CLERK'S NOTICE	DOCKET NUMBER 1677CV00756	Trial Court of Massachusetts The Superior Court

CASE NAME:
John Doe [redacted] vs. Sex Offender Registry Board

Thomas H. Driscoll, Jr., Clerk of Courts

TO:
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COURT NAME & ADDRESS
Essex County Superior Court - Salem
J. Michael Ruane Judicial Center
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Salem, MA 01970

You are hereby notified that on 11/08/2017 the following entry was made on the above referenced docket:

MEMORANDUM & ORDER:

Doe's motion for judgment on the pleadings (D.8) is ALLOWED and the Board's classification decision is VACATED. The matter is remanded to the Board for a new classification hearing. Judgment shall enter accordingly.

Judge: Feeley, Hon. Timothy Q

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
11/08/2017	Hon. Timothy Q Feeley	(978)825-4800

JUDGMENT ON THE PLEADINGS	Trial Court of Massachusetts The Superior Court
DOCKET NUMBER 1677CV00756	Thomas H. Driscoll, Jr., Clerk of Courts
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This action came before the Court, Hon. Timothy Q Feeley, presiding, upon a motion for judgment on the pleadings,

After hearing or consideration thereof;

The Court having allowed plaintiff's motion for judgment on the pleadings

It is **ORDERED AND ADJUDGED**:

That the Sex Offender Registry Board's classification decision is VACATED. The matter is remanded to the Board for a new classification hearing.

DATE JUDGMENT ENTERED	CLERK OF COURTS/ ASST. CLERK
11/08/2017	X

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL NO. 2016–00756-A

JOHN DOE, SORB NO. [redacted],
Petitioner

vs.

SEX OFFENDER REGISTRY BOARD,
Respondent

MEMORANDUM OF DECISION AND ORDER ON PETITIONER'S MOTION FOR JUDGMENT ON THE PLEADINGS

Petitioner John Doe No. [redacted] ("Doe") commenced this action on May 17, 2016, by filing a complaint seeking judicial review, under G. L. c. 6, § 178M and G. L. c. 30A, § 14, of the final decision of the respondent Sex Offender Registry Board (the "Board" or "SORB") reclassifying Doe as a level three sex offender. Prior to new sexual offense charges in 2014, Doe had been classified as a level two sex offender. Level three includes those offenders who carry a high risk of reoffending and whose "degree of dangerousness posed to the public is such that a public safety interest is served by public dissemination of registration information." G. L. c. 6, § 178K(2)(b). The various levels available for classification by SORB are actually levels of notification, from no availability (low risk), to public availability (moderate risk), to active dissemination (high risk). *Moe* v. *Sex Offender Registry Board*, 467 Mass. 598, 601 (2014). The Board, in issuing its final classification decision, "is

required to determine 'whether and to what degree public access to the offender's personal and criminal history information . . . is in the interest of public safety.'" *Id.* at 615, citing 803 CMR §§ 1.22(3)(c), 1.39(3)(c) (2004).

Currently before the court is Doe's motion for judgment on the pleadings. [D. 8]. The court held a non-evidentiary hearing on November 2, 2017, and has reviewed the submissions of the parties and the administrative record. For the reasons stated below, Doe's motion for judgment on the pleadings is **ALLOWED**.

BACKGROUND

Doe is currently [redacted] years of age. This Chapter 30A appeal relates to a reclassification decision made by SORB. Prior to 2014, Doe was classified as a level two sex offender. In February 2014, [redacted] She disclosed the alleged sexual assault that day to school officials. Doe was indicted in Middlesex Superior Court for aggravated rape (age difference) and rape of a child by force. The hearing which resulted in his reclassification as a level three sex offender occurred, and the hearing examiner's decision was issued, before final

adjudication of the rape charges. Several months after issuance of the final classification level, Doe went to trial in Middlesex Superior Court and was acquitted of both rape charges. Doe argues before this court that the 2014 rape allegations were proven to be unreliable by the subsequent acquittal and should not be considered as a supported basis for his reclassification to a level three sex offender. That is an argument that the court finds unpersuasive. Doe also argues that his classification hearing should have been continued pending final adjudication of the Middlesex rape charges. He argues that the pendency of the rape charges dramatically and adversely affected his participation in the final classification hearing. The court finds the procedural challenge to be persuasive and will remand this matter for rehearing.

DISCUSSION

Pursuant to G. L. c. 6, § 178M (1999 ed. & Supp. 2008) and G. L. c. 30A, § 14 (1999 ed. & Supp. 2008), Doe petitions this court to review the Board's classification decision. In his initial argument, Doe contends that the examiner's decision is not supported by substantial evidence, and is otherwise arbitrary, capricious, and an abuse of discretion. See G. L. c. 30A, §§ 14(7)(e) and (g).

I. Standard of Review

Judicial review of an appeal from an agency decision is limited to the administrative record. G. L. c. 30A, § 14(5); see also *Cohen* v. *Board of Registration*

in Pharm., 350 Mass. 246, 253 (1966). The party challenging the decision of the agency bears the burden of demonstrating that the decision is invalid. *Merisme* v. *Board of Appeals on Motor Vehicle Liab. Policies & Bonds*, 27 Mass. App. Ct. 470, 474 (1989). The court's approach is "one of judicial deference and restraint, but not abdication." *Arnone* v. *Commissioner of Dep't of Soc. Servs.*, 43 Mass. App. Ct. 33, 34 (1997) (further citation omitted). When reviewing an agency decision, the court is required to give "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G. L. c. 30A, § 14(7). The agency's decision must be supported by substantial evidence. *Id.* In assessing whether the underlying evidence is substantial, the court cannot displace an agency's decision between two fairly conflicting views, even though the court may have justifiably made a different decision. *Hotchkiss* v. *State Racing Comm'n*, 45 Mass. App. Ct. 684, 695-696 (1998). "Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion taking into account whatever in the record detracts from its weight." *Lycurgus* v. *Director of Div. of Employment Sec.*, 391 Mass. 623, 627-628 (1984) (internal quotations omitted). The court must consider the record as a whole, but as long as the agency's findings are properly supported, the decision will not be disturbed by a reviewing court. *Tri-County Youth Programs, Inc.* v. *Acting*

Deputy Dir. of the Div. of Employment & Training, 54 Mass. App. Ct. 405, 408 (2002).

II. Sex Offender Registry Law

The Board is an administrative agency that maintains a central computer registry of all sex offenders within the Commonwealth. G. L. c. 6, § 178D. One must register as a sex offender if the Board finds the individual to: (1) have at least one conviction or adjudication for an offense of a sexual nature; (2) reside or work in the Commonwealth; and (3) pose a current danger of reoffending. 803 C.M.R. § 1.06(2)(a)-(d).

Once the Board has determined a sex offender's eligibility, the Board recommends a classification level. A level one offender is one who bears a low risk of reoffending and who poses such a degree of dangerousness that public safety is not served by public availability of the offender's registration information. G. L. c. 6, § 178K(2)(a). Level two includes those offenders who carry a moderate risk of reoffending and whose "degree of dangerousness posed to the public is such that a public safety interest is served by public availability of registration information." *Id.* at § 178K(2)(b). A level three classification is proper when 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 registration

information. *Id.* at § 178K(2)(c).

When determining a sex offender's classification, the Board shall consider, among other relevant information, the offender's criminal record; the offender's age at the time of the predicate offense(s); conditions of probation; participation in sex offender treatment and/or counseling; recent behavior; mental condition; history of substance and/or alcohol abuse; the use of a weapon violence or bodily injury in commission of the sex offense; whether the sex offense was committed by a male on a male victim; whether the offender's behavior was repetitive and compulsive; and whether the sex offense involved an adult offender and a child victim. *Id.* at § 178K(1)(a)-(l); 803 C.M.R. § 1.40(1)-(24).

After the Board issues its recommendation, the offender can request a hearing challenging the classification. G. L. c. 6, § 187L(1)(c). The hearing officer conducts a *de novo* review and must find by clear and convincing evidence whether the offender must register, and if so, at what level. 803 C.M.R. § 1.10(1). The hearing officer's findings constitute a final agency decision, from which, the offender may seek judicial review, as Doe has done here. G. L. c. 6, § 178M and G. L. c. 30A, § 14(7).

III. Analysis – On the Merits

Doe challenges the Board's final decision to reclassify him as a level three sex

offender. Under the deferential standard of review required of this court, Doe has failed in his burden to establish the Board's decision was not supported by substantial evidence, or was otherwise arbitrary, capricious, or an abuse of discretion.[1]

The determinative issue on the merits of this case is whether the complaining witness' report of sexual assault by Doe is reliable enough for the hearing examiner to consider it for purposes of reclassifying Doe as a level three sex offender. In this court's view, reliability is the key issue, even without regard to the later acquittal. If the report of sexual assault is reliable for purposes of the reclassification decision, Doe was properly reclassified. See *Doe, SORB No. 10304* v. *Sex Offender Registry Bd.*, 70 Mass. App. Ct. 309, 312-313 (2007) (complaining witnesses statement to police, contained in police report, bore the requisite indicia of reliability to be admissible in the administrative hearing). "Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely on in the conduct of serious affairs." 803 CMR § 1.18(1). If the report to police by the complaining witness is unreliable, SORB has no basis to increase Doe's prior classification level.

The decided case law favors SORB on its reliance on acquitted conduct. As

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[1]Any constitutional challenge is better addressed by the appellate courts of this Commonwealth. The Sex Offender Registry Act has been found constitutional by the Supreme Judicial Court, and it is only that Court that can reach a contrary conclusion.

stated in *Doe, No. 356011* v. *Sex Offender Registry Bd.*, 88 Mass. App. Ct. 73, 79 (2015): "Contrary to Doe's assertion, the fact that Doe was ultimately acquitted of the criminal charges does not render the report inadmissible or unreliable." As the Supreme Judicial Court has stated: "we also recognize that an acquittal on such charges demonstrates only that the Commonwealth failed to prove the defendant guilty beyond a reasonable doubt, and is insufficient alone to show that the allegations were false or baseless." *Soe, SORB No. 252997* v. *Sex Offender Registry Bd.*, 466 Mass. 381, 383 (2013).

The hearing examiner's conclusion that the complaining witness' report was plausible and credible is based on the following:



See *Doe, SORB No. 356011* v. *Sex Offender Registry Bd.*, 88 Mass. App. Ct. 73, 79 (2015) (in acquitted conduct case, reliability in part supported by fact that "conduct that the victim described was consistent with Doe's other sexual assaults"). Given the deference owed to final decisions of SORB, and the hearing examiner's justification, this court cannot say that accepting as reliable the police report of the

sexual assault was an abuse of discretion, or arbitrary and capricious.

Doe also disagrees with the weighing conducted by the examiner, but this court will not disturb the examiner's decision so long as his findings are supported by substantial evidence. Predicting the risk of sexual recidivism is fraught with uncertainties and disagreements, even among experts, as is evident in nearly every SDP trial where the court is always presented with diametrically opposed expert opinions by highly qualified experts as to risk of future sexual recidivism. Here, the examiner had a substantial basis to find the articulated risk factors and to conclude, within his discretion, that Doe's reclassification level should be established at level three. The legislature has vested primary responsibility for classification decisions with SORB and has not authorized this court to substitute its *de novo* judgment for the final decision of the Board. Based on the record and applying the required deferential standard of review, the court cannot say that "the evidence points to no felt or appreciable probability of the conclusion [reached by the examiner] or points to an overwhelming probability of the contrary." *Cobble* v. *Commissioner of Dept. of Soc. Servs.*, 430 Mass. 385, 390-391 (1999) (internal citations omitted).

IV. Analysis – Continuance Challenge

Prior to the 2014 disclosure of sexual assault by [redacted] Doe was a level two sex offender. However, because his classification became final prior to July 12, 2013,

his sex offender registry information was available to the public but not subject to Internet publication on SORB's web site. See *Moe v. Sex Offender Registry Board*, 467 Mass. 598 (2014). Thus, any reclassification to level three after that date would have a profound effect upon Doe.[2]

Doe moved at his reclassification hearing to stay final decision until after disposition of the pending Middlesex rape charges. Because the examiner found the police report of the alleged sexual assault to be reliable, she determined that the ultimate disposition of the pending case would not alter her decision and denied Doe's motion.

This court is not writing on a blank slate. The Supreme Judicial Court has addressed the "continuance/stay" issue at length in *Soe, SORB No. 252997*, 466 Mass. at 387-393. "Although a sex offender has no due process right to the continuance of his classification hearing until the adjudication of criminal charges pending against him, given the weighty interests at stake, the board must exercise its sound discretion in balancing the public safety interest in promptly obtaining a final classification of

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[2]"Implicit in the earlier prohibition against Internet publication of the registry information of level two offenders and the existing prohibition against publication of the registry information of level one offenders is the recognition by the Legislature that public identification of a sex offender poses a risk of serious adverse consequences to that offender, including the risk that the sex offender will suffer discrimination in employment and housing, and will otherwise suffer from the stigma of being identified as a sex offender, which sometimes means the additional risk of being harassed or assaulted." *Id.* at 604

such a sex offender with the potential harm to the sex offender "if he is compelled to choose between defending the civil action and protecting himself from criminal prosecution.'" *Id.* at 391. "[T]he board should consider that both the public and a sex offender have a substantial interest in assuring the accuracy of the offender's classification because the classification level will determine the degree of access the public will have to the offender's registration information. *Id.* citing G. L. c. 6, § 178K(2); see also *Doe, SORB No. 972* v. *Sex Offender Registry Bd.*, 428 Mass. 90, 107 (1998) (Marshall, J., concurring in part and dissenting in part) ("State has no interest in making erroneous classifications."). "The decision whether to grant the continuance or stay 'ultimately requires and must rest upon 'a particularized inquiry into the circumstances of, and the competing interests in the case.'" *Id.* at 392. Doe bears the burden of establishing the need for the requested continuance. *Id.* at 391-392. This court's review of the examiner's denial of a continuance/stay is for abuse of discretion. *Id.*

This court rules that the examiner abused her discretion in denying Doe a continuance until after the adjudication of his criminal charges. First, her stated reason for denying a continuance does not reflect a particularized inquiry into the circumstance of and the competing interests in the case. She did not weigh the public interests against Doe's interests in protecting himself in the pending criminal

proceeding and thereby adversely affecting his participation in the reclassification hearing. The sole reason provided by the examiner for proceeding with the hearing over Doe's objection was that she found the police report of the sexual assault to be reliable, making the final adjudication of the rape charges immaterial. No result of the criminal trial would have altered her decision to classify Doe as a level three sex offender. The examiner misses the whole point of the *Soe* decision, which requires that she balance the public safety interest in promptly obtaining a final classification of a sex offender with the potential harm to the sex offender if he is compelled to choose between defending the civil action and protecting himself from criminal prosecution.

In this case, the public interest is mitigated somewhat because Doe was already a registered sex offender, so his sex offender registration information was already publicly available. As a reclassification proceeding, the new criminal charges are the only jurisdictional basis for a new hearing, making the reliability of the police report of the complaining witness' allegations the only real consideration at the hearing.[3]

Now that an acquittal has occurred, Doe's argument that more aggressive participation in the hearing could have changed the final classification hearing

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[3]As noted above, reliability of the allegations of sexual assault is the only issue in the reclassification proceeding. If the allegations are reliable, the level three classification stands. If the allegations are not reliable, the classification would revert to the prior classification of level two.

resonates with the court. In fact, it seems that SORB should want to be better informed about the alleged sex offense that prompted the reclassification hearing before making a determination that the report to police by the complaining witness was reliable evidence of the sexual assault. The examiner will not be precluded at a new hearing from finding the report of sexual assault to be reliable, but any such determination will be based on full participation of Doe, now armed with an acquittal at the criminal trial. The acquittal does not mean that the allegations are baseless, but given the denial of the requested continuance on grounds that failed to comply with the requirements of *Soe*, SORB will now be in a position to assess reliability in light of the acquittal, aided by whatever additional information and participation that Doe brings before the examiner. Full participation may disclose a motive for falsification that Doe did not disclose because of the pendency of the criminal case, or it may not. DNA evidence may be persuasive, or it may not. But, at the end of the day, the public has no interest in an erroneous classification, and a rehearing will ensure that Doe has his full right to testify, to offer evidence, and to challenge the board's evidence regarding the alleged sex offense that prompted the reclassification proceeding, unimpeded by the prior pendency of the Middlesex rape charges.