18-P-1067 Appeals Court

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 11204 vs. SEX OFFENDER REGISTRY BOARD.

No. 18-P-1067.

Suffolk. November 6, 2019. - June 4, 2020.

Present: Milkey, Singh, & Hand, JJ.

Sex Offender. Sex Offender Registration and Community Notification Act. Evidence, Sex offender, Expert opinion, Scientific test. Practice, Civil, Sex offender, Civil commitment. Administrative Law, Agency's interpretation of regulation, Evidence.

Civil action commenced in the Superior Court Department on July 10, 2017.

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

Eric Tennen for the plaintiff.
Christopher M. Bova for the defendant.

MILKEY, J. The plaintiff challenges his classification as a level three sex offender. At issue is whether the hearing examiner for the Sex Offender Registry Board (SORB) adequately engaged with certain evidence that the plaintiff claims

demonstrates his low current risk of reoffending. Our consideration of this question calls for us to revisit the extent to which a hearing examiner can and should consider expert reports prepared outside of the SORB classification process. For the reasons set forth below, we vacate the Superior Court judgment affirming the hearing examiner's classification decision and remand the matter for further proceedings.

Background. 1. Plaintiff's sex offenses. In 1995, the plaintiff pleaded guilty to one count of assault with intent to rape a child under sixteen, kidnapping, and assault and battery. The convictions were based on an incident that took place the prior year when the plaintiff was eighteen. According to police reports, the plaintiff confined a ten year old boy (victim 1) in the attic of a bicycle shop where the plaintiff worked, coerced the boy into performing fellatio on him, and then threw the boy against the wall after he refused to perform another sex act and attempted to leave. Before allowing victim 1 to leave, the plaintiff threatened to kill him if he told anyone of the incident. Based on his convictions, the plaintiff was sentenced to two years in the house of correction, followed by five years of probation.

The plaintiff was convicted of another sex offense; it involved the son of his employer (victim 2). According to

police reports, when the plaintiff was approximately eighteen and victim 2 was around nine, the plaintiff fellated victim 2 and threatened to beat him up if he told anyone. Two years later, the plaintiff again fellated victim 2, paying him twenty dollars to do so. This assault, which took place on a camping trip in Maine, occurred after the plaintiff was released from his initial incarceration for his convictions related to victim 1, but while he remained on probation. Shortly thereafter, the plaintiff asked victim 2 if he wanted to repeat what happened in Maine and, over victim 2's objections, proceeded to fellate him.

The new offenses resulted in the revocation of the plaintiff's probation, and in his pleading guilty to one count of rape of a child under sixteen. He was sentenced to a term of five to seven years on the earlier offenses, and five to nine years on the new conviction (to be served concurrently). In 2007, before his incarceration ended, the plaintiff was civilly committed as a sexually dangerous person (SDP).

2. Plaintiff's sex offender treatment. While confined as an SDP, the plaintiff went through extensive sex offender treatment and individual therapy. For example, as one of the qualified examiners (QEs) who evaluated the plaintiff observed, he "completed all five of the Understanding Pathways to Offending psychoeducational classes, which signifies the completion of the class curriculum offered in the Sex Offender

Treatment Program." In 2013, the plaintiff was released from SDP confinement after two QEs and the five-member community access board (CAB) unanimously concluded that he no longer met the criteria of an SDP. In their respective reports, the QEs and the CAB explained in detail the basis of their conclusions that the plaintiff was no longer likely to reoffend despite his diagnosed pedophilia and history of offenses. As QE Dr. Gregg Belle put it in summarizing his conclusions: "[the plaintiff's] continued progress in sex offender treatment, ability to integrate what he has learned in treatment and make significant connections to his sex offending history offsets many of the static and dynamic risk factors noted [earlier in the report]." Dr. Belle relied in part on a "phallometric assessment" done in 2012 that indicated that the plaintiff was aroused by "appropriate scenes involving consensual sex" between adults, but "showed no sexual arousal to inappropriate scenes" involving prepubescent children.[1]

The CAB drew similar conclusions, highlighting not only that the plaintiff "complet[ed] the sex offender treatment

[1] A phallometric assessment, also known as penile plethysmography or PPG, seeks to measure sexual arousal to various stimuli. We have described it as "a technique that records variations in the circumference of the penis as the study subject is exposed to various visual stimuli and graphically records his tumescence during the test procedure." Ready, petitioner, 63 Mass. App. Ct. 171, 177 n.6 (2005). See Commonwealth v. Ortiz, 93 Mass. App. Ct. 381, 383 (2018).

program," but also the specific progress he made in doing so. As the CAB stated in its report:

> "[The plaintiff] no longer minimizes and distorts his sexual interests and offending. He has developed a comprehensive understanding of his tendency to identify with children through a treatment experience. [The plaintiff] has explored sufficiently his appropriate sexual interests and healthy sexual behavior. He has demonstrated the ability to offer and discuss a reliable version of his sexual offenses in a therapeutic setting. He has developed skills designed to address his deviant sexual arousal. Based on [his] performance on the [phallometric assessment] he took in September 2012, he appears to have some ability to control his sexual interest in prepubescent males."

3. Plaintiff's support network. After he was released from SDP confinement, the plaintiff moved in with his mother, and he became active in the Methodist church that she had been a member of for several decades. The pastor of the church testified on the plaintiff's behalf at the SORB hearing, and several members of the congregation did so as well or wrote letters of support. They all spoke both to the church's openness to having the plaintiff in their congregation and to the program that the church had implemented to try to prevent any reoffending. Specifically, the church's "safe sanctuaries committee" -- a body created in the aftermath of the sex abuse scandal involving the Catholic Church -- drafted a "limited access covenant" that the plaintiff agreed in writing to follow. That covenant includes various precautionary measures, such as requiring that the plaintiff be actively monitored by a

designated, trained member of the congregation whenever there is an activity at the church that may involve children. One such monitor, who initially was unhappy with a sex offender joining the church, now considers the plaintiff a friend and testified on his behalf.

4. SORB process. In 2009, the SORB notified the plaintiff that it intended to classify him as a level three offender. A hearing examiner upheld that classification in 2010, but the matter was remanded for a new hearing in the wake of Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 473 Mass. 297, 300 (2015) (Doe No. 380316) (requiring that SORB classifications be based on clear and convincing evidence). At the hearing held in 2017, the SORB presented no witnesses and instead relied solely on various documents, principally the police reports about the plaintiff's prior sex offenses. At the plaintiff's request, and without any objection by the SORB, the hearing examiner admitted the reports prepared by the QEs and the CAB, the phallometric assessment referenced in the reports of Dr. Belle and the CAB, evaluations from the sex offender treatment classes that the plaintiff took, one letter of support from the plaintiff's former cellmate, five letters of support from members of the plaintiff's church, and a copy of the limited access covenant that the plaintiff had executed with his church. Four live witnesses testified on the plaintiff's

behalf: the pastor of his church, his mother, and two other members of the church.

The hearing examiner upheld the SORB's recommended level three classification and issued a twenty-five page decision. Most of his decision consisted of a recitation of the facts underlying the plaintiff's past sex offenses and a discussion of which statutory "high risk" factors and regulatory risk elevating factors were implicated by those facts. The hearing examiner noted what degree of weight he assigned to those factors (mere "aggravating consideration" versus "increased aggravating weight"). His opinion also reviewed applicable risk mitigating factors and stated that the hearing examiner was assigning "full mitigating weight" to two of them ("sex offender treatment" and "home situation and support systems") and "mitigating consideration" to another ("stability in the community").

Of special note is the hearing examiner's treatment of the four reports on which the plaintiff substantially relied: the two QE reports, the CAB report, and the phallometric assessment. The hearing examiner treated the material included in those reports in various ways. With respect to those aspects of the reports that potentially supported the plaintiff's case, the hearing examiner indicated that he was affording some "no weight," and others not "much" weight. He made no mention of

some of the reports altogether. Finally, the hearing examiner relied in part on certain "useful information" from the reports to support his decision to classify the plaintiff as a level three offender. Further details are reserved for later discussion.

After discussing the individual statutory and regulatory criteria, the hearing examiner ended his twenty-five page decision with a page-and-a-half "discussion" section. After again walking through the aggravating and mitigating factors -- this time in summary form -- the discussion section set forth the hearing examiner's reasoning in a single sentence: "Considering the nature of and extent of the risk aggravating and risk mitigating factors before me, I find by the clear and convincing evidence standard that the [plaintiff] presents a high risk to reoffend, that his dangerousness is such that active dissemination of his personal information is warranted and order that he register as a Level 3 sex offender."

Discussion. At the heart of this case is the following question of law: what role should material generated in the SDP process play in the SORB classification process? We begin by reviewing the similarities and differences between those processes, followed by a brief discussion of the SORB regulations addressing the use in the SORB process of expert reports generated outside of that process. We then turn to an

examination of how the hearing examiner addressed the issue in this case.

1. Similarities and differences between SDP and SORB statutes. The SDP and the SORB statutes both were enacted to help protect the public from sexual predators. While they serve the same overall purpose, they do so in different ways. The SDP process is designed to reduce the commission of new sex offenses by preemptively confining a particularly menacing subset of sex offenders, those who qualify as SDPs. Such people are indefinitely confined until -- as a result of sex offender treatment, the passage of time, or other factors -- they no longer qualify as SDPs.

By contrast, the SORB process seeks to protect the public by disclosing information about specific sex offenders, with the extent of such disclosure tied to the degree of risk that each offender presents. Unsurprisingly, the factual inquiries underlying each scheme largely overlap, with the principal focus on two issues: how likely it is that a particular sex offender will reoffend and what degree of dangerousness would be posed if he did so.[2] See G. L. c. 6, § 178K; G. L. c. 123A, § 1.

[2] We do not mean to suggest that these are the only factors to be considered. To establish that someone is an SDP, the Commonwealth also must prove that the sex offender suffers from either a "mental abnormality" or a "personality disorder." G. L. c. 123A, § 1 (definitions). In the SORB process, before classifying someone as a level two or a level three offender,

Of course, there also are important procedural and substantive differences between the two schemes. One such difference is who is assigned the role of evaluating the risks and dangers that individual sex offenders pose. In the SDP process, the question whether someone qualifies as an SDP is ultimately left to a jury, assuming one is requested. Moreover, in light of the extreme deprivation of liberty that confinement as an SDP entails, the jury are required to apply the standard of proof beyond a reasonable doubt. See G. L. c. 123A, § 14 (a), (d). While jurors serve as the ultimate fact finders in the SDP process, a critical role is also served by the QEs. Specifically, once the Commonwealth has brought an SDP petition against a sex offender, the offender is examined by two QEs, and unless at least one of them concludes that the offender meets the criteria of an SDP, the petition cannot go forward. See Chapman, petitioner, 482 Mass. 293, 294 (2019). Thus, the QEs serve an important role as neutral, expert gatekeepers to the process. The Legislature also created the CAB, comprised of five people with expertise in relevant fields, to "evaluate [SDPs] for participation in the community access program and

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the hearing examiner must separately evaluate "the efficacy of online publication" of information regarding the offender. Doe, Sex Offender Registry Bd. No. 496501 v. Sex Offender Registry Bd., 482 Mass. 643, 654 (2019).

establish conditions to ensure the safety of the general community." G. L. c. 123A, § 6A.[3]

By contrast, in the SORB classification process, it is an individual hearing examiner who determines the classification level for a sex offender. The hearing examiners' decisions are cabined, to some extent, by factors established by the Legislature and the SORB itself. Because the potential deprivation of liberty at issue in the SORB process is substantial -- albeit less than SDP confinement -- the hearing examiner must apply a clear and convincing evidence standard. See Doe No. 380316, 473 Mass. at 300. Under that standard, "[t]he requisite proof must be strong and positive; it must be 'full, clear and decisive.'" Adoption of Iris, 43 Mass. App. Ct. 95, 105 (1997), quoting Callahan v. Westinghouse Broadcasting Co., 372 Mass. 582, 584 (1977).[4] In addition, the findings supporting the decision must be "specific and detailed findings demonstrating that close attention has been given to the evidence." Adoption of Quentin, 424 Mass. 882, 886 (1997).

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[3] By statute, the CAB reports are automatically admissible in trials on petitions for release brought by SDPs pursuant to G. L. c. 123A, § 9. See G. L. c. 123A, § 6A.

[4] To flesh out the meaning of the clear and convincing standard, our cases look to the application of that standard in the context of the termination of parental rights. See Doe, Sex Offender Registry Bd. No. 523391 v. Sex Offender Registry Bd., 95 Mass. App. Ct. 85, 92-93 (2019).

Beyond differences in procedure, it bears emphasizing that while the two processes largely examine the same underlying factual questions regarding the risks and dangers that individual sex offenders pose, this does not mean that they utilize the same substantive thresholds regarding such risks and dangers. Obviously, confining a particular sex offender preemptively results in such a complete deprivation of liberty that it necessitates a greater showing of the risk and dangers than a decision regarding the level of public disclosure of information about the person.

Because of these procedural and substantive differences, the fact that a sex offender is not so menacing that he qualifies as an SDP has no dispositive force in a SORB classification proceeding. See Doe, Sex Offender Registry Bd. No. 10216 v. Sex Offender Registry Bd., 447 Mass. 779, 788-790 (2006) (Doe No. 10216). Thus, a determination that a sex offender is not an SDP does not preclude a SORB hearing examiner from classifying him as a level three sex offender. See id. at 789-790. However, it is equally true that the evaluations and information generated during the SDP process may still bear on the issues raised by the SORB classification decision. After all, as noted, both processes are based in large part on assessing the same underlying factual issues: the risk that a

sex offender will reoffend and the dangers posed by an offender's reoffense.

2. SORB regulatory framework. Before turning back to what the hearing examiner did here, one task remains: addressing the limits that the SORB regulations have sought to place on the use of expert reports generated outside the SORB process. The Supreme Judicial Court faced this issue in Doe No. 10216, 447 Mass. 779. In that case, the plaintiff argued, inter alia, that the hearing examiner failed adequately to address reports by two QEs who concluded that his risk of recidivism was low. The court rejected that claim on the merits, concluding that the hearing examiner fully had considered the reports and had rejected the arguments that the plaintiff had made based on them for good reason. Id. at 788.

However, the court then went on to state that "[e]ven if we accept the plaintiff's argument that the examiner failed to give [the QE] opinions consideration, the examiner was not obligated to review these reports." Doe No. 10216, 447 Mass. at 788-789. The court came to this conclusion because the reports were produced for the SDP process, not for the SORB classification proceedings. See id. at 789. According to the court, this distinction mattered because the SORB regulations defined "expert witness" as "'[a] licensed mental health professional . . . whose testimony and report offering an opinion as to a sex

offender's risk of reoffense and degree of dangerousness were prepared expressly for reliance by a Party at a [SORB classification] hearing.'" Id. at 789, quoting 803 Code Mass. Regs. § 1.03 (2002).[5]

Since Doe No. 10216 was published, the SORB regulations have been amended. The current version, which was applicable to the hearing before us, states that SORB "may give appropriate evidentiary weight to documentary reports and risk assessment, but the ultimate risk opinion, if any, will be excluded from consideration unless the mental health professional testifies as an expert witness at the classification hearing." 803 Code Mass. Regs. § 1.33(35) (2016). At least if read in isolation, this language appears to provide support for the plaintiff's position that while the hearing examiner may not consider a nontestifying expert's "ultimate risk opinion," the examiner otherwise may consider the rest of that expert's report and

[5] In Doe No. 10216, 447 Mass. 779, the court did not cite or discuss separately the SORB regulations that, at least on their face, appeared to require hearing examiners to consider "documentation . . . from a licensed mental health professional" addressing the risks that a sex offender posed, 803 Code Mass. Regs. § 1.40(15) (2002), while at the same time prohibiting hearing examiners from considering such information unless the author testified at the hearing, see 803 Code Mass. Regs. § 1.18(6) (2002). Those regulations further stated that where such information is considered, the hearing examiner "may" assign it "appropriate evidentiary weight." 803 Code Mass. Regs. § 1.40(15) (2002).

assign it "appropriate evidentiary weight."[6] However, the just-cited regulation lies in somewhat uneasy tension with another regulation which currently defines "expert witness" as follows:

> "A licensed medical doctor or mental health professional, excluding employees of the Sex Offender Registry Board, whose testimony and report offering an opinion as to a sex offender's risk of reoffense and degree of dangerousness were prepared expressly for reliance by a Party at a hearing conducted pursuant to 803 [Code Mass. Regs. §§] 1.10 through 1.20. Reports prepared by licensed mental health professionals that contain an opinion as to a sex offender's risk of reoffense and degree of dangerousness that were prepared for any other purpose will not qualify as Expert Witness opinions for a hearing conducted pursuant to 803 [Code Mass. Regs. §§] 1.10 through 1.20." 803 Code Mass. Regs. § 1.03 (2016).

This language could be taken to evince an intent to exclude a broader array of material included in a nontestifying expert's report.[7] Specifically, under such an interpretation, not only would the expert's "ultimate risk opinion" be excluded, but so too would the subsidiary opinions and analysis on which the ultimate risk opinion was based. Under that reading, the

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[6] See Doe, Sex Offender Registry Bd. No. 234076 v. Sex Offender Registry Bd., 484 Mass. 666, 674 n.14 (2020) ("Where the relevancy, reliability, and nonrepetitiveness of the evidence is a close call, hearing examiners should err on the side of admissibility and then give the evidence the weight that they believe it is fairly entitled to receive").

[7] At oral argument, both sides agreed that a plaintiff is unable to sidestep any procedural impediments created by the regulations by calling the QEs or the CAB members as witnesses before the hearing examiner. They both expressed the view that, at least as a practical matter, this could not be done.

evidentiary value of the report would be limited to the factual content included there.

In the case before us, the hearing examiner did not seek to resolve the just-noted tension in the regulations, nor did he address the continued applicability of the Supreme Judicial Court's pronouncements in Doe No. 10216. We will return to these issues after examining the grounds on which the hearing examiner did rely.

3. Hearing examiner's use of materials generated in SDP process. The plaintiff submitted the QE reports, the CAB reports, and the phallometric assessment all without objection. The hearing examiner stated that he was giving "no weight" to the QEs' ultimate conclusions that the plaintiff no longer met the criteria of an SDP, and the parties agree that this was proper. They differ on the extent to which the hearing examiner could and should address the other conclusions that the QEs and the CAB drew, such as their views about the likelihood that the plaintiff would reoffend. Notably, the hearing examiner did not rule that the SORB regulations prohibited him from considering such material. Instead, he simply indicated, in conclusory fashion, that he was not giving "much," if any, weight to one of the QE's "determination of [the plaintiff's] risk to reoffend

and degree of dangerousness as there are statutory differences in the criteria for civilly committing SDP[s]."[8]

At the same time that the hearing examiner relegated the material potentially helpful to the plaintiff to such a limited evidentiary role, he mined the reports for "useful information" to support his classification decision. For example, in concluding that the plaintiff remained at high risk to reoffend, the hearing examiner cited to the QEs' recognition that the plaintiff met the diagnostic criteria of pedophilia.

The hearing examiner did not address the phallometric assessment in his decision, even though Dr. Belle and the CAB relied in part on that data in concluding that the plaintiff did not pose a high risk to reoffend despite his pedophilia.[9] Nor did the hearing examiner even mention the CAB report.

4. Analysis. Reviewing courts are required to "give due weight to the experience, technical competence, and specialized

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[8] The hearing examiner used a slightly different analysis in reviewing the other QE opinion. With regard to Dr. Michael Henry's opinion, the hearing examiner indicated that he was giving some, but not "much," weight to Dr. Henry's examination of the risks that the plaintiff posed. The hearing examiner did not address whether he was giving any weight to Dr. Belle's opinion about such risks.

[9] The hearing examiner made a passing mention of the phallometric assessment only in a block quote taken from Dr. Belle's report.

knowledge of the agency."[10] Doe, Sex Offender Registry Bd. No. 205614 v. Sex Offender Registry Bd., 466 Mass. 594, 602 (2013), quoting G. L. c. 30A, § 14 (7). Moreover, "[a] hearing examiner has discretion . . . to consider which statutory and regulatory factors are applicable and how much weight to ascribe to each factor." Doe, Sex Offender Registry Bd. No. 68549 v. Sex Offender Registry Bd., 470 Mass. 102, 109-110 (2014). However, a hearing examiner's "decision must show 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 No. 136652). In assessing whether a decision is supported by substantial evidence, reviewing courts "must take into account not only the evidence that supports the SORB's decision but 'whatever in the record fairly detracts from its weight.'" Id., quoting New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 466 (1981).

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[10] The SORB is required to have some members with particular expertise. See Doe, Sex Offender Registry Bd. No. 15606 v. Sex Offender Registry Bd., 452 Mass. 784, 788 (2008), citing G. L. c. 6, § 178K. The same is not true of the SORB's hearing examiners, and nothing in the regulations or the record indicates that those hearing examiners are required to meet any defined vocational or educational qualifications. Moreover, as counsel for the SORB confirmed at oral argument, decisions made by the hearing examiners become final without review by the SORB.

Under the circumstances here, we agree with the plaintiff that -- to the extent the hearing examiner purported to address the material generated during the SDP process -- he did not adequately do so. As discussed above, despite their many important differences, the SORB and the SDP processes rely largely on the same fundamental inquiry: how likely is it that a sex offender will reoffend and what level of danger would be presented if he did so. See G. L. c. 6, § 178K; G. L. c. 123A, § 1. Here, the plaintiff had completed sex offender treatment during his decades of civil confinement in order to try to understand and cope with his urges so that he could conform his behavior to acceptable norms. The credentialed officials whom the Legislature has entrusted to serve as neutral gatekeepers in the SDP process examined the progress that the plaintiff had made in that treatment. They made detailed, fact-specific evaluations of why they concluded that he was no longer at high risk to reoffend despite his pedophilia. Their views, and the data on which they relied, bore on the issues before the hearing examiner, even though they lacked conclusive effect. Without engaging in the analysis or with the substantive data on which the experts relied in reaching that conclusion, the hearing examiner effectively disregarded such evidence simply by noting that there are differences between the SDP and the SORB processes. In our view, this falls short of the reasoned

analysis that the case law requires. In short, it is anomalous for a hearing examiner to make his own determination that the plaintiff was "highly likely to reoffend," while failing to demonstrate that the examiner considered the substance of a body of available evidence, generated by professionals possessed of documented expertise to make such conclusions, that bore on that issue.

What is more, as noted, the hearing examiner relied in part on selected conclusions drawn from the reports, such as the QEs' diagnoses of pedophilia. It is unfair for him to rely on those diagnoses without even addressing the experts' analysis as to why it does not in the end matter.

We further note that the hearing examiner did not address the results of the phallometric assessment, even though the SORB raised no challenge to that report, and it was admitted without objection. Nothing required the hearing examiner to accept the results of that assessment or the import that the plaintiff sought to place on it. However, the hearing examiner did not reject the PPG report as unreliable; he simply failed to discuss it (or the CAB report).[11] "Troublesome facts . . . are to be

[11] We acknowledge that our cases recognize that such testing has not been shown to be sufficiently reliable as a diagnostic tool to be admissible under the so-called Daubert-Lanigan standard. See Commonwealth v. Ortiz, 93 Mass. App. Ct. 381, 386-389 (2018). However, the Daubert-Lanigan standard does not apply to administrative proceedings, and the SORB itself has

faced rather than ignored." Adoption of Stuart, 39 Mass. App. Ct. 380, 382 (1995) (citation omitted).

In place of the reasoned analysis that the cases require, the hearing examiner engaged in a perfunctory effort based on a tally sheet of aggravating and mitigating factors, concluding in the end simply that the former outweighed the latter. This is a variation of the "checklist" approach that we have concluded is unacceptable. Doe No. 136652, 81 Mass. App. Ct. at 651. Reasoned analysis is required; "[a]ny other approach would effectively insulate the SORB's action from effective review." Id.

5. Application of regulations. Our discussion so far assumes, as the hearing examiner apparently did, that the regulations allowed him to consider the expert reports at issue. The SORB's litigation counsel now suggests that the agency's regulations prohibit such consideration and puts forward this

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relied on PPG testing in other classification proceedings. See Doe, Sex Offender Registry Bd. No. 15606 v. Sex Offender Registry Bd., 452 Mass. 784, 794-795 (2008). Finally, the record suggests that the phallometric assessment here was not being used as a diagnostic tool, that is, to assess whether the plaintiff suffers from pedophilia, but rather to support his claim that, based on the treatment he had received, he was able to exert control over his pedophilic urges. As we have recognized, there is at least some support for the proposition that phallometric assessments are generally accepted in treatment applications. Ortiz, supra at 387 (discussing references to such testing in American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders [5th ed. 2013]).

proposition as an alternative ground to affirm the hearing examiner's classification decision. Based on the wording of the regulatory language set forth above, the SORB's argument may enjoy some textual support. Moreover, despite numerous recent developments in the case law regarding the SORB proceedings, the Supreme Judicial Court has not overruled its decision in Doe No. 10216. Although some of the regulations have been redrafted since then, the regulatory definition of "expert witness" -- on which the court relied in concluding that the hearing examiner did not have to consider expert reports generated in the SDP context -- has not materially changed. See Doe, Sex Offender Registry Bd. No. 234076 v. Sex Offender Registry Bd., 484 Mass. 666, 672 (2020) (noting regulatory definition of expert witness). Accordingly, there is at least some question whether the reports prepared in the SDP process needed to be considered, or even could be considered, by the hearing examiner.[12] A remand of this issue will allow the hearing examiner to address this threshold question in the first instance, resolving any seeming inconsistencies in the wording of the regulations along the way. It is appropriate for such issues to be resolved in the first instance by the agency in the adjudicatory process, not in

[12] The plaintiff has not argued that such a reading would violate the statute or due process, and we therefore do not consider such issues.

judicial review of that process. See Costello v. Department of Pub. Utils., 391 Mass. 527, 536 (1984), quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 285-286 (1974) (reviewing courts are not to "supply a reasoned basis for the agency's action that the agency itself has not given").

Disposition. We vacate the judgment affirming the decision classifying the plaintiff as a level three sex offender, and a new judgment shall enter vacating the decision of the SORB and remanding this matter to the SORB for further proceedings consistent with this decision.

So ordered.