bd. No. 3177 v. Sex Offender Registry Bd., 486 Mass. 749, 757 (2021), quoting G. L. c. 30A, § 1 (6).

statute provides a nonexhaustive list of "[f]actors relevant to the risk of reoffense," beginning with those "indicative of a high risk of reoffense and degree of dangerousness posed to the public," including factor two on "repetitive and compulsive behavior." Id. "A level three classification is appropriate '[w]here the board determines that the risk of reoffense is high and the degree of dangerousness posed to the public is such that a substantial public safety interest is served by active dissemination' of information about the offender to the public." Doe No. 339940, 488 Mass. at 30, quoting Doe No. 3177, 486 Mass. at 754. See G. L. c. 6, § 178K (2) (c).

The board may initiate reclassification proceedings "upon receipt of information that indicates the offender may present an increased risk to reoffend or degree of dangerousness." 803 Code Mass. Regs. § 1.32(1) (2016), citing G. L. c. 6, § 178L (3). The board may seek to reclassify a sex offender after he or she has "[b]een investigated for or charged with committing a new sex offense." 803 Code Mass. Regs. § 1.32(2)(a).

c. Doe's challenges to the hearing examiner's decision. Doe asks this court to vacate the board's decision classifying him as a level three sex offender and remand for a new hearing. He argues that, because the board hearing examiner erroneously applied factors two and twenty-four and failed to ascribe

specific weight to eight other factors, see G. L. c. 6, § 178K (1) (a); 803 Code Mass. Regs. § 1.33 (2016), the board lacked substantial evidence to reclassify him as a level three sex offender, see G. L. c. 30A, § 14 (7).[5] Doe further argues that the hearing examiner failed to make specific and individualized findings on the necessity for the Internet dissemination of his sex offender registry information, see G. L. c. 6, § 178K (1) (a); Doe, Sex Offender Registry Bd. No. 496501 v. Sex Offender Registry Bd., 482 Mass. 643, 656-657 (2019) (Doe No. 496501), and that these failures amounted to arbitrary and capricious action by the board, see G. L. c. 30A, § 14 (7). We address each argument in turn.

i. Factor two: repetitive and compulsive behavior. Among the "criminal history factors indicative of a high risk of reoffense and degree of dangerousness posed to the public," under G. L. c. 6, § 178K (1) (a) (ii), is "conduct . . .

[5] Doe did not raise the arguments he presents here in his motion for judgment on the pleadings in the Superior Court. Rather, regarding factor two, he only argued that, since his last sex offense occurred over twelve years prior, there was "no evidence that he currently engages in repetitive[] or compulsive behavior." As explained above, we have nonetheless taken this case to address and resolve the important disputed issue regarding the meaning of "repetitive and compulsive behavior" as defined by statute and the board's regulations. Because the Appeals Court correctly recognized and resolved the error regarding factor twenty-four and alluded to the issue of the weighting of different factors, we briefly address these issues as well.

characterized by repetitive and compulsive behavior." In its regulations, the board has interpreted the statutory term "repetitive and compulsive behavior" (also referred to as factor two) as follows:

> "Repetitive and compulsive behavior is associated with a high risk of reoffense. Factor [two] is applied 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 [or her] conduct."

803 Code Mass. Regs. § 1.33(2)(a). The regulation further provides:

> "The [b]oard 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."

Id.

In the instant case the hearing officer made the following finding regarding factor two:

> "[Doe] committed sexual assaults in 1998, 2005, and 2007. He committed the latter two after being convicted of sexually assaulting [v]ictim [one], and he raped [v]ictim [three] just months after being interviewed and polygraphed for his repetitive sexual assaults of [v]ictim [two]. I find his sexual misconduct to be highly repetitive and compulsive and I give full weight to this high risk factor."

Doe -- relying on the concurring opinion in Doe, Sex Offender Registry Bd. No. 22188 v. Sex Offender Registry Bd., 96

Mass. App. Ct. 738, 745-746 (2019) (Milkey, J., concurring), and a declaratory judgment decision on remand in that case, Doe, Sex Offender Registry Bd. No. 22188 vs. Sex Offender Registry Bd., Mass. Super. Ct., No. 2081CV1130B (Middlesex County Apr. 16, 2021) (Doe No. 22188) -- contends that the hearing examiner failed to make a separate finding on whether Doe's behavior was compulsive and instead erroneously treated "repetitive and compulsive" in factor two as one element. Doe argues that, without a distinct finding of compulsiveness, the hearing examiner could not ascribe this high-risk factor to Doe, which would, in turn, weaken the hearing examiner's determination that Doe is at a high risk of reoffending and thus ought to be classified as a level three sex offender. We conclude that the fact finding made by the hearing officer that Doe engaged in sexual offenses after being convicted of, and while being investigated for, other sex offenses was sufficient to satisfy the separate requirement of proving that his conduct was compulsive as well as repetitive.

We begin by recognizing the uncertain status of the factor two regulation itself. In its declaratory judgment order in Doe No. 22188, the Superior Court invalidated the first two sentences of the regulation, which provided for a finding of repetitive and compulsive behavior based only on repetitive

offenses occurring after enough time for reflection.[6] Doe No. 22188, Mass. Super. Ct., No. 2081CV1130B, slip op. at 22, 26 (Middlesex County Apr. 16, 2021). The judge determined this portion of the regulation was not supported by the scientific research, including that conducted by Dr. Karl Hanson, a scholar in this field on whose work the board has heavily relied when crafting its regulations. See id. at 6-9 (discussing research). In its brief in this case, the board explained that it has not appealed this declaratory judgment and is bound by that decision. We agree that the regulation needs to be reconsidered and redrafted in accordance with expert understanding of compulsive behavior. That understanding, although based on limited testimony, does, however, support a finding of compulsive, as well as repetitive, behavior in the instant case, and the hearing examiner made the necessary findings when applying the second portion of the regulation to Doe's case.

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[6] This case has not yet been resolved, as the Appeals Court recently vacated the board's second classification of the offender and remanded for a third classification proceeding after determining that the board's decision was not supported by substantial evidence due to the hearing examiner's erroneous application of factor two. See Doe, Sex Offender Registry Bd. No. 22188 v. Sex Offender Registry Bd., 101 Mass. App. Ct. 797, 804-806 (2022). In that case, "Doe was not discovered, confronted, or investigated between the two rapes" for which he was convicted. Id. at 804. The board chose not to defend the portions of the regulation invalidated by the trial court judge in that case. Id. at 797, 804. The Appeals Court also indicated that the board "is revising its regulations" in response. Id. at 800.

Upon our request at oral argument, the board filed testimony from Dr. Hanson that had been previously presented to the board that illuminates the distinction between repetitive and compulsive. Dr. Hanson notes that, while there is no predictive value for the risk of reoffending based solely on the commission of multiple sex offenses, there is such value "[i]f a person offends, gets caught[,] and then goes on to reoffend again," particularly when "the criminal justice system . . . doesn't inhibit them." Where a sex offender reoffends in such circumstances, his or her conduct may be found not only to be repetitive but also compulsive.

The language regarding compulsive behavior in the second part of the regulation regarding factor two accurately reflects Dr. Hanson's testimony on the risk of reoffending. As the hearing officer's findings relied on this aspect of Doe's conduct in determining that his sexual offenses were repetitive and compulsive, we discern no error.

Here, the board sought to reclassify Doe after he committed sex offenses against two new victims, following his incarceration for a prior sex offense conviction. Furthermore, he sexually assaulted victim three just three months after police questioned him about and conducted a polygraph test in relation to the assault of victim two. The hearing examiner considered these circumstances, including close proximity in

time, when she afforded "full weight"[7] to the risk factor, which is appropriate when "an offender . . . engages in sexual misconduct after having been charged with or convicted of a sex offense." See 803 Code Mass. Regs. § 1.33(2)(a). As Dr. Hanson's testimony notes, the risk assessment for reoffending is supported where involvement with the criminal justice system fails to deter the offender from offending again. Accordingly, we discern no error in the hearing examiner's application of factor two as a high-risk factor in Doe's case.

ii. Factor twenty-four: less than satisfactory participation in sex offender treatment. Doe asserts that the hearing examiner improperly held against him, in violation of Doe, Sex Offender Registry Bd. No. 23656 v. Sex Offender Registry Bd., 483 Mass. 131, 141-142 (2019) (Doe No. 23656), his refusal to participate in sex offender treatment out of a concern that such treatment was not confidential and could be used against him in his civil commitment proceeding. We agree that the hearing examiner misapplied this factor; however, even when removing this factor from consideration, the hearing examiner's decision remains supported by substantial evidence.

[7] We understand the hearing examiner's use of "full weight" to refer to the regulation's language that "[t]he most weight shall be given to an offender who engages in sexual misconduct after having charged with or convicted of a sex offense," 803 Code Mass. Regs. § 1.33(2)(a) (2016), although using the precise language of the regulation would have simplified our review.

In Doe No. 23656, 483 Mass. at 141, we held that "the refusal of nonconfidential [sex offender] treatment cannot be used to infer an unwillingness to be treated." Nonetheless, in her decision, the hearing examiner made the following finding:

> "Factor [twenty-four]: Less Than Satisfactory Participation In Sex Offender Treatment: According to his [correction record], [Doe] has refused to participate in sex offender treatment. Parole notations indicated that he refused to discuss the offense[] and was concerned about his comments being used in civil commitment proceedings . . . . Given his refusal to participate in sex offender treatment offered to him while incarcerated, I consider this factor."

Given Doe's expressed concerns regarding confidentiality, which were noted in his correction file, the hearing examiner erred when she considered his refusal to engage in sex offender treatment. That error, however, was clearly harmless here. For the reasons discussed supra and in the board's brief, there was overwhelming evidence to support the level three classification.

iii. Specified weight for all factors. Doe also objects, for the first time on appeal, that the hearing examiner applied certain risk factors without denoting whether she ascribed a threshold, moderate, or high degree of weight to each factor. Doe posits that we should require board hearing examiners to ascribe weight to each factor they evaluate when classifying sex offenders within the framework set forth at 803 Code Mass. Regs. § 1.33, even when the regulations do not prescribe the weights that must accorded to a particular factor. Given that the

hearing officer applied the regulations according to their terms and consistent with our case law, which provides for "discretion to determine how much weight to ascribe to each factor under consideration," we discern no error. See Doe No. 23656, 483 Mass. at 138-139, citing Doe, Sex Offender Registry Bd. No. 68549 v. Sex Offender Registry Bd., 470 Mass 102, 109-110 (2014).

iv. Internet dissemination of offender status to protect public safety. Doe also argues that the hearing examiner failed to make specific and individualized findings on the necessity of publicly disseminating Doe's sex offender status via the Internet, in violation of his State and Federal constitutional and common-law rights to privacy, due process, and freedom from cruel and unusual punishment. This argument has no merit.

When classifying an offender as level three, the hearing examiner must establish by clear and convincing evidence that "the risk of reoffense is high and the degree of dangerousness posed to the public is such that a substantial public safety interest is served by active dissemination" of the offender's registration information. G. L. c. 6, § 178K (2) (c). See Doe No. 496501, 482 Mass. at 656-657 (interpreting statute in context of review of level two classification decision and extending to level three classifications). In so doing, the hearing examiner must "make explicit" those three findings -- a

high risk of reoffense, a high degree of dangerousness, and a public safety interest is served by active dissemination of the offender's registry information -- in a manner that is particularized and detailed to the offender. See Doe No. 496501, supra. "Where a prior classification decision fails to meet this requirement, and where an appeal is pending," we have the discretion to remand to the hearing examiner for these findings. Id. at 657. We need not remand, however, when "the underlying facts of the case . . . so clearly dictate the appropriate classification level." Doe No. 23656, 483 Mass. at 145, quoting Doe No. 496501, supra at 657 n.4.

Although the hearing examiner explicitly determined that "a substantial public safety interest is served by active dissemination of [Doe's] sex offender registry information," she did not make explicit findings on this element that are detailed and particularized to Doe. Her determination, however, follows a nearly four-page discussion of Doe's assaults against extrafamilial children, including multiple occasions where other people were present, among other high-risk indicators that puts the public at grave risk. Because "the underlying facts . . . so clearly dictate" that Doe was properly classified as a level three sex offender, requiring active dissemination of his registry information, "we do not exercise our discretion to remand for further findings on this element." Doe No. 23656,

483 Mass. at 145. Rather, "we determine that there was substantial evidence to support each element by clear and convincing evidence," and so "there was no error in the hearing examiner's classification of" Doe as a level three sex offender. Id. at 146.

3. Conclusion. For the foregoing reasons, we conclude that the hearing examiner's decision was supported by substantial evidence and not arbitrary or capricious. Therefore, the judgment affirming the board's decision to classify Doe as a level three sex offender is affirmed.

So ordered.