SJC-13736

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 527962 vs. SEX OFFENDER REGISTRY BOARD.

Franklin. May 5, 2025. - September 11, 2025.

Present: Budd, C.J., Gaziano, Kafker, Wendlandt, Georges, Dewar, & Wolohojian, JJ.

Sex Offender. Sex Offender Registration and Community Notification Act. Evidence, Sex offender. Practice, Civil, Sex offender, Standard of proof, Judgment on the pleadings. Administrative Law, Substantial evidence, Standard of proof, Decision.

Civil action commenced in the Superior Court Department on March 16, 2022.

The case was heard by Michael K. Callan, J., on a motion for judgment on the pleadings.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Joshua M. Daniels for the plaintiff.
David L. Chenail for the defendant.
Elizabeth Caddick, for Committee for Public Counsel Services, amicus curiae, submitted a brief.

KAFKER, J. John Doe, Sex Offender Registry Board No. 527962 (Doe), pleaded guilty to numerous sexual offenses committed against two girls, aged thirteen and fourteen, when he was eighteen years old. After he challenged his initial level three classification, a hearing examiner of the Sex Offender Registry Board (SORB or board) classified Doe as a level two offender. A Superior Court judge affirmed, and Doe appealed.

Before us, Doe's central argument is that the hearing examiner erred by considering Doe's multiple offenses as part of his determination of Doe's degree of dangerousness. More specifically, Doe contends that the hearing examiner erroneously, and unconstitutionally, considered Doe's multiple offenses as "other relevant information" bearing on Doe's dangerousness pursuant to SORB's regulatory factor thirty-seven, and did so even though SORB is precluded from consideration of multiple offenses, without involvement of the criminal justice system in between such offenses, regarding risk of reoffense pursuant to regulatory factor two, which applies to behavior that is not only repetitive but also compulsive. We conclude that dangerousness and risk of reoffense involve separate inquiries, and multiple offenses may therefore be considered differently under factors thirty-seven and two. We also decline Doe's invitation to declare the hearing examiner's application of factor thirty-seven unconstitutional based on a lack of

empirical evidence establishing a connection between multiple offenses and dangerousness, given the limited and late-filed record on this issue, and the Legislature's express requirement that the number of offenses be considered in determining dangerousness. After consideration of Doe's other arguments, we affirm the board's decision to classify Doe as a level two offender.[1]

Background. 1. Sex offender classification process. Pursuant to G. L. c. 6, § 178K, SORB is statutorily mandated to assess the risk of reoffense and degree of danger posed by sex offenders, make classifications thereof, and implement three levels of public notification. G. L. c. 6, § 178C. See Doe, Sex Offender Registry Bd. No. 339940 v. Sex Offender Registry Bd., 488 Mass. 15, 17-18 (2021) (Doe. No. 339940).

First, the board makes an initial recommendation regarding "each sex offender's duty to register and classification level," pursuant to G. L. c. 6, § 178L. 803 Code Mass. Regs. § 1.04(2) (2016). The board uses a numbered list of nonexhaustive factors to place offenders according to a three-tiered system: level one offenders pose a low risk of reoffense and degree of dangerousness "such that a public safety interest is [not]

[1] We acknowledge the amicus brief submitted by the Committee for Public Counsel Services.

served by public availability" of registration information; level two offenders pose a moderate risk and degree "such that a public safety interest is served by public availability of registration information"; and level three offenders pose a high risk of reoffense and degree of dangerousness, "such that a substantial public safety interest is served by active dissemination." G. L. c. 6, § 178K (2) (a)-(c). See 803 Code Mass. Regs. §§ 1.03, 1.33 (2016). See also G. L. c. 6, § 178C; Doe, Sex Offender Registry Bd. No. 496501 v. Sex Offender Registry Bd., 482 Mass. 643, 650 (2019) (Doe No. 496501).

If an offender wishes to challenge the initial classification by SORB, he or she is entitled to a de novo hearing before a hearing examiner. See G. L. c. 6, § 178L (1) (a); 803 Code Mass. Regs. § 1.04(3) (2016). The resulting "final classification" is then subject to judicial review in the Superior Court pursuant to G. L. c. 30A. G. L. c. 6, § 178M.

2. Doe's sex offenses. We recite the relevant facts drawn from the hearing examiner's findings and reserve some for later discussion.

Doe was eighteen years old at the time he committed sexual offenses against two younger girls. Prior to these offenses, Doe had received several psychological diagnoses, including autism spectrum disorder. Beginning in August 2018, Doe

offended against his ex-girlfriend's best friend (victim one, then thirteen years old) several times, including raping her.

In September 2019, amid the police investigation into the allegations brought by victim one, police interviewed Doe's ex-girlfriend (victim two), who stated that she dated Doe the prior year, when she was fourteen and he was eighteen. Victim two reported that Doe raped her "three to four times" -- including at least once when she told Doe "no," but he pulled her pants down and raped her.

3. Procedural history. Doe was subsequently indicted in the Superior Court on charges arising from his conduct against each victim. On July 1, 2021, Doe pleaded guilty to four counts of rape and abuse of a child in violation of G. L. c. 265, § 23, and one count of indecent assault and battery on a child under fourteen in violation of G. L. c. 265, § 13B.[2] Doe was sentenced to two and one-half years in a house of correction, with two years suspended, and four years of probation to end in November 2025.

On September 10, 2021, the board initially classified Doe as a level three offender and notified Doe of his obligation to

[2] Doe was also indicted on one count of forcible rape and abuse of a child in violation of G. L. c. 265, § 22A, and two additional counts of rape and abuse of a child in violation of G. L. c. 265, § 23. In exchange for the plea, the Commonwealth entered a nolle prosequi as to these additional counts.

register as such. Doe challenged the classification, and a de novo reclassification hearing before a hearing examiner was held on February 16, 2022. The hearing examiner found by clear and convincing evidence that Doe "present[ed] a moderate risk to re-offend and a moderate degree of danger such that a public safety interest is served by public access to his sex offender registry information." See G. L. c. 6, § 178K (2) (b). Doe was thus reclassified as a level two offender.

In making his determination on Doe's moderate risk of reoffense, the hearing examiner applied one statutory high-risk factor (factor three, adult offender with child victim), three regulatory risk-elevating factors (factor seven, relationship between the offender and victim; factor sixteen, public place; and factor twenty-two, number of victims), and one additional factor (factor thirty-five, psychological or psychiatric profiles regarding risk to reoffend). See 803 Code Mass. Regs. § 1.33. The hearing examiner also found that Doe's risk of reoffense was mitigated by four risk-mitigating factors -- factor twenty-eight, supervision by probation or parole; factor thirty-two, sex offender treatment; factor thirty-three, home situation and support systems; and factor thirty-four, materials submitted by the sex offender regarding stability in the community, the last of which he gave minimal weight. See id.

In assessing Doe's degree of dangerousness, the hearing examiner applied one statutory high-risk factor (factor three, adult offender with child victim), three risk-elevating factors (factor sixteen, public place; factor nineteen, level of physical contact; and factor twenty-two, number of victims), and one additional factor (factor thirty-seven, other useful information). See id. Specifically regarding factor thirty-seven, the hearing examiner stated that Doe "engaged in sexual misconduct multiple times between April 2018 and February 2019," including raping one of the victims multiple times, and that the examiner "consider[ed] this information in [his] analysis of the degree of danger [Doe] poses." Regarding factor sixteen, the hearing examiner wrote that he applied it because Doe "had no expectation of privacy" during several of Doe's offenses, which occurred "in the woods by a school" and "outside of a school on the ground." The hearing examiner balanced these factors against one risk-mitigating factor (factor twenty-eight, supervision by probation or parole). See id.

Finally, the hearing examiner determined that a public safety interest would be served by Internet publication of Doe's registration information. He reasoned that the availability of such information would specifically help protect teenage girls, the most likely victims of any reoffense by Doe.

As a result of these three requisite findings, the hearing examiner ordered that Doe register as a level two sex offender. Doe sought judicial review of the classification pursuant to G. L. c. 30A, § 14. After a hearing, the Superior Court judge denied Doe's motion for judgment on the pleadings, affirming the hearing examiner's classification. Doe timely appealed, and we transferred this case sua sponte from the Appeals Court.

Discussion. In reviewing SORB classification determinations, a 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 . . . , is based on an error of law, is not supported by substantial evidence, or is an arbitrary and capricious abuse of discretion."[3] Doe, Sex Offender Registry Bd. No. 6729 v. Sex Offender Registry Bd., 490 Mass. 759, 762 (2022) (Doe No. 6729). See G. L. c. 30A, § 14 (7). In our analysis, we "give due weight to the experience, technical competence, and specialized knowledge of the agency." Doe No. 6729, supra at 762-763, quoting Doe No. 339940, 488 Mass. at 30.

[3] "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).

Doe contends that the hearing examiner's decision was arbitrary, capricious, and an abuse of discretion. His central argument is that, in determining Doe's degree of dangerousness, the hearing examiner erroneously, and unconstitutionally, considered Doe's multiple offenses pursuant to the catch-all factor thirty-seven in a manner precluded by the law governing factor two, which concerns consideration of the impact of multiple offenses on risk of reoffense. See Doe No. 6729, 490 Mass. at 765-766, citing 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 or factor two litigation). He further contends that the lack of empirical evidence supporting a connection between the number of offenses and dangerousness renders the application of factor thirty-seven unconstitutional. Doe also asserts that the hearing examiner gave too much weight to some factors, and not enough to others, in making his determination of Doe's dangerousness. Finally, Doe argues that Internet dissemination should not be mandated in his case. We address each argument in turn.

1. Distinct inquiries of factors two and thirty-seven. Factor thirty-seven of the board's regulations dictates that "[p]ursuant to [G. L. c. 6, § 178L (1),] the [b]oard shall consider any information that it deems useful in determining

risk of reoffense and degree of dangerousness posed by any offender." 803 Code Mass. Regs. § 1.33. The hearing examiner cited Doe's multiple offenses under factor thirty-seven as supporting his conclusion that Doe's degree of dangerousness was moderate.

Doe now argues that such consideration was impermissible, given that previous decisions regarding the proper consideration of multiple offenses under factor two (repetitive and compulsive behavior) resulted in certain applications of that factor being deemed unconstitutional. See Doe No. 6729, 490 Mass. at 765-766; Doe No. 22188, Mass. Super. Ct., No. 2081CV1130B, supra. According to Doe, the hearing examiner's consideration of multiple offenses under factor thirty-seven was simply an end run around these limits on the use of factor two.

Doe's reliance on the factor two analysis is misplaced. Factor two specifically requires not only repetitive but also compulsive behavior. Such repetitive and compulsive behavior is central to the inquiry of risk of reoffense -- the only inquiry addressed by factor two -- as it has been empirically linked to the risk of reoffense, while repetitive behavior alone has not been so found. See Doe No. 6729, 490 Mass. at 766 ("[i]f a person offends, gets caught[,] and then goes on to reoffend again," his or her conduct may be found to be not only repetitive but also compulsive). In contrast, factor thirty-

seven does not require proof of compulsive behavior. And, as utilized here, the hearing examiner's application of factor thirty-seven was only for determining degree of dangerousness, not risk of reoffense. The statute renders these distinct inquiries: dangerousness is "measured by the severity and extent of harm" should an offender recidivate; the risk of reoffense measures the likelihood an offender will recidivate. Doe No. 496501, 482 Mass. at 651, 659. See 803 Code Mass. Regs. § 1.20(2) (2016) (hearing examiner must make separate determinations on risk of reoffense, dangerousness, and publication). Accordingly, the law restricting application of factor two does not control this case.

Indeed, in considering the impact of Doe's multiple offenses on his future dangerousness -- including that he raped one victim multiple times -- the hearing examiner was not ignoring the law, but rather complying with SORB's statutory mandate. General Laws c. 6, § 178K, the board's authorizing statute, requires that the board's classification guidelines include consideration of "the number, date and nature of prior offenses" "in determining . . . degree of dangerousness" (emphasis added). G. L. c. 6, § 178K (b) (iii). And here, factor twenty-two, accounting for the number of Doe's victims -- two -- does not fully capture the extent of his offenses, because he repeatedly offended against one of the victims. An

analysis of dangerousness "naturally takes place on a continuum," and based on this record, we discern no error in the hearing examiner considering Doe's multiple prior offenses in his determination of dangerousness. Doe No. 496501, 482 Mass. at 651, 659 ("Pragmatically, because past is prologue, a hearing examiner would make this [dangerousness] determination based on the sexual crime or crimes that the offender committed in the past"). See G. L. c. 6, § 178L (1) (board classification entails review of "any information useful in assessing . . . the degree of dangerousness posed to the public by the sex offender").

2. Empirical support for factor thirty-seven. Doe also asserts that the lack of empirical data establishing a connection between multiple offenses and degree of dangerousness is sufficient to invalidate the board's use of such on constitutional grounds. In essence, Doe asks us to conclude that because there has been no demonstrated empirical connection between repetitive behavior and risk of reoffense there has likewise been no demonstrated empirical connection between multiple offenses and dangerousness.

We decline to take that analytical leap when the issue of empirical support for a link between multiple offenses and degree of dangerousness has not been adequately raised or litigated in the instant case, and the number of offenses is an

express required consideration to determine dangerousness according to the act. In the factor two litigation, the parties had the opportunity to consider and contest the evidence submitted, after which the Superior Court judge made factual findings regarding the relevant science and rendered a well-supported decision on the basis of the board's application of factor two. See Doe No. 22188, Mass. Super. Ct., No. 2081CV1130B. None of that occurred here.[4] Instead, Doe did not raise the issue until his reply brief in this court, and the empirical evidence on which he relies is only found in an addendum to an amicus brief.[5] See Assessors of Boston v. Ogden Suffolk Downs, Inc., 398 Mass. 604, 608 n.3 (1986) ("[a]ny issue

[4] Nor did Doe raise the issue before the hearing examiner, a requirement for certain species of constitutional challenges. See Doe No. 339940, 488 Mass. at 20 (agency not authorized to decide constitutionality of its statutes and regulations, but where "a constitutional issue is closely intertwined with the facts of a specific case," party should "raise constitutional question in the agency proceeding" so agency can "make factual findings necessary to address the constitutional question"). See also Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 629-631 (2011).

[5] Among the evidence in question is a letter from Dr. Karl Hanson, "a scholar in this field on whose work the board has heavily relied when crafting its regulations." Doe No. 6729, 490 Mass. at 765. In his letter, Hanson states that he "know[s] of no studies that have directly examined the extent to which the number of index offences is related to the severity and extent of harm of future offences." Crucially, there has not been an evidentiary hearing here, with an opportunity for cross-examination to test any such statements or other evidence.

raised for the first time in an appellant's reply brief comes too late"). On the record before us, we therefore decline to consider the argument whether the current state of empirical evidence renders unconstitutional the board's use of multiple offenses in its degree of dangerousness determinations, as required by the act. See G. L. c. 6, § 178K (b) (iii).

3. Weight of classification factors. Doe also argues that several other errors in the hearing examiner's classification decision, singly or cumulatively, require relief. The first is that, according to Doe, the hearing examiner erred in applying risk-elevating factor sixteen (public place) in the analysis of risk of reoffense and dangerousness.[6] The hearing examiner found that the locations of Doe's assaults did not confer an "expectation of privacy" and that he did not make a "clear and concerted effort" to hide his behavior; accordingly the hearing examiner did not apply "less weight" to this factor. 803 Code

[6] Factor sixteen (public place) states: "The commission of a sex offense or engaging in sexual misconduct in a place where detection is likely reflects the offender's lack of impulse control. The [b]oard may apply less weight to factor [sixteen] if there is evidence that the offender made a clear and concerted effort to conceal his offending behavior from others. For purposes of factor [sixteen] 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" (quotation omitted). 803 Code Mass. Regs. § 1.33(16).

Mass. Regs. § 1.33(16)(a). The conduct in question occurred in a wooded area and in an alley, both near a school. Although, as Doe argues, the school may not have been in use at the time of the offenses, the locations were nevertheless sufficiently public to support the hearing examiner's findings and application of factor sixteen. See Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 633 (2011).

Doe next proposes that the hearing examiner should have afforded greater mitigating weight to factors thirty-three (home situation and support systems) and thirty-four (stability in the community). As reflected in his decision, the hearing examiner considered both factors in mitigation, expressly recognizing Doe's supportive home environment, and exercised his "discretion to determine how much weight to ascribe to each factor under consideration." Doe No. 6729, 490 Mass. at 768, quoting Doe, Sex Offender Registry Bd. No. 23656 v. Sex Offender Registry Bd., 483 Mass. 131, 138-139 (2019) (Doe No. 23656). We discern no error in the hearing examiner's application of those factors, including his conclusion that Doe's limited involvement with the community was to be given minimal weight; that Doe would prefer him to have weighed the factors differently does not amount to an abuse of discretion.

Doe does, however, correctly identify one potential flaw in the hearing examiner's decision. In the portion of the decision explaining the hearing examiner's application of the various regulatory factors, the first heading is "High Risk Factor." This heading is followed by the subheading "Factor 3 -- Adult Offender with Child Victim"; factor three is indeed a factor the Legislature has identified as "indicative of a high risk of reoffense and degree of dangerousness posed to the public." G. L. c. 6, § 178K (1) (a) (iii). That discussion is immediately followed by a subheading for and discussion of factor thirty-seven, which, conversely, is not a statutory high-risk factor.

There are reasons to be skeptical that this placement signifies that the hearing examiner gave improper weight to factor thirty-seven. The section heading of "High Risk Factor" is in the singular, which aligns with only factor three being considered as a high-risk factor. Moreover, the factor three discussion explicitly identifies that factor as high risk, while the factor thirty-seven discussion does not. Nevertheless, we need not decide the question of error, because we conclude that even if we were to excise any improper weight afforded to factor thirty-seven, the record still "clearly dictate[s]" the conclusion that Doe poses a moderate degree of dangerousness. Doe No. 496501, 482 Mass. at 657 n.4. See Doe No. 6729, 490

Mass. at 767. As an adult, Doe committed multiple contact sexual offenses (including rape) against two girls who were thirteen and fourteen years old, some in public places, and offended repeatedly against one of the victims. The only applicable mitigating factor regarding dangerousness is his probationary status. On these facts, we see no need to remand for clarification of the weighting of factor thirty-seven. See Doe No. 6729, supra at 769.

4. Internet dissemination. Doe lastly contends that Internet dissemination of his information should not be required. Internet dissemination is required for offenders presenting at least a moderate risk of reoffense and degree of dangerousness where the "public availability of [their] registration information" would serve "a public safety interest," as supported by clear and convincing evidence. Doe No. 496501, 482 Mass. at 646, 654, quoting G. L. c. 6, § 178K (2) (b). The board must look to "the particular risks posed by the particular offender" to assess whether Internet dissemination "might realistically serve to protect the public against the risk of the offender's sexual reoffense." Doe No. 496501, supra at 655.

We discern no error in the hearing examiner's findings regarding Internet dissemination. His subsidiary findings -- that should Doe reoffend, it would likely be against "a

vulnerable teenaged girl," and that Internet publication would serve to protect these "teenaged girls . . . from becoming [v]ictims of sex offenses" committed by Doe in the future -- were supported by the record. Those findings, in turn, support his ultimate determination that a public safety interest would be served by publication. See Doe No. 496501, 482 Mass. at 645, quoting St. 1999, c. 74, emergency preamble (purpose of sex offender registration law is to "protect . . . vulnerable members of our communities from sexual offenders"). Doe's reliance on his expert's testimony that Internet publication is unnecessary is unavailing: while the hearing examiner is permitted to weigh expert testimony, the board is not bound by such testimony. See Doe No. 23656, 483 Mass. at 137 ("Doe is not entitled to a guarantee that SORB will reach the same conclusion as his expert; he is entitled only to careful consideration of his expert's testimony").

Conclusion. For the foregoing reasons, we conclude that the hearing examiner's classification 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 two sex offender is affirmed.

So ordered.