

BPH RN 16-01: NOTICE OF PROPOSED ACTION

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 (previously: Psychological Risk Assessments for Life Inmates)

NOTICE IS HEREBY GIVEN that the Executive Officer of the Board of Parole Hearings (board), pursuant to the authority granted by Government Code section 12838.4 and Penal Code sections 3052 and 5076.2, authorizes the board to adopt the proposed Amended Section 2240 of the California Code of Regulations (CCR), Title 15, Division 2, concerning Psychological Risk Assessments for Life Inmates.

AUTHORITY AND REFERENCE

Government Code section 12838.4 vests the board with all the powers, duties, responsibilities, obligations, liabilities, and jurisdiction of the Board of Prison Terms and Narcotic Addict Evaluation Authority, which no longer exist.

Penal Code section 3052 vests with the board the authority to establish and enforce rules and regulations under which prisoners committed to state prisons may be allowed to go upon parole outside of prison when eligible for parole.

Penal Code section 5076.2 requires the board promulgate, maintain, publish, and make available to the general public a compendium of its rules and regulations.

Penal Code section 3041 requires the board to meet with each inmate before the inmate's minimum eligible parole for the purpose of reviewing and documenting the inmate's activities.

Penal Code section 3041.5 establishes the requirements and conditions concerning parole denial and guidelines concerning the inmate's right to petition the board concerning the results.

Penal Code section 3051 establishes the youth offender parole hearings and the procedures for reviewing the parole suitability of any prisoner who was under the age of 23 at the time of his or her controlling offense.

Penal Code section 11190 establishes the Western Interstate Corrections Compact, which provides for the development, and execution of programs, the co-operations for the confinement, treatment, and rehabilitation of offenders.

Penal Code section 11193 requires that any inmate under the jurisdiction of the California Department of Corrections and Rehabilitation, imprisoned in another state, shall be entitled to all

hearings, within 120 days of the time and under the same standards, which are normally accorded to persons similarly sentenced who are confined in institutions in this state.

The California Court of Appeal (First Appellate District) case *In re Lugo* and *In re Rutherford* required a remedial plan to be agreed upon by all parties to reduce the parole hearing backlog and bring the board in compliance with state law. (*In re Lugo* (2008) 164 CalApp.4th 1522; *In re Rutherford*, Cal. Super. Ct., Marin County, No. SC135399A.)

The California Court of Appeal (Third Appellate District) case *Sherman-Bey v. Shaffer* found the language of prior section 2240(b) lacks clarity because the term “may use” was permissive and “actuarially derived and structured professional judgment” was not easily understood by laypersons. (*Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.)

The Federal Eastern District Court of California case *Johnson v. Shaffer* approved a stipulated agreement between the parties requiring the discontinuation of subsequent risk assessments, replacement with comprehensive risk assessments, and a pre-hearing process through which inmates can object to factual errors. (*Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement].)

PUBLIC COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulations to the board. **THE WRITTEN COMMENT PERIOD ON THIS PROPOSED REGULATORY ACTION WILL COMMENCE ON NOVEMBER 4, 2016, AND WILL CLOSE AT 5:00 P.M. ON DECEMBER 19, 2016.** For comments to be considered by the board, they must be submitted in writing to the board’s Contact Person identified in this Notice no later than the close of the comment period.

CONTACT PERSON

Please direct requests for copies of the Initial Statement of Reasons, the Proposed Text of the Regulation, or other information upon which the rulemaking is based to:

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If Heather McCray is unavailable, please contact Chief Counsel, Jennifer Neill at Jennifer.Neill@cdcr.ca.gov. In any such inquiries, please identify the action by using the board’s regulation control number **BPH RN 16-01**.

NO PUBLIC HEARING SCHEDULED

The board has not scheduled a public hearing on this proposed regulatory action. However, the board will hold a hearing if it receives a written request for a public hearing from any interested person, or his or her authorized representative, no later than 15 days before the close of the written comment period. Written or facsimile comments submitted during the prescribed comment period have the same significance and influence as oral comments presented at a public hearing.

If scheduled, the purpose of a public hearing would be to receive oral comments about the proposed regulations. It would not be a forum to debate the proposed regulations, and no decision regarding the permanent adoption of the proposed regulations would be rendered at a public hearing. The members of the board would not necessarily be present at a public hearing.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The Board of Parole Hearings (board) proposes to amend California Code of Regulations, title 15, section 2240, which governs Comprehensive Risk Assessments (previously Psychological Risk Assessment for Life Inmates).

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 necessary to implement, interpret, and comply with the court's decision ordering implementation of the *Johnson v. Shaffer* stipulated agreement, the court order in *Sherman-Bey v. Shaffer*, and Penal Code Sections 3041, 3041.5, 3051, 11190, and 11193. The amendments included in this proposed action are intended to clarify, and increase efficiency for, comprehensive risk assessments, which will better meet the needs for inmates subject to the board's parole authority as well as other stakeholders.

ANTICIPATED BENEFITS OF THE PROPOSED REGULATIONS:

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 it, and the board exercises its discretion to prepare the assessment.

DETERMINATION OF INCONSISTENCY/INCOMPATIBILITY WITH EXISTING STATE REGULATIONS:

The board has determined that this proposed regulation is not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the board has concluded that these are the only regulations that concern the board’s role and requirements in performing a Comprehensive Risk Assessment prior to the parole consideration hearing or parole reconsideration hearing for an inmate subject to the parole authority of the board.

DISCLOSURES REGARDING THE PROPOSED ACTION

Local Mandates: The board has determined that the proposed action imposes no mandate upon local agencies or school districts.

Fiscal Impact Statement: The board has made the following initial determinations:

- Cost to any local agency or school district which must be reimbursed in accordance with Government Code §§ 17500 through 17630: **None**
- Cost or savings to any state agency: **None:** In the prior fiscal year, the board requested and was granted position authority for three additional psychologist positions to meet the new requirements for Comprehensive Risk Assessments to be completed every three years instead of every five years. This means these new positions were established, but the board absorbed the costs with its existing budget. Additionally, 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 any additional discretionary costs or savings to the board.
- Other non-discretionary cost or savings imposed on local agencies: **None**
- Cost or savings in federal funding to the state: **None**

Significant Statewide Adverse Economic Impact on Business: The board has determined that there is no significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

Cost Impacts on Representative Private Persons or Businesses: The board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Assessment of Effects on Job and/or Business Creation, Elimination or Expansion: The board has determined that adoption of this regulation will not: (1) create or eliminate jobs within California; (2) create new businesses or eliminate existing business within California; or (3) affect the expansion of businesses currently doing business within California. While three new psychologist positions were previously established to implement the increased frequency of the comprehensive risk assessments, as mandated by the court's order in *Johnson v. Shaffer*, the adoption of these regulations will not result in the creation or elimination of any additional jobs.

Effect on Housing Costs: The board has made an initial determination that the proposed action will have no significant effect on housing costs because housing costs are not affected by the internal processes governing the board's role and requirements in performing a Comprehensive Risk Assessment prior to the parole consideration hearing or parole reconsideration hearing for an inmate subject to the parole authority of the board.

Small Business Determination: The board has determined that the proposed regulation does not have a significant adverse economic impact on small business because small businesses are not affected by the internal processes governing the board's role and requirements in performing a Comprehensive Risk Assessment prior to the parole consideration hearing or parole reconsideration hearing for an inmate subject to the parole authority of the board.

RESULTS OF THE ECONOMIC IMPACT ANALYSIS/ASSESSMENT

The board concludes that it is (1) unlikely that the proposed regulations will create or eliminate any jobs in California, (2) unlikely that the proposed regulations will create any new business or eliminate any existing businesses, and (3) unlikely that the proposed regulations will result in the expansion of businesses currently doing business within the state.

Anticipated Benefits to the health and welfare of California residents, worker safety, and the state's environment: As further explained in the Economic Impact Analysis, contained within the Initial Statement of Reasons, 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.

CONSIDERATION OF ALTERNATIVES

The board must determine that no reasonable alternative it considered, or that has otherwise been identified and brought to its attention, would be more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons, than the proposed regulatory action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. Interested parties are accordingly invited to present statements or arguments with respect to any alternatives to the proposed changes during the public comment period.

AVAILABILITY OF PROPOSED TEXT

The board will make the rulemaking file available to the public throughout the rulemaking process at its offices located at 1515 K Street, Suite 600, Sacramento, California. As of the date this Notice is published in the Office of Administrative Law's Notice Register, the rulemaking file consists of this Notice, Form 400 (Notice of Submission of Regulation), the Proposed Text of the Regulation and Initial Statement of Reasons. Copies of any of these documents may be obtained by contacting the board's Contact Person identified in this notice at the mailing address, fax number, or email address listed above or by visiting the board's website at: http://www.cdcr.ca.gov/BOPH/reg_revisions.html.

AVAILABILITY OF CHANGES TO PROPOSED TEXT

After considering all timely and relevant comments received, the board may adopt the proposed regulations substantially as described in this Notice. If the board makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the

changes clearly indicated) available to the public for at least 15 days before the board adopts the regulations as revised. Please send requests for copies of any modified regulation text to the attention of the Contact Person identified in this Notice or by visiting the board's website at http://www.cdcr.ca.gov/BOPH/reg_revisions.html. If the board makes modifications, the board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting the board's Contact Person identified in this notice at the mailing address, phone number, fax number, or email address listed above or by visiting the board's website at: http://www.cdcr.ca.gov/BOPH/reg_revisions.html.

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