

BPH RN 16-01: INITIAL STATEMENT OF REASONS

TITLE 15. CRIME PREVENTION AND CORRECTIONS DIVISION 2. BOARD OF PAROLE HEARINGS CHAPTER 3. PAROLE RELEASE ARTICLE 2. INFORMATION CONSIDERED

Amendment of Section 2240 Comprehensive Risk Assessments

INTRODUCTION:

Section 2240 governs the use of “Comprehensive Risk Assessments” for parole suitability hearings before the Board of Parole Hearings (board).

In 2006, the board formed the Forensic Assessment Division (FAD) Lifer Unit, comprised of psychologists who prepare risk assessments for use by hearing panels when determining an inmate’s suitability for parole.

On April 20, 2012, the class action case *Johnson v. Shaffer* was filed, challenging the constitutionality of the protocol adopted by [the FAD] for use in the preparation of psychological evaluations to be considered in determining the suitability of class members for parole. On May 26, 2016, the court approved the parties’ negotiated settlement agreement. (*Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement].)

In 2014, while the *Johnson* case was still pending, the Sacramento County Superior Court determined that language in subdivision (d) of section 2240 was vague and confusing. This decision was upheld by the California Third District Court of Appeal. (*Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.)

This proposed regulation package is submitted to comply with the court orders in *Johnson* and *Sherman-Bey* so that the section governing comprehensive risk assessments is clearer, more efficient, and better meets the needs for inmates and stakeholders.

PROBLEM STATEMENT:

First, as currently written, section 2240(b) states in part, “Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate’s potential for future violence.” However, in *Sherman-Bey*, the court held that the phrases providing that psychologists “may” use the specific tools and that the tools used must be “actuarially derived” were vague and needed to be amended. (*Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.) The regulation must be updated to effectuate this change.

Second, as currently written, section 2240 requires FAD psychologists to complete a “Comprehensive Risk Assessment” only when more than five years had passed since the inmate’s last comprehensive risk assessment and to complete a shorter “Subsequent Risk Assessment” for any hearings scheduled in less than five years. However, the court-approved *Johnson* settlement agreement eliminated “Subsequent Risk Assessments” and requires instead that FAD psychologists complete a full “Comprehensive Risk Assessment” for any hearing scheduled more

than three years from the date on which the last risk assessment was approved. The regulation must be updated to effectuate this change.

Third, as currently written, when an inmate or attorney wishes to challenge alleged errors in a risk assessment, section 2240(d) requires the inmate or attorney to raise the issue at the hearing because the inmate appeal process does not apply to risk assessments. However, the court-approved *Johnson* settlement agreement required the board to develop an appeal process to allow inmates or their attorneys to “lodge timely written objections asserting factual errors . . . before their parole consideration hearing occurs.” (*Johnson v. Shaffer* (E.D.Cal. October 2, 2015, No. 2:12-cv-1059, Doc. 79, page 5, paragraph 7.) The regulation must be updated to effectuate this change.

PURPOSE:

The board proposes to amend California Code of Regulations, title 15, section 2240, as follows:

Subdivision (a) is *amended* to clarify that psychologists who administer Comprehensive Risk Assessments must be both licensed and employed by the board. Subdivision (a) also now clarifies the purpose of the risk assessment by using the *Kelly-Frye* standard of using “generally accepted” approaches when applying scientific evidence, previously contained in subdivision (b). The court noted “The Kelly-Frye language is the standard that California courts use in determining whether scientific evidence is admitted into a trial.” (*People v. Kelly* (1976) 17 Cal.3d 24, 27.) This amendment clarifies that any tools, instruments, or approaches used by the psychologists must adhere to be generally accepted in the psychology community.

Subsections (a)(1) and (a)(2) are *deleted* because the scheduling of new risk assessments is now covered in subdivision (d).

Subdivision (b) is *amended* to remove the scheduling language, which is now covered in subdivision (d) and to instead require risk assessments to consider the youth factors and their mitigating effects, in accordance with Penal Code section 3051, subdivision (f)(1), when completing a Comprehensive Risk Assessment for a qualified youth offender under Penal Code section 3051.

Subdivision (c) is *amended* to remove the requirements for Subsequent Risk Assessments and to instead provide guidelines for when the Chief Psychologist or Senior Psychologist may approve a Comprehensive Risk Assessment. This subdivision also clarifies the date on which a risk assessment becomes final.

Subdivision (d) is *amended* to remove the current process to challenge alleged errors in risk assessments, which is now covered in subdivisions (e) through (i). Instead, subsection (1) of this subdivision now clarifies that Comprehensive Risk Assessments will be scheduled for hearings if, on the date of the hearing, more than three years will have passed since the last risk assessment became final. Subdivision (g) was also relocated to become subsection (2) of this subdivision, and was re-worded to clarify that the board has the discretion to prepare risk assessments for inmate housed out of state but is not required to prepare one.

Subdivision (e) is *amended* to delete the prior requirement to raise any errors at a hearing and instead establishes the process through which an inmate, inmate's attorney of record, or prosecuting agency may challenge alleged factual errors in the comprehensive risk assessment prior to the hearing. This subdivision also provides the required deadlines for submission and defines the term "factual error" for the purpose of Section 2240 to provide greater clarity for all stakeholders. Finally, this subdivision provides instructions and timing for submitting pre-hearing objections to the board.

Subdivision (f) is *amended* to clarify the role of the Chief Counsel of the board or designee to determine whether an objection to a comprehensive risk assessment alleges a factual error and when to refer the objection to the Chief Psychologist of the board. This section also requires the Chief Counsel to promptly, but no later than 10 days prior to the hearing, provide a copy of the board's decision regarding the allegations if the inmate's objections fail to raise any factual errors. Prior requirements regarding factual errors were deleted and amended in subdivision (e).

Subdivision (g) is *amended* to remove the language regarding inmates housed out of state, which is now covered in subdivision (d)(2). This subdivision now clarifies the role of the Chief Psychologist of the board or designee to opine whether a factual error materially impacted the conclusions of the comprehensive risk assessment. Additionally, this subdivision requires the Chief Counsel to document his or her opinion in an addendum to the risk assessment. This subdivision also provides the description and timing of the actions the Chief Counsel must take based upon the Chief Psychologist's determination, which includes promptly, but no later than 10 days prior to the hearing, providing a copy of the board's decision regarding the allegations as well as the risk assessment addendum documenting the opinion of the Chief Psychologist. This subdivision further requires impacted risk assessments to be permanently removed from an inmate's file.

Subdivision (h) is *amended* to remove the language exempting medical parole and recall and resentencing procedures from the risk assessment process. Instead, subdivision (d)(1) now clarifies that comprehensive risk assessments shall only be completed for initial parole consideration hearings, subsequent parole consideration hearings, and subsequent parole reconsideration hearings. Additionally, subdivision (h) now clarifies the board's process upon receiving an untimely pre-hearing objection to alleged errors in a comprehensive risk assessment.

Subdivision (i) is *added* to clarify the hearing panel's process upon receiving an objection to alleged factual errors in a comprehensive risk assessment on the day of the hearing. This section defines "good cause" for failing to timely raise objections to alleged factual errors. This section also provides guidance to the panel on the determination the panel must make when confronted with at-hearing objections, the actions the panel must take upon determining that a risk assessment may contain a factual error that materially impacted the clinician's conclusions regarding risk of violence, and the circumstances under which the panel may proceed with the hearing or which necessitate postponement.

Subdivision (j) is *added* to clarify that inmates still retain the ability to object to or clarify for the record any statements that the clinician attributed to the inmate in the risk assessment, or respond to any of the clinician's observations, opinions, or diagnoses, all of which were exempted from the definition of "factual error" in paragraph (e)(2).

NECESSITY:

Updating the language regarding the risk assessment instruments that the psychologists use to evaluate risk is necessary to comply with the court's requirement in *Sherman-Bey* to provide clearer guidance on issue. (*Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.) Specifically, the *Sherman-Bey* court took issue with the language "Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for future violence," (emphasis added) previously contained in subdivision (b). The *Sherman-Bey* court found that the permissive nature of this statement, as well as the language "actuarially derived and structured professional judgment," was not sufficiently clear. The board addressed both issues in amended subdivision (a). Replacing the permissive language "may" with mandatory language "shall" is necessary to clarify that FAD psychologists are mandated to comply with these requirements. Additionally, adopting language from the *Kelly-Frye* test, requiring that instruments used by FAD psychologists be "generally accepted" instruments for the purpose of assessing offenders' future risk of violence, is necessary to ensure that instruments used are those that have been established in the psychology community as proper tools for this purpose. Moreover, clarifying this language is necessary to make the purpose of the risk assessments more easily understood by inmates, hearing panels, and other stakeholders.

The requirement for clinicians to consider the youth offender factors in Penal Code section 3051, subdivision (f)(1) when assessing a youth offender is necessary to comply with that statute. This section is also necessary to clarify that the clinician's consideration should specifically focus on the mitigating effects of those factors.

Mandating a new comprehensive risk assessment for suitability and reconsideration hearings that occur three years from the last supervisory approval date is necessary to comply with the court-ordered settlement agreement in *Johnson v. Shaffer*. (*Johnson v. Shaffer* (E.D.Cal. May 26, 2016, No. 2:12-cv-1059 KJM AC P) 2016 U.S. Dist.) Additionally, though FAD psychologists previously spent significant time preparing the "Subsequent Risk Assessments," these assessments provided no updated opinion on the inmate's current risk of future violence. Consequently, the subsequent risk assessments often led to confusion on the inmate's progress and were deemed to be unhelpful by inmates, panel members, and other stakeholders. Thus, this amendment is necessary to ensure that inmates, attorneys, and panels have access to recently updated risk assessments for every hearing, which provides important information to assist hearing panels in determining an inmate's suitability for parole. This amendment further ensures that the resources of the FAD psychologists have been directed toward providing the most helpful services to the inmate and hearing panel.

Clarifying the board's ability to complete risk assessments for out of state inmates was necessary to resolve an ambiguity in the prior wording of the regulation. The previous wording of this provision in prior subdivision (g) stated, "Life inmates who reside in a state other than California, including those under the Interstate Compact Agreement, *may not* receive a Comprehensive Risk Assessment, Subsequent Risk Assessment or other psychological evaluation for the purpose of evaluating parole suitability due to restraints imposed by other state's licensing requirements, rules of professional responsibility for psychologists and variations in confidentiality laws among the states." (Emphasis added.) This could be read to mean either (1) that the possibility existed that an out-of-state inmate would not receive a risk assessment due to licensing and other restraints or (2) that out-of-state inmates were prohibited from receiving risk assessments due to those restraints.

The board needed to clarify that the board retained discretion to complete a risk assessment for an inmate housed out of state if licensing, confidentiality laws, and other restraints permitted.

Developing the pre-hearing appeal process for inmate or their attorneys to “lodge timely written objections asserting factual errors . . . before their parole consideration hearing occurs” is necessary to comply with the court-ordered settlement agreement in *Johnson v. Shaffer*. (*Johnson v. Shaffer* (E.D.Cal. May 26, 2016, No. 2:12-cv-1059 KJM AC P) 2016 U.S. Dist.) Additionally, as currently written, the requirement for inmates and their attorneys to raise issues with a risk assessment only at the hearing has led to the postponement of multiple hearings because the hearing panel needed to refer alleged errors to the Chief Psychologist of the board prior to continuing with the hearing. This process resulted in the waste of any resources spent to schedule and prepare for that hearing. Thus, this amendment is necessary to create a process through which these issues may be resolved prior to hearings so that the board may reduce postponements and wasted resources.

In creating this pre-hearing appeal process, the board found it necessary to limit the pre-hearing objection process to factual errors that materially impact the risk assessment’s conclusions regarding the inmate’s risk of violence. The settlement agreement expressly limited this pre-hearing process to “factual errors.” (*Johnson v. Shaffer* (E.D.Cal. May 26, 2016, No. 2:12-cv-1059 KJM AC P) 2016 U.S. Dist., p. 5, line 7.) This is because the board can confirm or reject allegations of factual by reviewing available documentation or evidence provided by the inmate or attorney. However, because the process of amending or completing an entirely new risk assessment is costly and delays an inmate’s hearing, this should only be ordered if the alleged error actually had a material impact on the clinician’s conclusions regarding the inmate’s risk of violence. With that in mind, the board further found that establishing a two-part process to screen out objections to risk assessments that fail to allege factual errors is necessary to ensure the most efficient use of the Chief Psychologist’s resources.

Additionally, establishing the 30-day timeline is necessary to ensure that the board has sufficient time to adequately consider and respond to each pre-hearing objection prior to 10 days before the hearing to preserve the inmate’s disclosure rights. However, since inmates may sometimes not obtain the information or documentation necessary to support an objection to a risk assessment until after the regulatory timelines for pre-hearing objections has passed, establishing processes for submitting late objections or for presenting objections at a hearing is necessary to preserve inmates’ rights. Requiring the inmate to have “good cause” for failing to raise the objection during the pre-hearing process is necessary to encourage the use of the pre-hearing process and limit the number of postponements and wasted resources due to at-hearing challenges that cannot be immediately resolved.

Finally, while the pre-hearing process was limited to the review of factual errors that materially impacted the risk assessment’s conclusions regarding risk, the board found it necessary to preserve an inmate’s ability to discuss other concerns exempted from the definition of factual error: statements a risk assessment attributed to the inmate or clinical observations, opinions, or diagnoses in a risk assessment. This process is necessary to ensure panels have the greatest possible understanding of the risk assessments during hearings to determine an inmate’s suitability for parole. Since these clarifications and responses are resolved by determining the credibility of the inmate’s assertions, they are more appropriately raised at the hearing where the panel may assess the credibility. Additionally, since these clarifications and responses are exempted from the

pre-hearing review process, they may be raised at the hearing without a good cause requirement, notwithstanding subdivision (i).

ANTICIPATED BENEFITS:

Updating the language to require risk assessment tools to be “generally accepted” will benefit inmates, victims, hearing panels, and the public by ensuring that any instruments FAD psychologists use to assess risk have been deemed appropriate by the general psychology community. These amendments will also benefit all stakeholders by providing greater clarity about the requirements for these instruments.

Eliminating the shorter “Subsequent Risk Assessments” and instead mandating a new “Comprehensive Risk Assessment” every three years benefits all stakeholders. Since the hearing panels will have access to a more current and robust evaluation of the inmate’s risk at every hearing, the panels will be better informed, which will assist them in reaching increasingly accurate decisions regarding an inmate’s suitability. This will not only benefit inmates by ensuring that suitable inmates will be granted parole, but also benefit victims and the general public by ensuring that inmates who continue to pose an unreasonable risk to public safety are denied parole.

Developing the pre-hearing appeal process to lodge objections to factual errors in a comprehensive risk assessment prior to the hearing will similarly benefit multiple stakeholders. Allowing these issues to be resolved prior to a hearing will benefit inmates by ensuring that only accurate information is used during the hearing to assess the inmate’s current suitability for parole. Additionally, the pre-hearing process will reduce the number of postponements, which will benefit victims and all other hearing participants by reducing the number of wasted travel and appearances for hearings that ultimately do not go forward. Moreover, retaining an inmate’s right to object to or clarify statements that the risk assessment attributed to the inmate or respond to any of the clinician’s observations, opinions, or diagnoses ensures that hearing panels have the most accurate information possible when assessing an inmate’s suitability for parole.

Finally, clarifying the FAD’s authority with respect to inmates housed out of state will benefit out-of-state inmates by clarifying that they may be able to receive a risk assessment if licensing, confidentiality, and other restraints permit and the board exercises its discretion to prepare the assessment.

DOCUMENTS RELIED UPON:

The board, in proposing amendments to these regulations, relied on the court’s decision ordering implementation of the *Johnson v. Shaffer* stipulated agreement. (*Johnson v. Shaffer* (E.D.Cal. May 26, 2016, No. 2:12-cv-1059 KJM AC P) 2016 U.S. Dist.) The order is listed here pursuant to the order of the court. A copy of this order is attached to this initial statement of reasons as ATTACHMENT A. The board also relied on the court’s order in *Sherman-Bey* requiring amendment of the language regarding the tools on which psychologists may rely. (*Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.) A copy of this opinion is attached to this initial statement of reasons as ATTACHMENT B.

The board has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document not already included this section.

ECONOMIC IMPACT ANALYSIS:

Creation or Elimination of Jobs within the State of California

The proposed action is designed to bring the board's regulations into compliance with the *Johnson v. Shaffer* settlement agreement and court order in *Sherman-Bey*. However, the board has determined that the proposed action will have no impact on the creation or elimination of jobs within the State of California. Specifically, the main substantive changes in this proposed action are replacing prior "subsequent risk assessments" with "comprehensive risk assessments" every three years and establishing a pre-hearing appeal process through which inmates may raise allegations of factual error in their risk assessments. The shift from SRAs to CRAs every three years increased the number of hours clinicians need to spend in their reviews of inmates who would otherwise have received the shorter SRA. Thus, with the increase in workload, in Fiscal Year 2015-2016, the board requested and was granted position authority for three new psychologist positions, the funds for which were reallocated from the board's existing budget. However, the board had no discretion under the court order with respect to increasing the frequency of the Comprehensive Risk Assessments. Therefore, the regulations regarding the increase in frequency necessitating the new positions are only codifying the board's current mandated process, and will not result in the creation of any additional new jobs. Additionally, while the creation of the FAD pre-hearing appeal process for factual errors also requires additional work hours, this function has been absorbed by current staff positions and has not resulted in the creation of any additional jobs. Therefore, the adoption of this regulation is not resulting in the creation or any new jobs in California. No jobs in California have been eliminated as a result of these changes.

Creation of New or Elimination of Existing Businesses Within the State of California

The proposed action is designed to bring the board's regulations into compliance with the *Johnson v. Shaffer* settlement agreement and court order in *Sherman-Bey*. This regulatory action will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states, because private businesses are not affected by the internal management of State prisons or the assessment of risk for an offender seeking parole. These proposed regulations will have no additional effect on the creation or elimination of businesses in California.

Expansion of Businesses within the State of California

The proposed action is designed to bring the board's regulations into compliance with the *Johnson v. Shaffer* settlement agreement and court order in *Sherman-Bey*. This regulatory action will not have a significant, statewide adverse economic impact directly affecting the expansion of business in California because private businesses are not affected by the internal management of State prisons or the assessment of risk for an offender seeking parole. These proposed regulations will have no additional effect on business expansion in California.

Anticipated Benefits of the Regulations

As explained above, the proposed shift toward comprehensive risk assessments for regularly scheduled hearings, rather than the shorter subsequent risk assessments, will provide hearing officers charged with determining an inmate's suitability for parole with a greater understanding of the inmate's psychological features and their impact on his or her risk of violence. Additionally, the regulations increase protections to both victims and inmates by ensuring greater accuracy of risk assessments through newly implemented pre-hearing and at-hearing objection and clarification processes. This increased accuracy and hearing officers' enhanced understanding of an inmate's risk of violence when determining suitability will, in turn, promote both inmate rehabilitation and better protection of public safety.

ADDITIONAL FINDINGS:

The board has made an initial determination this regulatory action will not have a significant adverse economic impact on business. Neither the timing and requirements for risk assessments nor the process through which to submit objections to a risk assessment affects operation of businesses in California. No facts, evidence, documents, testimony, or other evidence to the contrary has been provided to or reviewed by the board.

The board has determined this action imposes no mandates on local agencies or school districts, or a mandate which requires reimbursement pursuant to Part 7 (Section 17561) of Division 4 of the Government Code.

The Board, in proposing amendments to these regulations, has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document not already included above in the "Documents Relied Upon" section.

The board has determined that no alternative considered would be (1) more effective in carrying out the purpose of this action, (2) as effective and less burdensome to affected private persons than the action proposed, or (3) more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

****END****