SJC-12908

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 339940 vs.
SEX OFFENDER REGISTRY BOARD.

Suffolk. January 4, 2021. - July 20, 2021.

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

Sex Offender. Sex Offender Registration and Community Notification Act. Kidnapping. Constitutional Law, Sex offender. Due Process of Law, Sex offender. Evidence, Sex offender, Hearsay, Expert opinion. Practice, Civil, Sex offender, Hearsay. Administrative Law, Substantial evidence. Witness, Expert.

Civil action commenced in the Superior Court Department on June 2, 2017.

The case was heard by Robert L. Ullmann, J., on a motion for judgment on the pleadings.

The Supreme Judicial Court granted an application for direct appellate review.

Elizabeth Doherty for the plaintiff.
Nicole M. Nixon for the defendant.

BUDD, C.J. The plaintiff, John Doe, appeals from the judgment of the Superior Court affirming the decision of the Sex

Offender Registry Board (board) to classify him as a level three sex offender. The plaintiff challenges the constitutionality of provisions in the sex offender registration law, G. L. c. 6, §§ 178C-178Q, that require a person convicted of kidnapping a child to register as a sex offender, as applied in the circumstances of his case. The plaintiff also contests the admission of hearsay evidence at his classification hearing; the denial of his motion for funds to engage an expert; and the sufficiency of the evidence to support his level three classification. We conclude that the sex offender registration law is not unconstitutional as applied to the plaintiff. Further, we conclude that there was no error in the hearing officer's reliance on hearsay evidence and denial of the plaintiff's motion for expert funds, and that the board's decision to classify the plaintiff as a level three sex offender was supported by substantial evidence and was not arbitrary, capricious, or an abuse of discretion. We therefore affirm the judgment.

Background. 1. Facts. We summarize the facts from the administrative record, reserving some details for later discussion. At the time of the primary incident at issue in this case, the plaintiff was in a relationship with a woman who lived in the same apartment complex as a ten year old girl (victim). On April 27, 2010, the plaintiff left his

girlfriend's apartment after a disagreement. As the plaintiff walked through the apartment complex, he encountered the victim in a stairwell while she was walking to her grandmother's apartment. The two had never spoken, but the victim recognized the plaintiff. The plaintiff suddenly blocked the victim from the exit door she was trying to use and punched her in the face, knocking her backward and causing severe bleeding from her nose and mouth. The plaintiff continued to punch the victim in the back of her head while she was on her knees. He covered her mouth to prevent her from screaming and said, "If you don't shut up, I will break your neck." The plaintiff then dragged the victim down the stairwell. At some point, the plaintiff removed his shirt to wipe the victim's blood off her face. As the plaintiff continued to drag the victim down the steps, they approached the lobby of the apartment complex, at which time the victim was able to break free and reach a security guard.

The plaintiff subsequently was arrested, and he later pleaded guilty to kidnapping a child, G. L. c. 265, § 26; assault and battery by means of a dangerous weapon, G. L. c. 265, § 15A (b); and other crimes.[1] During his plea hearing,

[1] The plaintiff also pleaded guilty to assault and battery on a child with injury, G. L. c. 265, § 13J (b); unarmed robbery, G. L. c. 265, § 19 (b); threatening to commit a crime, G. L. c. 275, § 2; and witness intimidation, G. L. c. 268, § 13B.

the plaintiff acknowledged that his guilty plea to the charge of kidnapping of a child would require him to register as a sex offender with the board. He was sentenced to from six to eight years in prison on the charge of kidnapping of a child with a subsequent five-year probationary period on the charge of assault and battery by means of a dangerous weapon.[2]

2. Statutory and regulatory framework. The sex offender registration law, G. L. c. 6, §§ 178C-178Q, imposes registration requirements on persons convicted of certain enumerated offenses, including kidnapping of a child under G. L. c. 265, § 26. See G. L. c. 6, § 178C (defining "sex offender," "sex offense," and "sex offense involving a child"); Noe, Sex Offender Registry Bd. No. 5340 v. Sex Offender Registry Bd., 480 Mass. 195, 196 (2018) (Noe No. 5340). After the offender has been convicted, the agency that has custody of or supervision over the offender "shall transmit to the board said sex offender's registration data." G. L. c. 6, § 178E (a)-(b). The board is then tasked with deciding whether the offender should have a duty to register and, if so, determining the offender's classification level, taking into account certain statutory factors, the board's guidelines, and any materials submitted by the offender. See G. L. c. 6, §§ 178K (1)-(3), 178L (1) (a);

[2] The plaintiff received concurrent sentences on the other counts to which he pleaded guilty.

803 Code Mass. Regs. §§ 1.04-1.07, 1.33 (2016); Doe, Sex Offender Registry Bd. No. 23656 v. Sex Offender Registry Bd., 483 Mass. 131, 133-134 (2019) (Doe No. 23656); Commonwealth v. Hammond, 477 Mass. 499, 509-510 (2017).

The board may find that the offender has no duty to register, where it determines that the circumstances of the offense in conjunction with the offender's criminal history do not indicate a risk of reoffense or a danger to the public. See G. L. c. 6, § 178K (2) (d); 803 Code Mass. Regs. § 1.29 (2016). Significantly, however, such relief is not available to certain classes of offenders, including those who already have not been registered for at least ten years and have been convicted of a sex offense involving a child. See G. L. c. 6, § 178K (2) (d); 803 Code Mass. Regs. § 1.29 (4); Hammond, 477 Mass. at 510.

Sex offenders who are determined to have a duty to register are classified into three "levels of notification" to government authorities and the public depending on their risk of reoffense, the degree of dangerousness they pose to the public, and whether a public safety interest is served by public access to information pertaining to the offender. See G. L. c. 6, § 178K (2); 803 Code Mass. Regs. § 1.03 (2016); Doe, Sex Offender Registry Bd. No. 3177 v. Sex Offender Registry Bd., 486 Mass. 749, 754 (2021) (Doe No. 3177).

Upon notification of the board's recommended classification level, sex offenders may accept it, in which case the recommended classification level becomes final, or they may reject it and request a de novo evidentiary hearing before a hearing examiner to challenge their duty to register and classification level.[3] See G. L. c. 6, § 178L (1); 803 Code Mass. Regs. §§ 1.04, 1.08, 1.17 (2016); Noe No. 5340, 480 Mass. at 197. The hearing examiner's decision is subject to review and modification by the board, and offenders may then seek judicial review of that final decision in the Superior Court. See G. L. c. 6, § 178M; G. L. c. 30A, § 14; 803 Code Mass. Regs. §§ 1.21, 1.24 (2016); Doe No. 23656, 483 Mass. at 134.

3. Board proceedings. On March 3, 2014, the board notified the plaintiff of his duty to register as a level three sex offender, the highest classification level. The plaintiff challenged the board's recommendation, and on May 9, 2017, a hearing examiner held an evidentiary classification hearing. Prior to the hearing, the plaintiff moved for expert funds in order to retain an expert witness to testify to the effect of the plaintiff's mental condition on his current level of dangerousness and risk of reoffense. The hearing examiner

[3] As discussed in greater detail infra, the board bears the burden at the hearing of proving the offender's classification level and duty to register by clear and convincing evidence. See Doe No. 3177, 486 Mass. at 756-757.

denied the motion, citing the plaintiff's failure to produce enough evidence to show a connection between his alleged generalized anxiety disorder and its impact on his continued dangerousness or risk.

The plaintiff also moved to exclude evidence of a past charge of aggravated rape of a child and other related offenses, for which he was ultimately found not guilty after a jury trial. This evidence included a police report, which stated that the eight year old daughter (rape complainant) of the plaintiff's then girlfriend had told police and victim advocates that the plaintiff sexually assaulted her. The rape complainant claimed that, on four consecutive nights, the plaintiff came into her room and licked her vagina and buttocks, which the plaintiff told her would help her stop wetting the bed. The hearing examiner denied the plaintiff's motion to exclude this evidence, and upon finding the rape complainant's statement to be detailed and reliable, the hearing examiner considered it in assessing the plaintiff's level of dangerousness and risk of reoffense.

At the close of the plaintiff's hearing, the hearing examiner determined, by clear and convincing evidence, that the plaintiff was dangerous and posed a high risk of reoffense. The board subsequently required the plaintiff to register as a level three sex offender.

The plaintiff then filed a complaint requesting judicial review of the board's decision pursuant to G. L. c. 6, § 178M, and G. L. c. 30A, § 14. A Superior Court judge affirmed the board's decision, finding it to be supported both by the law and by the evidence. The plaintiff timely appealed, and we granted his application for direct appellate review.

Discussion. 1. Constitutionality of G. L. c. 6, §§ 178C et seq., as applied. The plaintiff first argues that by requiring him to register as a sex offender, pursuant to G. L. c. 6, §§ 178C and 178K, the board violated his due process rights under the Fourteenth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights, because his index offense had no sexual component and allegedly did not involve any sexual conduct or purpose.

As a threshold matter, we reject the board's contention that the plaintiff did not use the proper procedural avenue to present this constitutional challenge and thus that the issue is not properly before this court. The board cites Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603 (2011) (Doe. No. 10800), where we held that the board lacked the authority to consider an offender's facial challenge to the constitutionality of the board's classification regulations, and consequently concluded that the constitutional issue in the offender's appeal from the board's decision

pursuant to G. L. c. 30A, § 14, was not properly before this court. See id. at 628-631. We said that the offender should have commenced a separate declaratory judgment action in the Superior Court properly to raise the constitutional challenge in a judicial forum. See id. at 630-631.

In the present case, however, it was proper for the plaintiff to challenge the constitutionality of the registration requirement as applied to him in the proceedings before the board and in his subsequent appeal. Where, as here, a constitutional issue is closely intertwined with the facts of a specific case subject to agency adjudication, it is appropriate for a party to raise the constitutional question in the agency proceeding and for the agency to assume jurisdiction. Although the agency lacks the power to decide the constitutionality of its enabling statutes and regulations, it can and should make the factual findings necessary to address the constitutional question and apply its expertise to the construction and application of any related statutes or regulations in light of the constitutional question. This process compiles an appropriate record for the Superior Court to consider on appeal in determining whether the agency's determinations were made in compliance with or in violation of constitutional provisions, pursuant to G. L. c. 30A, § 14 (7) (a). See Branch v. Commonwealth Employment Relations Bd., 481 Mass. 810, 815 n.11

(2019), cert. denied sub nom. Branch v. Massachusetts Dep't of Labor Relations, 140 S. Ct. 858 (2020), and cases cited; Hammond, 477 Mass. at 513. We thus turn to the merits of the plaintiff's constitutional claim.

Challenges to the constitutionality of a statute are questions of law that we consider de novo. See Commonwealth v. Feliz, 481 Mass. 689, 696 (2019), S.C., 486 Mass. 510 (2020). Because the plaintiff does not assert that a fundamental right is at issue (nor is any fundamental right apparent),[4] we employ the rational basis standard of review to evaluate whether the application of the sex offender registration law to him comports with due process. "Under the Federal Constitution, the rational basis test under principles of due process is 'whether the statute bears a reasonable relation to a permissible legislative objective . . . and, under the . . . State Constitution[, is] whether the statute bears real and substantial relation to public health, safety, morals, or some other phase of the general welfare'" (quotations omitted). Chief of Police of Worcester v. Holden, 470 Mass. 845 (2015), quoting English v.

[4] We previously have concluded that the sex offender registration statute does implicate liberty and privacy interests, but that such interests are not fundamental. See, e.g., Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 473 Mass. 297, 311 (2015); Doe, Sex Offender Registry Bd. No. 1211 v. Sex Offender Registry Bd., 447 Mass. 750, 759 (2006).

New England Med. Ctr., Inc., 405 Mass. 423, 430 (1989), cert. denied, 493 U.S. 1056 (1990). "In any evaluation of reasonableness, . . . we will recognize every rational presumption in favor of the legislation," Chelsea Collaborative, Inc. v. Secretary of the Commonwealth, 480 Mass. 27, 45 (2018), quoting Carleton v. Framingham, 418 Mass. 623, 631 (1994), and the party challenging the law bears the "burden of proving the absence of any conceivable grounds which would support the statute," Zeller v. Cantu, 395 Mass. 76, 84 (1985), quoting Commonwealth v. Franklin Fruit Co., 388 Mass. 228, 235 (1983).

The primary objective of the sex offender registration law is "to protect 'the vulnerable members of our communities from sexual offenders.'" Doe, Sex Offender Registry Bd. No. 8725 v. Sex Offender Registry Bd., 450 Mass. 780, 789 (2008) (Doe No. 8725), quoting St. 1999, c. 74, emergency preamble. As stated in the preamble to the revised 1999 law,

> "the Legislature found 'the danger of recidivism posed by sex offenders, especially sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior, to be grave and that the protection of the public from these sex offenders is of paramount interest.' It also found that . . . the registration of sex offenders is a proper exercise of police powers 'regulating present and ongoing conduct, which will provide law enforcement with additional information critical to preventing sexual victimization.'"

Doe No. 8725, supra at 789-790, quoting St. 1999, c. 74, emergency preamble. The plaintiff does not contest that this is

a permissible legislative objective that involves public safety, but he argues that requiring him to register as a sex offender even though his index offense had no sexual component is not reasonably related to this objective. Based on our review of the legislative history behind the sex offender registration law, and the circumstances of the plaintiff's case, we disagree.

The sex offender registration law was first enacted in 1996, see St. 1996 c. 239, § 1, in response to the Federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act), Pub. L. No. 103-322, Title XVII, § 170101, 108 Stat. 2038 (1994), codified at 42 U.S.C. § 14071 (repealed and replaced by 34 U.S.C. §§ 20901 et seq.), which reduced Federal funding for State law enforcement programs by ten percent if States failed to establish registration schemes in compliance with Federal standards promulgated under the act, see 42 U.S.C. § 14071(f)(2)(A). See also Nichols v. United States, 136 S. Ct. 1113, 1116 (2016); Doe, Sex Offender Registry Bd. No. 34186 v. Sex Offender Registry Bd., 470 Mass. 554, 558 n.7 (2015) (Doe No. 34186). The Wetterling Act was named for an eleven year old boy who had been abducted at gunpoint in 1989, see Nichols, supra, and as its full title indicates, it obligated States to adopt registration requirements not only for persons convicted of sexually violent offenses, but also for persons convicted of certain criminal

offenses against a victim who is a minor, including kidnapping of a minor except by a parent, see 42 U.S.C. § 14071(a)(1)(A), (3)(A)(i).[5]

Commentary in support of the Wetterling Act indicates that Congress had two related reasons for requiring registration by persons previously convicted of certain crimes involving minors, such as kidnapping, even when those crimes did not directly involve a sexual component. First, as a general matter, Congress was concerned about recidivism not only among sex offenders, but also among persons previously convicted of crimes against children, including crimes other than sex offenses, and it concluded that a registry of such persons would facilitate locating them quickly for purposes of investigation when a child is abducted or otherwise victimized:

> "The reason this bill is so important is because of the high rate of recidivism in persons who have committed crimes against children, and it is not just sex crimes against children but all crimes against children. The recidivism rate is probably higher in this area of our criminal justice system . . . .

[5] The Wetterling Act was amended in 1996 by Megan's Law, which further mandated public release of "relevant information that is necessary to protect the public concerning a specific person required to register under this section." See Pub. L. No. 104-145, § 2, 110 Stat. 1345 (1996), codified at 42 U.S.C. § 14071(d). In 2006, Congress repealed the Wetterling Act, replacing it with the Sex Offender Registration and Notification Act, 120 Stat. 590, 42 U.S.C. §§ 16901 et seq. (subsequently transferred to 34 U.S.C. §§ 20901 et seq.). See Nichols, 136 S. Ct. at 1116; Doe No. 34186, 470 Mass. at 558 n.7.

> "So the first place that law enforcement looks when a child has been abducted or has been the victim of a crime which does not involve abduction is with the list of offenders that are within that community or within that area, and very often when a child is abducted, the person who has perpetrated this crime takes the child a far way away where law enforcement really do not know who is involved, so time is of the essence in law enforcement being able to track down known child offenders to see if they were involved in an abduction or another crime against a child." (Emphases added.)

139 Cong. Rec. 31250 (Nov. 20, 1993) (remarks of Rep. F. James Sensenbrenner, Jr.). Second, Congress cited statistics showing that a high percentage of child abductions also involve sexual assaults, indicating a correlation between the two crimes. See H.R. Rep. No. 103-392, 103d Cong., 1st Sess., at 4 (1993) (Committee on the Judiciary), citing Office of Juvenile Justice and Delinquency Prevention, United States Department of Justice, "Missing, Abducted, Runaway and Thrownaway Children in America" 142 (May 1990) ("Two-thirds of the cases of non-family child abduction reported to police involve sexual assault"). See also 139 Cong. Rec. 12057 (May 28, 1993) (remarks of Sen. David F. Durenberger); 139 Cong. Rec. 31251 (Nov. 20, 1993) (remarks of Rep. James M. Ramstad); 139 Cong. Rec. 31252 (Nov. 20, 1993) (remarks of Rep. Hamilton Fish, Jr.).[6] In light of these

[6] The board cites subsequent studies showing that the perpetrator sexually had assaulted the child victim in forty-six percent of the nonfamily abductions studied, see D. Finkelhor, H. Hammer, & A.J. Sedlak, United States Department of Justice, Nonfamily Abducted Children: National Estimates and Characteristics, National Incidence Studies of Missing,

concerns about recidivism among persons previously convicted of a crime against a child and the correlation between child abductions and sexual assault, Congress rationally could have concluded that a person previously convicted of kidnapping a child should be required to register both because that person poses a risk of repeating the offense and, more particularly, because a person previously convicted of kidnapping a child may have intended to assault the child sexually as well, even if that purpose was thwarted, and poses a risk of repeating the offense for the same purpose in the future.

Given that the sex offender registration law was enacted to comply with the Wetterling Act's requirements, the Legislature was presumably acting in accord with the same rationale when it included kidnapping of a child under the age of sixteen in

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Abducted, Runaway, and Thrownaway Children, at 10 (Oct. 2002), and that sixty-three percent of child victims were assaulted sexually when kidnapped, see J. Wolak, D. Finkelhor, & A.J. Sedlak, United States Department of Justice, Child Victims of Stereotypical Kidnappings Known to Law Enforcement in 2011, Juvenile Justice Bulletin, at 10 (June 2016). Conversely, the plaintiff cites a law review article criticizing the methodologies of both the 1990 and the 2002 Department of Justice studies cited supra. See Raban, Be They Fish or Not Fish: The Fishy Registration of Nonsexual Offenders, 16 Wm. & Mary Bill Rts. J. 497, 519-523 (2007). For purposes of rational basis review, however, "it is not the province of the court to sit and weigh conflicting evidence supporting or opposing a legislative enactment." Shell Oil Co. v. Revere, 383 Mass. 682, 687 (1981), quoting Clark v. Paul Gray, Inc., 306 U.S. 583, 594 (1939). We only need determine whether there is some conceivable, rational ground that would support the law that is being challenged.

violation of G. L. c. 265, § 26, as one of the offenses triggering registration requirements under the Massachusetts law. See St. 1996, c. 239, § 1; G. L. c. 6, § 178C.[7] See generally Swift v. AutoZone, Inc., 441 Mass. 443, 447 (2004) (where Massachusetts law was intended essentially to be identical to Federal law, legislative history of cognate Federal statute is relevant to understanding intent of Legislature in enacting Massachusetts statute).

Although the sex offender registration law's objective of protecting the public against the danger of recidivism by sex offenders, as stated in the 1999 preamble, is arguably narrower than that of the Wetterling Act, the inclusion of child kidnapping among the offenses requiring registration is still reasonably related to such an objective, given the correlation between child abductions and sexual assault undergirding the Federal law on which G. L. c. 6, § 178C, was based. As courts

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[7] In 1999, the Legislature substantially revised the sex offender registration law in response to various rulings by this court. See Roe v. Attorney Gen., 434 Mass. 418, 422-423 (2001). The revised law listed kidnapping of a child under G. L. c. 265, § 26, as a sex offense, and kidnapping of a child under the age of sixteen under G. L. c. 265, § 26, as a sex offense involving a child. See St. 1999, c. 74, § 2. See also St. 1999, c. 74, § 12 (amending G. L. c. 265, § 26, to establish kidnapping of child under age of sixteen by person other than child's parent as distinct offense). The revised law also prohibited the sentencing court and the board from relieving persons convicted of sex offenses involving a child from the law's registration requirements. See St. 1999, c. 74, § 2; G. L. c. 6, §§ 178E (e), (f), 178K (2) (d); Hammond, 477 Mass. at 513.

in other States have observed in rejecting similar as-applied due process challenges to their sex offender registration laws, requiring sex offender registration for persons convicted of child kidnapping is reasonable because "kidnapping can be a precursor to sex offenses against children." People v. Johnson, 225 Ill. 2d 573, 591 (2007).

Although the kidnapping itself may not involve any sexual component, "in many cases, the offender intends a sexual assault that is prevented only by the offender's arrest or the escape of the victim," People v. Knox, 12 N.Y.3d 60, 68, cert. denied, 558 U.S. 1011 (2009), and absent an overt act "an offender's sexual motive or intent may be difficult to prove," State v. Smith, 2010 WI 16, ¶ 13, cert. denied, 562 U.S. 865 (2010) (considering grounds for requiring registration by person convicted of false imprisonment of minor). Furthermore, "a child cut off [by kidnapping] from the safety of everyday surroundings is vulnerable to sexual abuse even if the offender's sexual desires are not the motive of the crime." Knox, supra. Among other risks, a "kidnapper may plan to prostitute a child, or may seize an unplanned-for opportunity to do so." Id.

We recognize that there are some cases where courts have reached a contrary conclusion, holding that sex offender registration requirements violated due process as applied to persons convicted of kidnapping a child. But typically, these

cases have involved situations where the State conceded, or the facts conclusively demonstrated, that there was no sexual component or motivation in the kidnapping. For example, the Florida Supreme Court determined that the State's sex offender registration requirement was not reasonably related to the legislative purpose of protecting children from sexual predators as applied to a defendant who was convicted of kidnapping after he stole a car that had a baby in the back seat, where "the State concede[d] that the crime contained no sexual element and the circumstances of the crime conclusively belie[d] any sexual motive." State v. Robinson, 873 So. 2d 1205, 1217 (Fla. 2004). In that case, it was undisputed that the defendant had stolen the car because he had run out of gasoline while driving another vehicle, and that the kidnapping had been committed solely to facilitate the carjacking. Moreover, the defendant had voluntarily left the child, still sitting in her car seat, in front of a doctor's office. See id. at 1207-1208, 1214-1215.[8]

[8] See also, e.g., Yunus vs. Lewis-Robinson, U.S. Dist. Ct., No. 17-cv-5839 (AJN) (S.D.N.Y. Jan. 11, 2019) (granting preliminary injunction prohibiting enforcement of sex offender registration requirements in favor of plaintiff who had been convicted of kidnapping of minor, where kidnapping had been carried out to ransom victim in exchange for money and drugs, and nonsexual nature of offense was conceded and conclusive); State v. Small, 2005-Ohio-3813, ¶ 30 (Ct. App.) (subjecting defendant to sex offender registration requirements violated due process where defendant had kidnapped one year old boy to facilitate robbery and there was no evidence of any sexual motivation); State v. Reine, 2003-Ohio-50, ¶ 28 (Ct. App.)

The circumstances in the present case are very different from those in Robinson, as the plaintiff's kidnapping of the victim was not merely collateral to another crime. The plaintiff intentionally and violently assaulted the victim, a ten year old girl, before threatening to break her neck if she did not keep quiet and dragging her down several flights of stairs. Had the victim not broken free and escaped, the kidnapping likely would have continued, putting the victim at potential risk of sexual assault.[9]

On these facts, and considering that we must recognize every rational presumption in favor of the sex offender registration law's validity, we conclude that the law's registration requirements for persons convicted of kidnapping a child, as applied to the plaintiff, bear a reasonable, real, and substantial relation to the legislative objective of protecting vulnerable members of our communities, such as children, against recidivism by sex offenders.

2. Hearing examiner's consideration of hearsay evidence. The plaintiff next argues that it was unreasonable for the hearing examiner to credit and admit hearsay statements in the

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(classifying defendant as sex offender violated due process where parties stipulated that defendant's kidnapping offenses were committed without any sexual motivation or purpose).

[9] See discussion of Congress's findings concerning the high correlation between child abductions and sexual assault supra.

police report concerning his alleged sexual abuse of the rape complainant, because such statements do not qualify as "substantial evidence" under G. L. c. 30A, § 1. We disagree.

As a general matter, apart from the heightened standards of proof that we have required for specific types of decisions, the board's adjudicatory decisions must be supported by "substantial evidence," which is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, §§ 1 (6), 14 (7) (e). See Doe, Sex Offender Registry Bd. No. 68549 v. Sex Offender Registry Bd., 470 Mass. 102, 109 (2014). The range of evidence that may be considered by hearing examiners is not limited by the same rules of evidence that apply in court proceedings; hearing examiners may exercise their discretion to admit and give probative value to evidence "if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." G. L. c. 30A, § 11 (2). See 803 Code Mass. Regs. § 1.18(1) (2016). See also Doe No. 10800, 459 Mass. at 638. In this context, we have held that "hearsay evidence bearing indicia of reliability constitutes admissible and substantial evidence." Id. Such indicia include "the general plausibility and consistency of the victim's or witness's story, the circumstances under which it is related, the degree of detail, the motives of the narrator, the presence or absence of corroboration and the like." Doe, Sex

Offender Registry Bd. No. 10304 v. Sex Offender Registry Bd., 70 Mass. App. Ct. 309, 313 (2007).

In the present case, the hearing examiner highlighted the detailed nature of the rape complainant's statement in concluding that it was reliable. She noted that the rape complainant specifically described how the plaintiff sexually assaulted her (the rape complainant stated that the plaintiff licked her private parts and indicated the vagina and buttocks area on an anatomically correct gingerbread drawing); where the assault occurred (in the bedroom she shared with her younger brother); and what the plaintiff told her prior to or during the assaults (that what he was doing would help her to stop wetting the bed). Although the rape complainant could not provide specific dates and times for the assaults, she also stated that they had occurred on four consecutive nights.

The hearing examiner also considered the circumstances under which the rape complainant's statement was taken, observing that the disclosures were made during a multidisciplinary investigation team interview at the child advocacy center. And she cited the plausibility of the rape complainant's statement, noting that the fact that the plaintiff subsequently also beat, threatened, and kidnapped another young girl (the victim) added credibility to the rape complainant's account.

In contesting the hearing officer's reliance on the rape complainant's statements in the police report, the plaintiff focuses on the lack of corroboration for these hearsay statements. But as the hearing officer noted, there was indirect corroboration by the plaintiff's admission to an attack on another young girl, the victim, and in any event corroboration is only one of several indicia of reliability to be considered. Here, the hearing examiner primarily cited the detail in the statement by the rape complainant.[10]

On this record, we are satisfied that the hearing examiner did not abuse her discretion in admitting and giving probative

[10] The plaintiff argues that mere detail in a hearsay statement does not confer reliability, but the case that he cites in support of this proposition, Edward E. v. Department of Social Servs., 42 Mass. App. Ct. 478, 486 (1997), actually involved a paucity of detail, where the reporting child was not able to talk about specifics and the only detail she provided concerned where the alleged sexual assaults took place. See id. By comparison, the statement by the rape complainant in the present case provided much more detail about the context and nature of the assaults than was provided by the victim in Edward E.

effect to the hearsay statements contained in the police report.[11,12]

3. Motion for expert funds. The plaintiff argues next that the hearing examiner abused her discretion by denying the plaintiff's motion for funds for an expert witness to examine and testify to his current mental condition and its effect on his current level of risk of reoffense and level of dangerousness. We disagree.

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[11] As we discuss in more detail infra, the hearing examiner was permitted to consider the rape complainant's statement in the police report as part of the classification process notwithstanding the plaintiff's acquittal of the charges brought against him as a result of that statement. As we recently reaffirmed, where "a sex offense is unproven at a criminal trial, a hearing examiner may consider the facts underlying the charges 'where such facts are proven by a preponderance of evidence,' the standard used for subsidiary facts." Doe No. 3177, 486 Mass. at 754-755, quoting Soe, Sex Offender Registry Bd. No. 252997 v. Sex Offender Registry Bd., 466 Mass. 381, 396 (2013). See id. at 757. See also Doe, Sex Offender Registry Bd. No. 523391 v. Sex Offender Registry Bd., 95 Mass. App. Ct. 85, 90 (2019) ("The lack of criminal conviction does not render information contained within a police report inadmissible in an administrative proceeding"). In light of the hearing examiner's findings discussed supra, she could have also properly found that the facts alleged in the rape complainant's statement were adequately established by a preponderance of the evidence.

[12] The plaintiff urges us to adopt a heightened standard for determining the reliability of hearsay statements when they provide the sole basis for determining that a convicted sex offender poses a danger, suggesting that we should require corroboration by independently admitted sources or an offender's admissions. Having recently rejected a related argument for increasing the standard of proof for subsidiary facts in classification proceedings, see Doe No. 3177, 486 Mass. at 754-757, and note 11, supra, we decline to do so here.

The board has discretion to grant funds to indigent offenders for an expert witness or report to be presented at the classification hearing, "whether or not the board itself intends to rely on this type of expert evidence." Doe, Sex Offender Registry Bd. No. 89230 v. Sex Offender Registry Bd., 452 Mass. 764, 770, 774 (2008) (Doe No. 89230) (avoiding constitutional question by construing sex offender registration law as permitting board discretion to grant expert witness funds to indigent offenders regardless of whether board intends to present expert evidence).

The board's discretionary decision to grant or deny an offender's motion for expert funds is "based on the facts presented in an individual case." Id. at 775. The offender's motion for expert funds must

> "1. identify a condition or circumstance special to the sex offender and explain how that condition is connected to his or her risk of reoffense or level of dangerousness; 2. identify the particular type of Expert Witness who would provide testimony to assist the Hearing Examiner in his or her understanding and analysis; and 3. include supporting documentation or affidavits verifying the specific condition or circumstance that the offender suffers from."

803 Code Mass. Regs. § 1.16(4)(a) (2016). A motion that fails to meet these criteria may be denied prior to the hearing. Id.

In particular, the offender bears the burden of "identify[ing] and articulat[ing] the reason or reasons, connected to a condition or a circumstance special to him, that

he needs to retain a particular type of expert." Doe No. 89230, 452 Mass. at 775. "A general motion for funds to retain an expert to provide an opinion on the sex offender's risk of reoffense, without more, would appear to be insufficient." Id.

Here, the plaintiff's motion was supported by an affidavit from his counsel averring that the plaintiff suffered from an anxiety disorder, that he had a past history of psychiatric hospitalizations, and that an expert was needed to determine the effect of his mental illness on his level of dangerousness and risk of reoffense. The motion also attached documentation showing that the plaintiff had received treatment for symptoms of generalized anxiety disorder during his incarceration. The plaintiff did not, however, provide documentation showing that he had in fact been diagnosed with that disorder, nor did his motion "explain how that condition is connected to his . . . risk of reoffense or level of dangerousness."[13] 803 Code Mass. Regs. § 1.16(4)(a)(1). The plaintiff also failed to provide or cite significant research or evidence to support such a connection of the kind that has been provided in other cases

[13] In addition, the hearing examiner noted that the plaintiff had stated at his plea hearing first that he had been drinking in addition to taking medication at the time of the assault on the victim, and then that he had been off the medication at that time. These statements raised questions about whether treatment would be effective in mitigating the risk of future offenses, even assuming that the kidnapping was causally related to his mental condition.

where the denial of expert funds was held to be an abuse of discretion. See, e.g., Doe, Sex Offender Registry Bd. No. 205614 v. Sex Offender Registry Bd., 466 Mass. 594, 610 (2013) (hearing examiner abused discretion in denying motion for expert funds supported by significant evidence that research undergirding board guidelines limited almost exclusively to male sexual recidivism, and evidence indicating that females have lower over-all rates of sexual recidivism); Doe, Sex Offender Registry Bd. No. 58574 v. Sex Offender Registry Bd., 98 Mass. App. Ct. 307, 311 (2020) (Doe's motion for expert funds improperly denied where it "was tailored to the specifics of Doe's chronic hepatitis C" and included physician's report supporting his condition and "setting forth some of Doe's symptoms and his treatment with interferon," as well as "two scientific articles show[ing] a correlation between Doe's particular condition . . . and lower libido and sexual dysfunction"); Doe, Sex Offender Registry Bd. No. 151564 vs. Sex Offender Registry Bd., 85 Mass. App. Ct. 1, 9-11 (2014) (expert testimony needed to provide "assistance and guidance for the proper interpretation and understanding" of "technical and complex" studies regarding correlation between age and recidivism). We conclude that the hearing examiner did not abuse her discretion in denying the plaintiff's motion for funds to engage an expert.

4. Classification of plaintiff as a level three sex offender. Finally, we reject the plaintiff's contention that his classification as a level three sex offender was not supported by clear and convincing evidence.

"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, or is an arbitrary and capricious abuse of discretion," provided that "[t]he reviewing court 'shall 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. 3177, 486 Mass. at 754, quoting G. L. c. 30A, § 14 (7).

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. 3177, supra, quoting G. L. c. 6, § 178K (2) (c). This determination comprises "three elements that must each be established by clear and convincing evidence: (1) the offender's risk of reoffense, (2) the offender's dangerousness as a function of the severity and extent of harm the offender

would present to the public in the event of reoffense, and (3) the public safety interest served by public access to the offender's information." Doe No. 3177, supra. Importantly, "[i]n determining whether these elements have been established by clear and convincing evidence," however, "a hearing examiner may consider subsidiary facts that have been proved by a preponderance of the evidence." Id. at 756-757, quoting Doe, Sex Offender Registry Bd. No. 496501 v. Sex Offender Registry Bd., 482 Mass. 643, 656 (2019).

The plaintiff's argument contesting his level three classification essentially recapitulates the issues already discussed, albeit in a different context. He contends that the evidence was insufficient to support his level three classification because his kidnapping and assault of the victim did not involve a sexual purpose or motive and was occasioned by a mental health issue, and because the rape complainant's statement was hearsay. In particular, he challenges the hearing examiner's application of two factors in the board's guidelines: factor 2 (repetitive and compulsive behavior involving two or more separate episodes of sexual misconduct) and factor 3 (adult offender with a child victim as an indicator of a heightened risk to public safety and, for adults targeting prepubescent children, deviant sexual interest and an even higher risk of reoffense and degree of dangerousness). See 803 Code Mass.

Regs. § 1.33(2), (3). With regard to factor 2, the hearing examiner found that the plaintiff had engaged in sexual misconduct with two victims on separate occasions, and with regard to factor 3, she found that the plaintiff had sexually assaulted two prepubescent child victims.

Based on the indicia of reliability discussed supra, the hearing examiner could properly admit the rape complainant's statement in the police report and find by a preponderance of the evidence that the plaintiff had sexually assaulted the rape complainant. And given that kidnapping of a child is defined as a sex offense by the sex offender registration law, that there is evidence of a statistical correlation between kidnapping and sex offenses, and that the plaintiff's rape of the rape complainant provided other evidence of the plaintiff's involvement in a child sex offense, the hearing examiner properly could find that the kidnapping of the victim was also an act of sexual misconduct.

The hearing examiner also considered numerous other risk-elevating factors from the board's guidelines in classifying the plaintiff as a level three sex offender.[14] These included his

[14] General Laws c. 6, §§ 178K (2) and 178L (1), delineate "criteria to be considered by the [b]oard in determining risk of reoffense and degree of dangerousness and authorize the [b]oard to identify and utilize additional risk factors and criteria not specifically listed in the statute." 803 Code Mass. Regs. § 1.04. Relying on this statutory authority, the board

physical attack on a stranger (the victim);[15] the physical contact involved in his rape of the rape complainant;[16] his assault on two different types of victims;[17] evidence of his alcohol and substance use;[18] and his poor disciplinary record

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promulgated 803 Code Mass. Regs. § 1.33, "which describes and defines the factors that the [b]oard shall consider in making all registration and classification decisions." 803 Code Mass. Regs. § 1.04.

[15] Factor 7 -- relationship between the offender and victim (giving full weight based on a finding that the victim of the plaintiff's index offense was a stranger, which demonstrates a higher risk of reoffense than offenders who target victims known to them); factor 8 -- weapons, violence, or infliction of bodily injury (finding that the plaintiff beat and threatened, thereby causing injury to, the victim of the plaintiff's index offense -- an aggravating factor that may be indicative of sexual arousal to violence or an antisocial orientation). See 803 Code Mass. Regs. § 1.33(7), (8).

[16] Factor 19 -- level of physical contact (giving moderate weight based on a finding that the plaintiff engaged in oral, vaginal penetration of the rape complainant, which has been shown to cause increased psychological harm to the victim). See 803 Code Mass. Regs. § 1.33(19).

[17] Factor 21 -- diverse victim type (finding that the plaintiff sexually assaulted both a stranger and a victim known to him); and factor 22 -- number of victims (finding that the plaintiff committed acts of sexual misconduct against two victims). See 803 Code Mass. Regs. § 1.33(21), (22).

[18] Based on statements from the plaintiff regarding his drinking and statements from the plaintiff's girlfriend regarding his cocaine addiction, the examiner gave full weight to factor 9 -- alcohol and substance abuse, which may increase an offender's risk of reoffense. See 803 Code Mass. Regs. § 1.33(9).

during his incarceration.[19] The hearing examiner also considered three risk-mitigating factors relating to the plaintiff's probation supervision, treatment, and home situation and support systems.[20] But she gave the plaintiff's participation in treatment very little weight upon finding that it was short lived and rooted in his desire to receive parole, and gave no weight to his home situation, upon finding that the plaintiff lacked supportive relationships in Massachusetts. Finding that these limited mitigation factors were far outweighed by the risk indicated by the many aggravating factors, the hearing examiner concluded that the plaintiff presented a high risk of reoffense and high degree of dangerousness, thereby warranting registration as a level three sex offender.

We conclude that the hearing examiner demonstrated the appropriateness of the plaintiff's level three classification by clear and convincing evidence. As the plaintiff has failed to show that the examiner's determination was arbitrary, capricious, an abuse of discretion, not supported by substantial

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[19] Factor 12 -- behavior while incarcerated or civilly committed. See 803 Code Mass. Regs. § 1.33(12). The plaintiff had seventeen disciplinary reports while in prison. The hearing examiner gave this factor minimal weight, however, due to the relatively minor nature of the offenses.

[20] Factor 28 -- supervision by probation or parole; factor 32 -- sex offender treatment; and factor 33 -- home situation and support systems. See 803 Code Mass. Regs. § 1.33(28), (32), (33).

evidence, or otherwise unlawful, we defer to the board's classification decision. See Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 473 Mass. 297, 300 (2015) ("appellant bears the burden of showing that one of these conditions has been met").

Conclusion. The judgment affirming the board's decision to classify the plaintiff as a level three sex offender is affirmed.

So ordered.