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## **Criminal Law - Extra Extra Read All about It: Sex Offender's Request for Reclassification - Noe v. Sex Offender Registry Bd., No. SUCV2014-02071-A, 2017 Mass. Super. Lexis 9 (Mass. Super Ct. Mar. 28, 2017)**

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**CRIMINAL LAW – EXTRA! EXTRA! READ ALL  
ABOUT IT! “SEX OFFENDER’S REQUEST FOR  
RECLASSIFICATION” – *NOE V. SEX OFFENDER  
REGISTRY BD.*, NO. SUCV2014-02071-A, 2017 MASS.  
SUPER. LEXIS 9 (MASS. SUPER. CT. MAR. 28,  
2017).**

“We cast the net widely to make sure we got all the sex offenders. Now, 15 years on, it turns out that really only a small percentage of people convicted of sex offenses pose a true danger to the public.”<sup>1</sup> This quote illustrates why sex offenders should be able to reclassify their sex offender level.<sup>2</sup> In *Noe v. Sex Offender Registry Board*,<sup>3</sup> the Superior Court of Suffolk County addressed the proper standard of review in sex offender reclassification cases and the appropriate burden of proof at sex offender reclassification hearings.<sup>4</sup> The court held that the Sex Offender Registry Board’s (“Board”) conclusion that Petitioner, sex offender, had not presented sufficient evidence establishing a substantial change in circumstances that could warrant a reduction in his classification level was a violation of Petitioner’s constitutional rights and a violation of law.<sup>5</sup>

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<sup>1</sup> Lisa Sandberg, *Texas Group Fights Sex Crime Stigma Members Call Unfair*, CHRON (Dec. 14, 2008, 6:30 AM), <http://www.chron.com/news/houston-texas/article/Texas-group-fights-sex-crime-stigma-members-call-1773670.php> (quoting Ray Allen, former Texas House Corrections Chair, who helped implement tough sex registration bills).

<sup>2</sup> See MASS. ANN. LAWS ch. 6, § 178L(3) (LexisNexis 2013) (discussing reclassification amendment to Sex Offender Registry Law); see also Sarah Tofte, *No Easy Answers Sex Offender Laws in the US*, HUMAN RIGHTS WATCH (Sept. 11, 2007), <https://www.hrw.org/report/2007/09/11/no-easy-answers/sex-offender-laws-us> (analyzing effects of sex offender laws in United States). According to the report by the Human Rights Watch, “sex offender registration, community notification, and residency restriction laws are ill-considered, poorly crafted, and may cause more harm than good.” Tofte, *supra* note 2. The Human Rights Watch is not suggesting that these laws are not needed, considering that sex offenses are very serious crimes, but instead it believes they are simultaneously dangerous to individuals who do not pose a true safety risk to the public. Tofte, *supra* note 2. Furthermore, the report addresses the serious harms associated with registering as a sex offender, including: harassment; violence; shattered privacy; social ostracism; diminished employment; and housing opportunities. Tofte, *supra* note 2.

<sup>3</sup> No. SUCV2014-02071-A, 2017 Mass. Super. LEXIS 9, at \*1 (Mass. Super. Ct. Mar. 28, 2017) (citing case in chief).

<sup>4</sup> See *id.* at \*17-30 (explaining correct procedures for sex offender reclassifications).

<sup>5</sup> See *id.* at \*1-2 (concluding error of Board in Petitioner’s reclassification case); see also MASS. ANN. LAWS ch. 6, § 178M (LexisNexis 2013) (governing judicial review of sex offender

Daniel Noe, Petitioner, was convicted on five occasions for “open and gross lewdness and lascivious behavior.”<sup>6</sup> Noe’s convictions never derived from sexually violent offenses nor physical contact with others, yet his reoccurring convictions were enough to classify him as a “Level 3” sex offender - the highest classification level possible under the law.<sup>7</sup> Once classified, Noe lived within the community for several years without any subsequent sexual offenses.<sup>8</sup> However, Noe, like many other sex offenders, found life difficult with a stigmatic Level 3 sex offender status attached to his identity.<sup>9</sup> Thus, Noe submitted a request to the Board in January 2013

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modification); MASS. ANN. LAWS ch. 6, § 178L(3) (LexisNexis 2013) (discussing reclassification amendment to Sex Offender Registry Law).

<sup>6</sup> See MASS. ANN. LAWS ch. 272, § 16 (LexisNexis 1987) (stipulating law); see also *Noe v. Sex Offender Registry Bd.*, No. SUCV2014-02071-A, 2017 Mass. Super. LEXIS 9, at \*1, \*9 (Mass. Super. Ct. Mar. 28, 2017) (quoting Administrative Record at 117).

<sup>7</sup> See MASS. ANN. LAWS ch. 6, § 178C (LexisNexis 1999) (defining sexually violent offense); see also MASS. ANN. LAWS ch. 6, § 178K(2)(c) (LexisNexis 1998) (stipulating Level 3 is reserved for specific individuals). Under the statute, Level 3 is reserved for individuals whose “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 individual’s identity and offense history to the public. *Id.*; *Noe*, 2017 Mass. Super. LEXIS 9, at \*1, \*9 (explaining all Petitioner’s convictions involved him exposing himself and masturbating in public).

<sup>8</sup> See *Noe*, 2017 Mass. Super. LEXIS 9, at \*10 (describing sequence of events leading up to issue).

<sup>9</sup> See *id.* at \*10 (quoting Administrative Record at 107) (finding Level 3 classification made it “extremely difficult to put [his] life back together.”); see also John972, *Curse of a Sex Offender. It’s for the rest of your life!*, DAILY KOS (Jul. 06, 2015, 5:40 PM), <https://www.dailykos.com/stories/2015/7/6/1399609/-Curse-of-a-Sex-Offender-It-s-for-the-rest-of-your-life> (discussing effects of sex offender identification). The article illustrates sex offenders suffer not only a jail sentence, but a life where their offenses become who they are in the eyes of the public. John972, *supra* note 9. The article stipulates the following:

When you are listed on a sex offender registry, it’s for life, a sanction that requires the offender to be in regular contact with the authorities, to allow searches of his home every 90 days and to live far from schools, parks and other public places. His probation will also require him to stay off the Internet, even though you may need it, for a job.

*Id.*; see also Mike Cernovich, *The Hell of Sex Offender Registration*, CRIME & FEDERALISM (July 26, 2010, 12:43 PM), <http://www.crimeandfederalism.com/2010/07/the-hell-of-sex-offender-registration.html> (providing e-mails from sex-offenders discussing their life once they register). One e-mail dictates:

I wake up and [can’t] believe [what’s] happen[ed]. [T]his has been going on now for 8 1/2 years[.] [I] have no job [;] [I] am broke[;] [I] have nothing[;] [I] am going to lose my home [and] my parents pay for my bills[. . .] I lost my medical insurance when [I] was fired from my job. [M]y savings are gone.  
[I can’t] form a relationship because who wants to be with a felon and a registered sex offender?? I have lost friends [I] had. Now they changed how you have to register so you have to pay for a [driver’s] license every year and on top of that they charged \$75 a year just for the privilege of being a registered sex offender which they raised to \$125 which [I] don’t have the money to pay for [I] don’t have any money because [I] was fired

asking for a reduction in his classification level.<sup>10</sup> At the time, the Board had not adopted regulations allowing sex offenders to put in a request for their own reclassification hearing.<sup>11</sup>

Nonetheless, once the regulations became effective, Noe was informed that a hearing would be conducted on February 24, 2014.<sup>12</sup> During the hearing, Noe represented himself.<sup>13</sup> Noe offered no physical evidence of the several years he lived in the community without any instance of re-offense.<sup>14</sup> In contrast to Noe's lack of evidence regarding his years without offense, the Board offered a copy of Noe's request, an updated Board of Probation Record, and evidence showing the Boston Police knew Noe was seeking reclassification.<sup>15</sup> Two months later, the Board issued its decision denying Noe's request.<sup>16</sup> The Board concluded Noe "remained a high risk of re-offense and a high degree of dangerousness."<sup>17</sup>

Consequently, Noe initiated an action in the Superior Court seeking judicial review of the Board's decision.<sup>18</sup> Noe claimed, "the Board's denial

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from my job and am now unemployable [...] I live off my parents who [cannot] afford it. [M]y life is a pure hell. [I] am 10 years older now and unemployed [...], all my savings which [I] had saved for retirement is GONE! but [I] want people to know....

*Id.*

<sup>10</sup> See *Noe*, 2017 Mass. Super. LEXIS 9, at \*1, \*10 (quoting Administrative Record at 107) (discussing when and how Petitioner submitted request). Furthermore, Petitioner prepared and submitted his request without the assistance of counsel and had no supporting documentation or other evidence accompanying the request. *Id.*

<sup>11</sup> See *id.* at \*11 (explaining Second Path Regulations had not been implemented yet); see also *infra* p. 17 and accompanying notes 30, 33 (discussing Second Path Regulation in depth).

<sup>12</sup> See *Noe*, 2017 Mass. Super. LEXIS 9, at \*12 (quoting Administrative Record at 139-144) (showing Board sent Petitioner notice accepting request for hearing). Furthermore, stipulating "[t]he burden [will be] on you to show that your risk to reoffend and your degree of dangerousness has decreased since your previous classification." *Id.* Additionally, the Board's notice also stated Petitioner could have legal counsel represent him at hearing and that "there [would] not be counsel appointed" for him. *Id.*

<sup>13</sup> See *id.* at \*12 (discussing Petitioner appearing at hearing *pro se*).

<sup>14</sup> See Board's Reclassification Decision at 2-3, *Noe v. Sex Offender Registry Bd.*, No. SUCV2014-02071-A (2017) (No.22.0) (providing Petitioner represented himself and offered no physical evidence on his behalf). The decision indicates Petitioner did not call independent witnesses, offer any exhibits, nor file motions on his own behalf. *Id.* at 2.

<sup>15</sup> See *id.* at 2 (giving relevant background contributing to police knowledge).

<sup>16</sup> See *Noe*, 2017 Mass. Super. LEXIS 9, at \*13 (concluding Petitioner remained high-risk).

<sup>17</sup> See *id.* at \*13 (explaining why Board denied Petitioner's request). The Board directly states in its decision, "[s]ince his January 2007 Level 3 decision, [Petitioner] has remained offense free to the community for approximately seven years" and "has maintained sobriety for approximately five and [one-half] years." *Id.* The decision goes on to say that regardless, Petitioner, "remains a high risk of reoffense and a high degree of dangerousness . . ." and thus, should "continue to register as a Level 3 sex offender in accordance with G.L.c. 6, § 178K(2)(c)." *Id.* at \*14.

<sup>18</sup> See *id.* (initiating action with Supreme Judicial Court to review hearing decision).

of his request for reclassification . . . was arbitrary and capricious, an abuse of discretion, and unsupported by substantial evidence.”<sup>19</sup>

During this time, the Massachusetts Supreme Judicial Court (“SJC”) issued its decision in *Doe 380316* (“*Doe*”),<sup>20</sup> holding that a different standard of proof was necessary in order to satisfy due process.<sup>21</sup> The SJC further clarified its ruling would be exercised “retroactively to classification proceedings pending before the Board, the Superior Court, or the appellate courts.”<sup>22</sup> The Board attempted to dismiss the complaint and give Noe another chance to demonstrate an earned lowering of his sex offender level pursuant to the SJC holding in *Doe*, but Noe declined.<sup>23</sup> The Superior Court now has an opportunity to address the validity and constitutionality of the Board’s denial of Noe’s reclassification request.<sup>24</sup> Ultimately, the SJC held that the Board violated Petitioner’s constitutional rights and simultaneously violated state law.<sup>25</sup>

In 1996, the Massachusetts Legislature enacted an initial sex offender registry law, but later amended it after a series of judicial opinions exposed weaknesses in the original language.<sup>26</sup> However, the rules

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<sup>19</sup> *Id.*; see also MASS. ANN. LAWS ch. 30, § 14 (LexisNexis 2015) (discussing appeals from final decisions of agencies in adjudicatory proceedings).

<sup>20</sup> See *Doe*, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Board, 41 N.E.3d 1058 (Mass. 2015) (acknowledging different standard should apply).

<sup>21</sup> See *id.* at 1067-69 (finding clear and convincing evidence is correct standard of proof).

<sup>22</sup> See *Noe*, 2017 Mass. Super. LEXIS 9, at \*15 (explaining what would follow its decision); *Doe 380316*, 41 N.E.3d at 314 (setting forth new standard of proof for sex offender classifications in Commonwealth).

<sup>23</sup> See *Noe*, 2017 Mass. Super. LEXIS 9, at \*16 (mentioning Board’s attempt to amend petitioner’s hearing).

<sup>24</sup> See *id.* (discussing Board’s new precedent).

<sup>25</sup> See *id.* at \*1-2 (concluding Board’s error in Petitioner’s reclassification case).

<sup>26</sup> See MASS. ANN. LAWS ch. 6, § 178D (LexisNexis 2013) (discussing establishment and maintenance of sex offender registry); see also MASS. ANN. LAWS ch. 6, § 178L (LexisNexis 2013) (explaining classification of offenders and offenders right to hearing); MASS. ANN. LAWS ch. 6, § 178P (LexisNexis 2013) (authorizing police officer’s to arrest sex offenders for failure to comply with registration requirements); MASS. ANN. LAWS ch. 6, § 178K (LexisNexis 2013) (discussing role of Board); MASS. ANN. LAWS ch. 6, § 178C (LexisNexis 2011) (defining words within statute); MASS. ANN. LAWS ch. 6, § 178M (LexisNexis 2011) (implementing modification or risk designation); MASS. ANN. LAWS ch. 6, § 178F (LexisNexis 2010) (discussing verification of registration data); MASS. ANN. LAWS ch. 6, § 178H (LexisNexis 2010) (providing what happens when there was failure to register or verify registration information); MASS. ANN. LAWS ch. 6, § 178Q (LexisNexis 2010) (assessing seventy-five dollars registration fee upon every sex offender); MASS. ANN. LAWS ch. 6, § 178J (LexisNexis 2008) (dictating procedures for making request for sex offender registry information); MASS. ANN. LAWS ch. 6, § 178E (LexisNexis 2006) (explaining transmission of registration data to board and sex offender’s duty to register); MASS. ANN. LAWS ch. 6, § 178G (LexisNexis 2003) (establishing duration of duty to register); MASS. ANN. LAWS ch. 6, § 178O (LexisNexis 2003) (granting police officials and public employees immunity in civil or criminal proceedings); MASS. ANN. LAWS ch. 6, § 178I (LexisNexis 1999) (stipulating importance of public access to sex offender registry); MASS. ANN. LAWS ch. 6, § 178N (LexisNexis 1999)

governing reclassification of a sex offender's level, upward or downward, are fairly new.<sup>27</sup> In 2013, the Legislature amended parts of the law to grant the Board power to change sex offender classification upon receipt of new information determining the potential safety risk of the offender.<sup>28</sup>

Furthermore, the amended law allowed the Board to "promulgate regulations defining such new information and [established] procedures relative to a reclassification hearing."<sup>29</sup> Despite the changes to the law,

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(warning of unlawful use of sex offender registry information). *See generally* Doe v. Sex Offender Registry Bd., 857 N.E.2d 473, 477-78 (Mass. 2006) (stipulating fault in statute). The court summarizes the statute, as written provides:

A person convicted of any of the enumerated sex offenses on or after August 1, 1981, or released on or after August 1, 1981, from confinement, parole, or probation supervision following a conviction of one of these offenses, is a "[s]ex offender" . . . provides for the appointment by the Governor of a seven-member sex offender registry board. A sex offender who lives or works in the Commonwealth must register with the board by mail, listing his name, home address, and (if applicable) work address, or his intended home and work addresses . . . [and] provides for post-registration hearings and mandates the order of priority in which offenders are to be reviewed. The board is to promulgate guidelines for classifying an offender's level of dangerousness and risk of reoffense and apply those guidelines to assess the risk level of particular offenders . . . . Once an offender receives notice from the board of its initial recommended classification, he can request an evidentiary hearing to determine his future duty to register and his final classification. The board then assigns a final risk classification level: level one (low); level two (moderate); or level three (high). Offenders may seek judicial review pursuant to G.L.c. 30A, § 14, of the board's final classification and registration requirements . . . .

*Id.* at 477-78.

<sup>27</sup> *See* MASS. GEN. LAWS ch. 6, § 178L (codifying sex offenders right to hearing). The Legislature amended the rules governing reclassification to authorize the Board, on its own initiative or upon written request by a police department or district attorney, to reclassify any registered and finally classified sex offender in the event new relevant information to a determination of a risk of re-offense or degree of dangerousness is received. *Id.*; *see also* MASS. GEN. LAWS ch. 6, § 178L(3) (LexisNexis 2013) (codifying amendment to Sex Offender Registry Law). The Registry Law, as amended, also empowers the Board to promulgate regulations defining such new information and establishing the procedures relative to a reclassification hearing held for this purpose, provided, however, certain procedural safeguards are followed. *Id.*

<sup>28</sup> *See* MASS. GEN. LAWS ch. 6, § 178L(3) (LexisNexis 2013) (granting Board new powers).

<sup>29</sup> *Id.* (giving Board broad discretion in reclassification hearings). The law further stipulates the following:

(i) the hearing is conducted according to the standard rules of adjudicatory procedure or other rules which the board may promulgate, (ii) the hearing is conducted in a reasonable time, and (iii) the sex offender is provided prompt notice of the hearing, which includes: the new information that led the board to seek reclassification of the offender, the offender's right to challenge the reclassification, the offender's right to submit to the board documentary evidence relative to his risk of reoffense and the degree of dangerousness posed to the public, the offender's right to retain counsel for the hearing, and the offender's right to have counsel appointed if the offender is indigent, as determined by the board using the standards in chapter 211D.

sections of the statute remained vague concerning distinctions in the different types of reclassification hearings and who bears the burden of proof.<sup>30</sup> The Board supplemented the statute by adopting regulations creating two different procedural paths for sex offender reclassification hearings.<sup>31</sup>

The first path dictates the procedure the Board takes when they want to reclassify an offender.<sup>32</sup> The second path establishes the steps an offender can take when they submit a request to change classification.<sup>33</sup> Any reclassification decision issued pursuant to either path is considered

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*Id.*

<sup>30</sup> See “First Path Regulations,” 803 MASS. CODE REGS. § 1.37C(10) (2013) (describing what occurs when Board brings case); *see also* “Second Path Regulations,” 803 MASS. CODE REGS. § 1.37C(1)-(9) (2013) (establishing procedure when offender brings case).

<sup>31</sup> See “First Path Regulations,” 803 MASS. CODE REGS. § 1.37C(10) (2013) (describing what occurs when Board brings case); *see also* “Second Path Regulations,” 803 MASS. CODE REGS. § 1.37C(1)-(9) (2013) (establishing what occurs when an offender brings a case).

<sup>32</sup> See “First Path Regulations,” 803 MASS. CODE REGS. § 1.37C(10) (2013) (regulating what occurs when Board brings hearing). The first path, titled “Board Seeks Reclassification of Sex Offender,” applies to cases in which the Board, “on its own initiative, seek[s] to reclassify any registered and finally classified sex offender upon Receipt of any information that indicates offender may present an increased risk to reoffend or degree of dangerousness.” *Id.* Furthermore, reclassification hearings conducted pursuant to the First Path Regulations incorporate all procedural protections mandated by amended Section 178L, including right to notice, right to offer evidence relative to his or her risk of re-offense and degree of dangerousness posed to public, right to be represented by counsel at reclassification hearing, and right to have counsel appointed if indigent. *Id.* § 1.37C(10)(c) (incorporating, by reference, all procedures and protections pertaining to initial classification hearings). The First Path Regulations also provide that the Board bears the burden of proof in any reclassification hearing conducted pursuant to those regulations. *Id.* § 1.10(1) (incorporating, by reference, in the Board’s First Path Regulations at § 1.37C(10)(c)).

<sup>33</sup> See “Second Path Regulations,” 803 MASS. CODE REGS. § 1.37C(1)-(9) (2013) (regulating what occurs when offender brings hearing). The Board’s Second Path Regulations permits a registered Level 2 or Level 3 sex offender who has not been convicted of a new sex offense to “file a written motion with the Board to re-examine his or her classification level” no sooner than “three years after the date of his [or her] final classification.” *Id.* § 1.37C(2)(a) (discussing procedure for offender to file motion for classification). Any request for reclassification submitted by a registered sex offender is subject to a mandatory hearing before “a panel of hearing examiners or a single hearing examiner” appointed by the Board’s Chair. *Id.* § 1.37C(5). Reclassification hearings conducted pursuant to Second Path Regulations, however, do not incorporate all of the procedural protections mandated by amended Section 178L. *Id.* For example, while the Board’s Second Path Regulations permit a sex offender to be “represented at the [reclassification] hearing by privately retained counsel or an authorized representative,” they do not provide for appointment of counsel for indigent sex offenders. *Id.* § 1.37C(5)(d). The Board’s Second Path Regulation places the burden on sex offender to prove at reclassification hearing “his or her risk of reoffense and the degree of dangerousness he or she poses to the public has decreased since his or her final classification.” *Id.* § 1.37C(2)(c).

“final.”<sup>34</sup> However, any decision by the Board is subject to judicial review pursuant to regulations under MASS ANN. LAWS ch. 30A, § 14.<sup>35</sup>

The court in *Noe* found the Board’s conclusion, that *Noe* had not presented sufficient evidence establishing a sufficient change in circumstances warranting a reduction in his level, was a violation of Petitioner’s constitutional rights and a violation of law.<sup>36</sup> The court considered numerous elements of *Noe*’s case by “[giving] due weight to the experience, technical competence, and specialized knowledge of the board as well as to the discretionary authority conferred upon it.”<sup>37</sup> Furthermore, in order to evaluate whether the Board violated *Noe*’s due process rights, the court utilized the test established in *Mathews v. Eldridge*.<sup>38</sup> In *Mathews*, the

<sup>34</sup> See MASS ANN. LAWS ch. 30A, § 14 (LexisNexis 2015) (dictating procedure for appeals from final decisions of agencies and adjudicatory proceedings).

<sup>35</sup> See *id.* (stipulating procedure for appeals process). The statute specifically states, “[e]xcept so far as any provision of law expressly precludes judicial review, any person or appointing authority aggrieved by a final decision of any agency in an adjudicatory proceeding, whether such decision is affirmative or negative in form, shall be entitled to a judicial review thereof.” *Id.*

<sup>36</sup> See *Noe v. Sex Offender Registry Bd.*, No. SUCV2014-02071-A, 2017 Mass. Super. LEXIS 9 \*1, \*18-30 (Mass. Super. Ct. Mar. 28, 2017) (discussing court’s conclusion).

<sup>37</sup> *Id.* at \*18 (citing *Doe v. Sex Offender Registry Bd.*, 947 N.E.2d 9, 34 (Mass. 2011)) (explaining specific factors the court considered); see also MASS. ANN. LAWS ch. 30A, § 14(7) (LexisNexis 2017) (citing law governing appeals from final decisions of agencies in adjudicatory proceedings). The law specifically states that,

[t]he court may affirm the decision of the agency, or remand the matter for further proceedings before the agency; or the court may set aside or modify the decision, or compel any action unlawfully withheld or unreasonably delayed, if it determines that the substantial rights of any party may have been prejudiced because the agency decision is—

- (a) In violation of constitutional provisions; or
- (b) In excess of the statutory authority or jurisdiction of the agency; or
- (c) Based upon an error of law; or
- (d) Made upon unlawful procedure; or
- (e) Unsupported by substantial evidence; or
- (f) Unwarranted by facts found by the court on the record as submitted or as amplified under paragraph (6) of this section, in those instances where the court is constitutionally required to make independent findings of fact; or
- (g) Arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.

§ 14(7).

<sup>38</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976) (addressing due process). The *Mathews* court notes that in recent years, courts are more inclined to consider the extent to which due process requires evidentiary hearings prior to the deprivation of some interest. *Mathews*, 424 U.S. at 333. According to *Mathews*, due process requires the following factors:

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the



court balanced: “the private interests affected by an agency decision; the risk of an erroneous deprivation of those interests; the probable value, if any, of additional or substitute procedural safeguards; and the governmental interests involved.”<sup>39</sup>

The *Noe* court proceeded to evaluate the arguments of both parties concerning the allocation of the burden of proof at sex offender reclassification hearings and the Petitioner’s right to counsel at the hearing.<sup>40</sup> The court applied the due process test established in *Mathews* and concluded that the existing regulations, which placed a burden on the offender to prove his risk of re-offense or degree of dangerousness had lowered, violated the offender’s rights to due process.<sup>41</sup> In addition, the court used the test dictated in *In re Erin*<sup>42</sup> to support its conclusion that a sex offender seeking reclassification is required to show by clear and convincing evidence that a decrease in his or her sex offender level is required.<sup>43</sup> Lastly, the court

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Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* See also *Noe*, 2017 Mass. Super. LEXIS 9, at \*18-19 (Mass. Super. Ct. Mar. 28, 2017) (discussing *Mathews* test for level of due process); *Doe*, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 41 N.E.3d 1058, 1063-70 (Mass. 2015) (discussing effect of subsequent developments in Sex Registry law on *Mathews* analysis). *Doe* summarizes the SJC and states “balances the private interests affected by an agency decision; the risk of an erroneous deprivation of those interests; the probable value, if any, of additional or substitute procedural safeguards; and the governmental interests involved.” *Doe*, 41 N.E.3d at 1063. Therefore, the *Mathews* due process test takes into consideration the interests at stake. *Id.* at 1068.

<sup>39</sup> *Doe*, 41 N.E.3d at 1063; see also *Mathews*, 424 U.S. at 333 (emphasizing right to hearing when deprived of property interest).

<sup>40</sup> See *Noe*, 2017 Mass. Super. LEXIS 9, at \*19-40 (establishing what issues court specifically analyzed); see generally, *Commonwealth v. Samuel S.*, 69 N.E.3d 573, 580-81 (Mass. 2017) (discussing rule of lenity). Under the rule of lenity, if the court discovers that “[a] statute is ambiguous or [is] unable to ascertain the intent of the Legislature, the defendant is entitled to the benefit of any rational doubt.” *Id.* (quoting *Commonwealth v. Richardson*, 13 N.E.3d 989, 995 (Mass. 2014)).

<sup>41</sup> See *Mathews*, 424 U.S. at 333-35 (addressing due process). The *Mathews* court stipulated that in recent years, courts are more inclined to consider the extent to which due process requires evidentiary hearings prior to the deprivation of an interest. *Id.* at 333.

<sup>42</sup> 823 N.E.2d 356, 361-62 (Mass. 2005) (describing clear and convincing evidence).

<sup>43</sup> See *Noe v. Sex Offender Registry Bd.*, No. SUCV2014-02071-A, 2017 Mass. Super. LEXIS 9 \*1, \*24-30 (Mass. Super. Ct. Mar. 28, 2017) (concluding sex offender bears burden of production in reclassification proceedings); see also *Erin*, 823 N.E.2d at 360-61 (dictating correct burden of proof). The court in *Erin* discussed the correct burden in child custody cases and stated, “it is never permissible in an initial care and protection proceeding to shift the burden of proof to the respondent parent.” *Erin*, 823 N.E.2d at 361. The court emphasized that a review and redetermination proceeding is a readjudication of the custody order; therefore, “it implicates the same liberty interests that exist at an initial determination that a child is in need of care and protection.” *Id.* The court in *Noe* analogized between *Noe* and the mother in *Erin*, and believed that a reclassification hearing is a readjudication of the former proceeding; thus, the same level of interest exists as identified by the court in *Erin*. See *Noe*, 2017 Mass. Super. LEXIS 9, at \*26-27.

addressed an offender's right to assistance of counsel at reclassification hearings by looking directly at the Sex Offender Registry Law.<sup>44</sup> The court remanded the case to the Board for further proceedings with instructions to utilize the test established in *Mathews* and *Erin* and allow Noe assistance of counsel.<sup>45</sup>

The court in *Noe*, followed all requisite steps in determining whether a violation of due process occurred and examined each of petitioners claims to create clarity within the Sex Offender Registry Law.<sup>46</sup> First, the court addressed the problem with assigning the burden of proof to the offender at a reclassification hearing.<sup>47</sup> As such, the court correctly recognized that a sex offender has sufficient liberty and privacy interest at stake that are constitutionally protected by the Fourteenth Amendment of the United States

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<sup>44</sup> See *Noe*, 2017 Mass. Super. LEXIS 9, at \*30-39 (discussing sex offender's right to assistance of counsel); see also MASS. ANN. LAWS ch. 6, § 178L(3) (LexisNexis 2013) (discussing petitioner's right to counsel at reclassification hearing). Section 3 of the statute dictates,

The board may, on its own initiative or upon written request by a police department or district attorney, seek to reclassify any registered and finally classified sex offender in the event that new information, which is relevant to a determination of a risk of re-offense or degree of dangerousness, is received. The board shall promulgate regulations defining such new information and establishing the procedures relative to a reclassification hearing held for this purpose; provided that (i) the hearing is conducted according to the standard rules of adjudicatory procedure or other rules which the board may promulgate, (ii) the hearing is conducted in a reasonable time, and (iii) the sex offender is provided prompt notice of the hearing, which includes: the new information that led the board to seek reclassification of the offender, the offender's right to challenge the reclassification, the offender's right to submit to the board documentary evidence relative to his risk of reoffense and the degree of dangerousness posed to the public, the offender's right to retain counsel for the hearing, and the offender's right to have counsel appointed if the offender is indigent, as determined by the board using the standards in chapter 211D. An indigent offender may also apply for and the board may grant payment of fees for an expert witness in any case in which the board intends to rely on the testimony or report of an expert witness prepared specifically for the purposes of the reclassification proceeding. The failure of the offender to attend the hearing may result in a waiver of the offender's rights and the board's recommended reclassification becoming final.

§ 178L(3).

<sup>45</sup> See *Noe*, 2017 Mass. Super. LEXIS 9, at \*40-41 (remanding case back to board).

<sup>46</sup> See *id.* at \*19 (recognizing Sex Offender Registry Law is vague as to which party bears burden of proof).

<sup>47</sup> See *id.* at \*19-28 (analyzing *Mathews* and *Erin* test). Due to the vagueness of the Sex Offender Registry Law, the court in *Noe* had to examine whether shifting the burden to petitioner violated his due process rights. *Id.* at \*20. The court denounced the Board's contention that there was no liberty interest at stake for the Petitioner and stated that twenty years ago a sex offender had "sufficient liberty and privacy interests constitutionally protected by art. 12 [of the state Constitution] that he is entitled to procedural due process before he may be required to register and before information may properly be publicly disclosed about him." *Id.* at \*21 (quoting *Doe v. AG*, 686 N.E.2d 1007, 1012 (Mass. 1997)).

Constitution and article 12 of the Massachusetts Declaration of Rights.<sup>48</sup> Moreover, the court emphasized how intrusive, humiliating and continuous sex offender registration is to the individual themselves.<sup>49</sup> The court stresses how an opportunity to reclassify a sex offender status balances the purpose of the Sex Offender Registry Law but also provides a mechanism for protection of an offender's constitutionally based rights.<sup>50</sup> Therefore, reclassification is necessary to public safety because it helps to separate sexual predators likely to repeat their offenses from other offenders who no longer pose any danger.<sup>51</sup>

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<sup>48</sup> See U.S. CONST. amend. XIV (establishing equal protection); see also MASS. CONST. art. XII, pt. I (dictating constitutional rights); *Noe v. Sex Offender Registry Bd.*, No. SUCV2014-02071-A, 2017 Mass. Super. LEXIS 9 \*1, at \*20 (Mass. Super. Ct. Mar. 28, 2017) (rejecting Board's argument that Petitioner has no liberty interest at stake). The court listed numerous cases that contradicted the Board's proposition. See *Doe v. AG*, 686 N.E.2d 1007, 1012-13 (Mass. 1997) (recognizing the need to safeguard liberty interest). This court discussed the implications of publicly disclosing sex offender information and advocated that – because of the abrasive and humiliating nature that sex offender registration creates – there is a need to protect the liberty interest of the offender once he or she is able to reclassify themselves based on their reduction in dangerousness. See *Poe v. Sex Offender Registry Bd.*, 926 N.E.2d 187, 196 (Mass. 2010) (“At stake in a classification hearing is the sex offender’s constitutionally protected liberty and privacy interest in avoiding registration and public dissemination of registration information.”); *Doe v. Sex Offender Registry Bd.*, 697 N.E.2d 512, 518 (Mass. 1998) (“Sex offenders have a constitutionally protected liberty and privacy interest in avoiding registration and public dissemination of registration information.”).

<sup>49</sup> See *Noe*, 2017 Mass. Super. LEXIS 9, at \*23 (quoting *Doe v. AG*, 686 N.E.2d 1007, 1016 (Mass. 1997) (Fried, J., concurring)) (“Sex offender registration ‘is a continuing, intrusive, and humiliating regulation of the person himself.’”); see also Tofte, *supra* note 2 (discussing the effects of registering as a sex offender). Tofte addresses the real effects associated with sex offender registration and how some offenders’ name on a registry list can ensure a life of harassment, and continuously being classified as an offender whom no one wants to associate their business, residencies, or friendships with. See Tofte, *supra* n. 2; John972, *supra* note 9 (illustrating real life example of what occurs once labeled sex offender); Cernovich, *supra* note 9 (giving another example of being branded as sex offender).

<sup>50</sup> See *Doe v. Sex Offender Registry Bd.*, 971 N.E.2d 800, 808 (Mass. App. Ct. 2012) (discussing what reclassification does). The court stipulated:

the opportunity for reclassification balances the clearly articulated purpose of the legislation to protect vulnerable victims with the also clearly articulated constitutional rights of a sex offender. It provides the sole mechanism for protection of an offender’s constitutionally based rights where the passage of time has reduced the risk of dangerousness such that the Commonwealth’s interest in disclosure is eroded, properly permitting him to obtain a lower classification level.

*Id.* at 809 n.11.

<sup>51</sup> See *Doe, Sex Offender Registry Bd. No. 68549 v. Sex Offender Registry Board*, 18 N.E.3d 1081, 1085 (Mass. 2014) (quoting *Doe v. Sex Offender Registry Bd.*, 697 N.E.2d 512, 521 (Mass. 1998) (Marshall, J. concurring)) (“We have emphasized that the sex offender registration requirement ‘implicates constitutionally protected liberty and privacy interests.’ Accordingly, ‘careful and individualized due process is necessary to sort sexual predators likely to repeat their crimes from large numbers of offenders who pose no danger to the public.’”). The ongoing liberty

Moreover, the court was equally correct in its conclusion that although the Board bore the ultimate burden of proof at a reclassification hearing, the offender is still required to bear the initial burden of production.<sup>52</sup> The court addressed the findings in *Erin* and argued that it can be logically applied to the Board's proceedings on petitioner's request for reclassification.<sup>53</sup> The court believed that petitioner's request for reclassification effectively constituted a readjudication of the Board's initial determination to classify Noe as a Level 3 sex offender.<sup>54</sup> Thus, it was essential that petitioner's reclassification cannot be abrogated without clear and convincing evidence.<sup>55</sup>

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interest involved in sex offender classification and notification requirements make it clear that a sex offender is entitled to an individualized determination as to whether the individual currently poses a risk to public safety; regardless, his or her liberty interest is protected as long as they remain obligated to register with the Board. *Id.*; see also *Doe v. Sex Offender Registry Bd.*, No. MICV2010-4044-A, 2011 Mass. Super. LEXIS 29, at \*12 (Mass. Super. Ct. Mar. 18, 2011) (“[O]nce classified, a registered sex offender has a liberty and privacy interest in obtaining a lower classification some years after the initial classification, if the facts warrant.”).

<sup>52</sup> See *In re Erin*, 823 N.E.2d 356, 361 (Mass. 2005) (requiring the parent bear initial burden of production in order to trigger redetermination proceedings). The court in *Erin* held that,

[a]lthough the department retains the ultimate burden of showing that the child is still in need of care and protection, we conclude that the party filing a petition for review and redetermination has an initial burden of production that must be met in order to trigger the department's burden. The party filing the petition must present some credible evidence that circumstances have changed since the initial determination such that the child may no longer be in need of care and protection. Once the party filing the petition meets its burden of production, the department must make its showing.

*Id.*

<sup>53</sup> See *id.* (finding *Erin*'s analysis on burden of proof applicable to case at hand).

<sup>54</sup> See *Erin*, 823 N.E.2d at 360-61 (explaining correct burden of proof). The court in *Erin* discussed the correct burden in child custody cases and stated, “it is never permissible in an initial care and protection proceeding to shift the burden of proof to the respondent parent.” *Id.* at 361. The court emphasized that a review and redetermination proceeding are a readjudication of the custody order and stressed that such proceedings, “implicat[e] the same liberty interests that exist at an initial determination that a child is need of care and protection.” *Id.* In *Noe*, the SJC compared the sex offender reclassification proceeding at issue with the parent custody proceeding in *Erin*, and concluded that both processes implicated the same liberty interests. See *Noe v. Sex Offender Registry Bd.*, No. SUCV2014-02071-A, 2017 Mass. Super. LEXIS 9 at \*26-28 (Mass. Super. Ct. Mar. 28, 2017).

<sup>55</sup> See *Custody of a Minor*, 452 N.E.2d 483, 490 (Mass. 1983) (holding that “[e]vidence that is at least ‘clear and convincing’ is constitutionally required for a finding of parental unfitness.”); see also *Erin*, 823 N.E.2d at 360-61 (requiring DCF prove parent unfit by clear and convincing evidence). Similarly, the court in *Noe* applies this standard. See *Noe v. Sex Offender Registry Bd.*, No. SUCV2014-02071-A, 2017 Mass. Super. LEXIS 9 at \*30 (Mass. Super. Ct. Mar. 28, 2017) (citing *Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Board*, 41 N.E.3d 1058, 1072 (Mass. 2015)) (recognizing sex offender risk classifications must be established by clear and convincing evidence to satisfy due process).

Lastly, the court addressed the issue of petitioner's right to assistance of counsel.<sup>56</sup> The Sex Offender Registry Law stipulated that sex offenders are entitled to assistance of appointed counsel at reclassification hearings.<sup>57</sup> The court correctly read the law to provide that even indigent sex offenders are entitled to appointed counsel due to the general legislative desire to ensure that sex offenders have effective legal representation at all levels of the registration and classification process.<sup>58</sup> Even if the law itself placed doubt on this proposition, petitioner would still be granted an appointed attorney under the "rule of lenity."<sup>59</sup> Under the rule of lenity, if the court "find[s] that [a] statute is ambiguous or [is] unable to ascertain the intent of the Legislature, the defendant is entitled to the benefit of any rational doubt."<sup>60</sup> Nonetheless, the court found Petitioner, Noe, was entitled to counsel.<sup>61</sup>

The Sex Offender Registry Laws protect the safety of the public but also protect the rights of the offender. It is essential to the judicial system that agencies like the Sex Offender Registry Board, properly follow the principles of the laws that govern the lives of offenders. The law itself is markedly intrusive and causes substantial effects to the lives of the individuals who must follow the rules established within it. The court in *Noe* stepped in and sifted through the unambiguous parts of the law and essentially reminded the Board of their obligations. Now, it is imperative that the Board continues to set forth the correct standard for reclassification hearings by using the courts findings to promote a fairer justice system.

*Keshia L. Blair*

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<sup>56</sup> See *Noe*, 2017 Mass. Super. LEXIS 9 at \*30-31, \*38 (establishing petitioners right to counsel).

<sup>57</sup> See MASS. ANN. LAWS ch. 6, § 178L(3) (LexisNexis 2013) (codifying petitioner's right to counsel).

<sup>58</sup> See § 178(3) (establishing right to counsel). Section 178(3) describes sex offender's rights in a hearing to challenge classification, stating that "the hearing [shall be conducted] according to the standard rules of adjudicatory procedure or other rules which the board may promulgate . . . the [offender has a] right to retain counsel for the hearing, and the [offender has a] right to have counsel appointed if the offender is indigent." *Id.*

<sup>59</sup> See *Commonwealth v. Samuel S.*, 69 N.E.3d 573, 580-81 (Mass. 2017) (discussing rule of lenity). Under the rule of lenity, if the court discovers that "[a] statute is ambiguous or [is] unable to ascertain the intent of the Legislature, the defendant is entitled to the benefit of any rational doubt." *Id.* (quoting *Commonwealth v. Richardson*, 13 N.E.3d 989, 994 (Mass. 2014)).

<sup>60</sup> *Noe v. Sex Offender Registry Bd.*, No. SUCV2014-02071-A, 2017 Mass. Super. LEXIS 9 at \*37 (citing *Commonwealth v. Samuel S.*, 69 N.E.3d 573, 580-81 (Mass. 2017)) (explaining rule of lenity and its application).

<sup>61</sup> See *Noe*, No. SUCV2014-02071-A, 2017 Mass. Super. LEXIS 9 at \*37-38 (applying rule of lenity and § 178(3) about right to counsel).