

## ADMINISTRATIVE DIRECTIVE NO: 2015-04

**SUBJECT: EX PARTE COMMUNICATION**

### INTRODUCTION

This Administrative Directive addresses ex parte communication between a hearing panel member and any interested parties (inmates, inmate counsel, prosecutors, victims, and observers). This directive provides guidance as to when ex parte communication is permissible, when it is impermissible, and what actions need to be taken in the event of impermissible ex parte communication.

### LEGAL AUTHORITY

#### General Rule Prohibiting Ex Parte Communication

**Government Code section 11430.10** states:

- (a) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.
- (b) Nothing in this section precludes a communication, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing.
- (c) For the purpose of this section, a proceeding is pending from the issuance of the agency's pleading, or from an application for an agency decision, whichever is earlier.

#### Permissible Ex Parte Communication

**Government Code section 11430.20** states:

A communication otherwise prohibited by Section 11430.10 is permissible in any of the following circumstances:



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- (a) The communication is required for disposition of an ex parte matter specifically authorized by statute.
- (b) The communication concerns a matter of procedure or practice, including a request for a continuance, that is not in controversy.

## Required Action in the Event of Impermissible Ex Parte Communication

**Government Code section 11430.50** states:

- (a) If a presiding officer receives a communication in violation of this article, the presiding officer shall make all of the following a part of the record in the proceeding:
  - 1) If the communication is written, the writing and any written response of the presiding officer to the communication.
  - 2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the presiding officer, and the identity of each person from whom the presiding officer received the communication.
- (b) The presiding officer shall notify all parties that a communication described in this section has been made a part of the record.
- (c) If a party requests an opportunity to address the communication within 10 days after receipt of notice of the communication:
  - 1) The party shall be allowed to comment on the communication.
  - 2) The presiding officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that has been concluded.

**Government Code section 11430.60** may allow for the disqualification of a presiding officer to eliminate the effect of an ex parte communication.

**California Code of Regulations, title 15, section 2250** entitles an inmate to an impartial hearing panel. If a hearing panel member is “actually prejudiced against or biased in favor of the prisoner to the extent that he cannot make an objective decision,” that member must be disqualified.



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## DIRECTIVE

### 1. Permissible Ex Parte Communication

#### Matters of Procedure or Practice Not in Controversy

Hearing panel members may communicate with an interested party on noncontroversial issues, such as scheduling or other purely procedural matters. The best practice in these situations is to refer the individual to BPH Program Operations if the matter was raised prior to the week of the hearing. If communication with an interested party on noncontroversial issues is unavoidable, hearing panel members shall communicate in a manner that avoids the appearance of unfairness to one party.

Uncontested requests for waivers and postponements (but not stipulations) are issues of procedure, and therefore, hearing panel members are not required, but are encouraged, to include all interested parties in the disposition of such matters.

### 2. Impermissible Ex Parte Communication

There shall be no ex parte communication, direct or indirect, between a hearing panel member and any interested party (inmates, inmate counsel, prosecutors, victims, and observers) on a contested matter in the absence of or without the express consent of all parties regarding a case to which they have been assigned or that is pending decision review.

#### Inmates Represented by an Attorney

If an inmate is represented by an attorney at the time he or she makes a request for a voluntary waiver, stipulation, or postponement, hearing panel members shall not engage in ex parte communications with the inmate. As such, hearing panel members shall not act on the request unless the attorney concurs with the request by co-signing BPH Form 1001(a). Likewise, an attorney may not submit a request for a voluntary waiver, stipulation, or postponement without the inmate's signature.

### 3. Remedy in the Event of an Impermissible Ex Parte Communication

In the event a hearing panel member receives an impermissible ex parte communication, that information shall be made a part of the record at the hearing,



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pursuant to Government Code section 11430.50. The hearing panel member shall also refer the matter to the BPH Legal Division to discuss whether disqualification is appropriate.

*This Administrative Directive shall take effect immediately. If you have any questions concerning the contents of this Administrative Directive please contact the BPH Legal Division at (916) 324-7604.*

<b>APPROVED BY:</b> _____ <b>JENNIFER P. SHAFFER</b> Executive Officer, BPH	<b>DATE:</b> _____
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# BOARD OF PAROLE HEARINGS



**ADMINISTRATIVE DIRECTIVE NO: 2013-07  
(REVISED DECEMBER 21, 2015)**

**SUBJECT: GUIDANCE ON PAROLE CONSIDERATION HEARINGS FOR YOUTH OFFENDERS**

## INTRODUCTION

This directive provides guidance on conducting parole consideration hearings for qualified youth offenders under Penal Code section 3051.

## LEGAL AUTHORITY

**Penal Code section 3051, subdivision (f)(1)**, directs that, “In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, shall be administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual.”

**Penal Code section 4801, subdivision (c)**, further directs that, “When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, prior to attaining 23 years of age, the board, in reviewing a prisoner’s suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.”

When enacting **Penal Code sections 3051, subdivisions (f)(1) and 4801(c)**, the Legislature specifically found and declared that “as stated by the United States Supreme Court in *Miller v. Alabama* (2012) 183 L.Ed.2d 407, ‘only a relatively small proportion of adolescents’ who engage in illegal activity ‘develop entrenched patterns of problem behavior,’ and that ‘developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,’ including ‘parts of the brain involved in behavior control.’ The Legislature recognizes that youthfulness both lessens a juvenile’s moral culpability and enhances the prospect that, as a youth

matures into an adult and neurological development occurs, these individuals can become contributing members of society. The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in *People v. Caballero* (2012) 55 Cal.4th 262 and the decisions of the United States Supreme Court in *Graham v. Florida* (2010) 560 U.S. 48, and *Miller v. Alabama* (2012) 183 L.Ed.2d 407. Nothing in this act is intended to undermine the California Supreme Court's holdings in *In re Shaputis* (2011) 53 Cal.4th 192, *In re Lawrence* (2008) 44 Cal.4th 1181, and subsequent cases. It is the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established."

In the event parole is denied, **Penal Code section 3051, subdivision (g)**, states that, "If parole is not granted, the board shall set the time for a subsequent youth offender parole hearing in accordance with paragraph (3) of subdivision (b) of Section 3041.5 [Marsy's Law]. In exercising its discretion pursuant to paragraph (4) of subdivision (b) and subdivision (d) of Section 3041.5 [Marsy's Law], the board shall consider the factors in subdivision (c) of Section 4801."

## **DIRECTIVE**

At a parole consideration hearing for a qualified youth offender, all of the following shall occur:

- (1) In reviewing a qualified youth offender's suitability for parole, the hearing panel shall give great weight to the diminished culpability of the youth offender, the hallmark features of youth, and any subsequent growth and increased maturity of the youth offender in accordance with relevant case law;
- (2) If parole is not granted, the hearing panel shall set the time for a subsequent parole consideration hearing for the youth offender to occur in fifteen, ten, seven, five, or three years in accordance with Marsy's Law; and
- (3) When reviewing a petition to advance pursuant to subdivision (d) of Penal Code section 3041.5 or conducting an administrative review pursuant to subdivision (b)(4) of Penal Code section 3041.5, the hearing officer shall consider the diminished culpability of the youth offender, the hallmark features of youth, and any subsequent growth and increased maturity of the youth offender.

*This Administrative Directive shall take effect immediately. If you have any questions concerning the contents of this Administrative Directive please contact the BPH Legal Division at (916) 324-7604.*

<b>APPROVED BY:</b> _____	<b>DATE:</b> _____
<b>JENNIFER P. SHAFFER</b> <b>Executive Officer, BPH</b>	