BOARD OF PAROLE HEARINGS

ADMINISTRATIVE DIRECTIVE NO: 2013-03C

SUBJECT: PRE-HEARING REVIEW OF REQUESTS FOR WAIVERS, STIPULATIONS, AND POSTPONEMENTS

INTRODUCTION

Life inmates have the right to request a voluntary waiver, stipulation of unsuitability, or postponement prior to a parole consideration hearing. This Administrative Directive provides direction for hearing officers with the Board of Parole Hearings in reviewing pre-hearing requests for a voluntary waiver, stipulation of unsuitability, or postponement in instances when the inmate is represented by an attorney or when the inmate has identified disabilities.

LEGAL AUTHORITY

"A prisoner may request to voluntarily waive his or her life parole consideration hearing for any reason. Requests shall be made in writing to the board and shall state the reason for the request." (**California Code of Regulations, title 15, section 2253(b)**.) "A request for a voluntary waiver of a life parole consideration hearing should be submitted to the board at the earliest possible date that the prisoner becomes aware of the circumstances leading to the request, but shall be no later than 45 calendar days prior to the date of the scheduled hearing. A request made no later than 45 days prior to the scheduled hearing shall be presumed to be valid." (**California Code of Regulations, title 15, section 2253(b)(2)**.) "A request for a voluntary waiver ... submitted less than 45 calendar days prior to the scheduled hearing shall be presumed to be invalid and shall be denied by the board unless good cause is shown and the reason(s) given were not and could not reasonably have been known to the prisoner 45 calendar days prior to the scheduled hearing." (**California Code of Regulations, title 15, section 2253(b)(3)**.)

"At any time prior to a life parole consideration hearing a prisoner may offer to stipulate to unsuitability for parole." (**California Code of Regulations, title 15, section 2253(c)(1)**.)

"A prisoner may request that the board postpone a life parole consideration hearing to resolve matters relevant to his or her parole consideration … . The board may grant a postponement only upon the affirmative showing of good cause on the part of the prisoner and only if the prisoner did not and could not have known about the need for the postponement earlier than when he or she made the postponement request." (**California Code of Regulations, title 15, section 2253(d)(2)**.)

Rule 2-100 of the California Rules of Professional Conduct prohibits, with certain exceptions, a lawyer from communicating "directly or indirectly about the subject of the representation with a party the [lawyer] knows to be represented by another lawyer in the matter, unless the [lawyer] has the consent of the other lawyer."

Rule 3-500 of the California Rules of Professional Conduct requires that a lawyer "shall keep a client reasonably informed about significant developments relating to the … representation … ." **Paragraph 2 of the preamble to the American Bar Association Model Rules of Professional Conduct** provides, "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications."

The ***Armstrong* Remedial Plan II**, (revised on August 16, 2010, as negotiated by the parties in *Armstrong v. Brown (Armstrong II)*, (N.D. Cal, C94-2307 CW)), sets forth circumstances under which an inmate is mandated to have an attorney for his or her parole consideration hearing and circumstances under which it is presumed an inmate should have an attorney. Page five of the *Armstrong* Remedial Plan II reads:

> Mandatory Attorney Cases – the following inmates[ ] shall be assigned attorneys and shall not be allowed to waive their pre-hearing and hearing rights, including waivers of appearance, stipulations to unsuitability, waivers of hearings, and waivers of representation:
>
> - All inmates presently receiving treatment at the Department of Mental Health (DMH), Enhanced Outpatient Program (EOP), or Mental Health Crisis Bed (MHCB) level of care in the MHSDS [Mental Health Services Delivery System]. [¶]
> - All inmates[ ] who have been identified by CDCR as being included in the DDP [Developmental Disability Program].
> - All inmates with a learning disability including inmates with a TABE [Test of Adult Basic Education] score of 4.0 or below.

Presumptive Attorney Cases – staff will presume that the following inmates[ ] need an attorney, unless there is documentation, or other reliable information that indicates that an attorney is not needed:

- All inmates participating in the Correctional Clinical Case Management System (CCCMS) level of care in the MHSDS. [¶] [¶]

DIRECTIVE

Life inmates have the right to request a voluntary waiver, stipulation of unsuitability, or postponement prior to a parole consideration hearing. This is typically done by submission of a BPH Form 1001(a). The BPH Form 1001(a) includes signature lines for the inmate and an attorney. A best practice is for attorneys to meet and discuss all requests for a voluntary waiver, stipulation of unsuitability, or postponement, with their clients prior to submitting a request. In reviewing such a request, the hearing officer shall determine whether the inmate is represented by an attorney and whether the inmate has identified disabilities requiring that the inmate be assigned an attorney as outlined below.

Inmates Represented by Counsel

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

Inmates with Disabilities Identified as "Mandatory Attorney Cases"

The hearing officer shall review the available information in the Disability and Effective Communication System (DECs) to determine if the inmate meets one of the criteria for a "Mandatory Attorney Case," which includes inmates at the DMH, EOP, or MHCB level of mental health care, inmates in the DDP, and inmates with a TABE score of 4.0 or below. If the inmate meets one of the criteria for a "Mandatory Attorney Case," the hearing officer shall not act on a request for a voluntary waiver, stipulation of unsuitability, or postponement until the inmate has been assigned an attorney, and the attorney concurs with the request by co-signing the BPH Form 1001(a).

Timing of Requests for Waivers

Generally speaking, a request for a voluntary waiver submitted no later than 45 calendar days prior to the date of the scheduled hearing and signed by both the inmate and counsel shall be presumed valid and a request submitted less than 45 calendar days prior to the scheduled hearing shall be presumed invalid. However, in the event that an inmate submits a request for voluntary waiver no later than 45 calendar days prior to the hearing and the inmate is represented by counsel or meets one of the criteria for a Mandatory Attorney Case but counsel has not co-signed the BPH Form 1001(a), then a hearing officer shall nevertheless presume the request valid if upon forwarding the BPH Form 1001(a) to the attorney it is promptly co-signed and returned to the BPH. On the other hand, in the event an attorney submits a request for voluntary waiver without the inmate's signature on the BPH Form 1001(a) it shall be deemed invalid and returned to the attorney regardless of when it was submitted.

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

APPROVED BY:	**JENNIFER P. SHAFFER** **Executive Officer, BPH**	**DATE:** 9/23/13