

# **BPH RN 19-02: NOTICE OF PROPOSED ACTION**

**Enactment of:**

## **CHAPTER 2.5. ADVANCING PAROLE CONSIDERATION HEARING DATES**

**To include:**

### **ARTICLE 1. PETITION TO ADVANCE THE DATE OF AN INMATE'S NEXT PAROLE CONSIDERATION HEARING**

### **ARTICLE 2. ADMINISTRATIVE REVIEW TO ADVANCE THE DATE OF AN INMATE'S NEXT PAROLE CONSIDERATION HEARING**

### **ARTICLE 3. REVIEW ON THE MERITS**

### **ARTICLE 4. DECISION REVIEW**

**Enactment of Sections 2150 – 2157, governing  
advancing parole consideration hearing dates**

**NOTICE IS HEREBY GIVEN** that the Executive Officer of the Board of Parole Hearings (Board), under the authority granted by Government Code section 12838.4 and Penal Code sections 3052 and 5076.2, authorizes the Board to adopt the proposed added Sections 2150 through 2157 of the California Code of Regulations, Title 15, Division 2, concerning Advancing Parole Consideration Hearing Dates.

#### **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 3041.5 establishes the requirements and conditions concerning parole denial. It also authorizes the Board to advance an inmate's parole consideration hearing on its own motion or based on an inmate's written petition to the Board for an earlier hearing.

Penal Code section 3043 requires the Board to provide proper notice to victims regarding an inmate's parole consideration hearing.

Penal Code section 3055 establishes the Board's Elderly Parole Program for reviewing the parole suitability of any inmate who is 60 years of age or older and has served a minimum of 25 years of continuous incarceration on his or her current sentence.

Penal Code section 4801 requires the Board to give great weight to certain factors when considering the parole suitability of an inmate who committed his or her controlling offense at the age of 25 years of age or younger.

The Ninth Circuit Court of Appeals in *Gilman v. Schwarzenegger* (9th Cir. 2011) 638 F.3d 1101 (*Gilman I*), held that increased parole denial lengths under the California Victim's Bill of Rights Act of 2008 (also known as "Marsy's Law") did not violate ex post facto laws on its face because it did not create a significant risk of prolonging an inmate's incarceration. The court specifically pointed to the Board's discretionary authority to advance parole hearings under Penal Code section 3041.5, subdivision (b)(4) and the inmate's right to submit a Petition to Advance (PTA) under subdivision (d)(1), and found that the availability of advanced hearings removed any possibility of harm to the inmate. (*Id.* at p. 1109.) The same court in February 2016 held that no ex post facto violation had occurred as applied to the plaintiff class because there was insufficient evidence "demonstrating that the PTA process failed to afford relief from the classwide risk of lengthened incarceration posed by [Marsy's Law]." (*Gilman v. Brown* (9th Cir. 2016) 814 F.3d 1007, 1021 (*Gilman II*).)

The California Supreme Court in *In re Vicks* (2013) 56 Cal.4th 274 held that increased parole denial lengths under Marsy's Law did not violate ex post facto laws because of the Board's discretionary authority to advance hearings under Penal Code section 3041.5 subdivision (b)(4), and an inmate's ability to submit a written request for an advanced hearing under subdivision (d)(1). (*Id.* at pp. 304-305, 317.)

### **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 FRIDAY, APRIL 19, 2019, AND WILL CLOSE ON MONDAY, JUNE 3, 2019.** 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:

**Mina Y. Choi, Staff Attorney**  
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If Mina Choi is unavailable, please contact Assistant Chief Counsel, Heather L. McCray at Heather.McCray@cdcr.ca.gov. In any such inquiries, please identify the action by using the Board's regulation control number **BPH RN 19-02**.

### **NO PUBLIC HEARING SCHEDULED**

The Board has not scheduled a public hearing on this proposed regulatory action. The Board, however, 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 proposes to add California Code of Regulations, title 15, chapter 2.5 regarding the Board's processes of advancing parole consideration hearings under Penal Code section 3041.5, subdivisions (b)(4) and (d)(1). These regulations memorialize the Board's longstanding PTA and administrative review processes to advance hearings in the appropriate circumstances. The regulations identify the timing of a valid PTA submission, information that must be included in a PTA, and criteria for the Board when reviewing a PTA. The regulations also identify when the Board will conduct an ad hoc administrative review or an administrative review of a three-year denial, and the criteria used by the Board when reviewing a case. Additionally, the regulations describe the notification requirements and the decision review process for PTAs and administrative reviews.

These regulations are necessary to allow the Board to continue to comply with court decisions and to protect Marsy's Law. Section 3041.5 of the Penal Code previously required the Board to conduct annual parole consideration hearings, which could be deferred under certain circumstances for up to five years for murderers and up to two years for non-murderers. In 2008, the People of California passed Marsy's Law, which amended Penal Code section 3041.5 and increased denial periods to a minimum of three years and a maximum of 15 years. Therefore,

the shortest denial length an inmate can receive after Marsy's Law has increased from one to three years.

Following these changes, inmates potentially faced longer periods of incarceration after a denial of parole by the Board, which raised the question of whether the amendments prolonged an inmate's incarceration in violation of ex post facto laws. However, section 3041.5, subdivisions (b)(4) and (d)(1), also gave the Board discretion to advance an inmate's parole consideration hearing to an earlier date under its own authority or based upon a written request by an inmate.

The courts in *Gilman II* and *In re Vicks* found no ex post facto violations in the increased denial lengths specifically because of the Board's discretionary authority to advance hearings under section 3041.5, subdivisions (b)(4) and (d)(1). Additionally, the courts clarified their expectation for the Board to implement a meaningful mechanism to exercise this discretion to advance hearings. The Board subsequently exercised its discretion under section 3041.5, subdivision (b)(4) to conduct a structured administrative review process whereby deputy commissioners review cases to determine whether, in accordance with statutory requirements, new information or a change in circumstances established a reasonable likelihood that consideration of public safety does not require the additional period of incarceration.

Recent litigation challenged the Board's ability to advance hearings under the PTA and advanced review processes, based mainly on the lack of regulations formally memorializing these processes in the Board's regulations. (*Tony Rackauckas, et al. v. State of California, et al.*, Orange County Superior Court, Case No. 30-2018-00985610-CU-WM-CJC.) Thus, on September 17, 2018, a majority of the Board voted to approve the Board's parole hearing date advancement processes as reflected in the text of the original emergency regulations filed by the Board on October 12, 2018, and approved by the Office of Administrative Law on October 22, 2018.

Since then, the Board has met with various stakeholders regarding the emergency regulations, and, on March 18, 2019, a majority of the Board voted to approve amendments to the emergency regulations as reflected in the current text of the Board's proposed regulations on the hearing advancement processes that are the subject of this notice. This proposed regulation will make permanent the emergency regulations.

### **ANTICIPATED BENEFITS OF THE PROPOSED REGULATIONS**

The proposed regulations benefit the public by upholding the validity of Marsy's Law, which protects the safety and rights of victims of serious crimes. Penal Code section 3041.5, subdivisions (b) and (d) give the Board broad discretion to consider and advance the date of an inmate's next parole hearing; however, courts have been clear that the Board is expected to create and implement processes that meaningfully effectuate this statutory authority. These regulations accomplish this by creating a meaningful process for the Board to consider and advance parole hearing dates under Marsy's Law.

The proposed regulations also benefit inmates by protecting their liberty interests by providing a meaningful opportunity for them to be considered for parole at similar intervals they may have been considered for parole prior to Marsy's Law, thus eliminating the potential of prolonged

incarceration as a result of Marsy's Law. It also provides inmates with clear direction on how to petition to advance their next hearing date and when the Board will exercise its discretionary authority to advance an inmate's next hearing date.

The proposed regulations further benefit all stakeholders by providing transparency and clarity regarding the parole hearing advancement process. The proposed regulations also identify clear timelines and administrative processes that best ensure the timely and comprehensive consideration of advancing inmates' parole hearing dates. This promotes transparency and reduces confusion that may arise without such clear guidelines.

### **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 requirements in advancing parole consideration hearings.

### **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 sections 17500 through 17630: **None**
- Cost or savings to any state agency: **None:** There are no specific costs or savings anticipated for the fiscal year 2018-2019. These regulations codify the Board's current processes, and the Board has already absorbed the costs with its existing budget. In fiscal year 2015-2016, the Board requested an increase in staffing. However, this was for position authority only and had no impact on funding. In fiscal years 2016-2017 and 2017-2018, the Board requested an increase in staffing, but the workload justifications were not specifically attributed to individualized workloads, such as PTAs and administrative reviews.
- 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:** This rulemaking action will not have a significant adverse economic impact directly affecting the expansion of businesses in California or on existing businesses within the State of California, because it is highly unlikely that private businesses will be affected by the Board's continued implementation of parole hearing date advancement processes. These proposed regulations may lead to expansion of businesses in California to the extent more inmates may need legal assistance and representation and to the extent more victims may need support and assistance from entities during the parole hearing advancement process and any hearing held as a result of the advancement. However, expansion of this nature is speculative and not possible to predict with accuracy due to the myriad factors that impact whether inmates or victims will seek legal or other assistance. Moreover, since legal representation for inmates and other assistance for victims is already provided by the Board and Department within their existing budgets, it is also possible that these regulations will have no impact on expansion of these types of businesses. These proposed regulations will have no additional effect on business expansion in California.

**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 Board's processes in advancing hearings under Penal Code section 3041.5, subdivisions (b)(4) and (d)(1).

**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 Board's processes in advancing hearings under Penal Code section 3041.5, subdivisions (b)(4) and (d)(1).

## **RESULTS OF THE ECONOMIC IMPACT ANALYSIS/ASSESSMENT**

In accordance with Government Code section 11346.3, subdivision (b), the Board has made the following assessments regarding the proposed regulations:

### **I. Creation or Elimination of Jobs Within the State of California**

The rulemaking action memorializes the parole hearing advancement processes already being implemented by the Board in accordance with statutes and case law. The Board has determined the proposed action will have minimal impact on the creation or elimination of jobs within the State of California, primarily because the impact on Board staffing has already been absorbed by current staff positions and any projection on the impact to inmate attorneys, victims, and entities assisting victims are speculative.

Specifically, the proposed regulations provide for the possible advancement of parole hearings through a petition to advance, an ad hoc administrative review initiated by the Board, and an administrative review of three-year denials. These three processes have been in place for a number of years. Petitions to advance were explicitly written into Marsy's Law, which became

effective on January 1, 2009, and the Board has been reviewing these petitions to advance since that time. Ad hoc administrative reviews simply reflect the Board's broad discretionary authority to review a case for a possible hearing advancement, which again, was written into Marsy's Law. Administrative reviews of three-year denials have been implemented by the Board following the *Vicks* decision in 2013, which stated the Board should have a meaningful way to effectuate the parole hearing advancement process. When first implementing the administrative reviews of three-year denials, the Board augmented its staff to conduct screening and review of these cases. However, the increase in staffing and resources has already been absorbed by the Board's current staff positions. Therefore, the proposed rulemaking action does not create or eliminate any new jobs for the Board.

Due to various statutes enacted over the past few years affecting the timing and eligibility of certain inmates for parole consideration, the Board projects an increase in the number of parole consideration hearings. Therefore, in addition to more grants of parole, the Board expects more denials of parole, which could result in more inmates submitting petitions to advance and the Board conducting more administrative reviews of three-year denials. This, in turn, could create more jobs for inmate attorneys and entities assisting victims. However, as mentioned earlier, any prediction concerning the creation or elimination of jobs is highly speculative, as the Board has no control over which inmates petition to advance a hearing, or which victims choose to participate in the parole hearing advancement process. Additionally, the Board presently anticipates absorbing any increases through current staffing or additional staffing already requested for other unrelated purposes.

Based on the foregoing reasons, the Board's adoption of this regulation does not result in the creation or elimination of any new jobs for the Board. The adoption of this regulation may have some impact on the creation or elimination of jobs for inmate attorneys and entities assisting victims, but as explained above, this prediction is highly speculative.

## II. Creation of New or Elimination of Existing Businesses Currently Doing Business Within the State of California

This rulemaking action will not have a significant adverse economic impact on existing businesses within the State of California, including the ability of California businesses to compete with businesses in other states, because it is highly unlikely that private businesses will be affected by the Board's continued implementation of parole hearing date advancement processes. No businesses are expected to be eliminated. As previously noted, these proposed regulations may lead to the creation of new businesses both within California and outside of California to the extent more inmates may need legal assistance and representation, and to the extent more victims may need support and assistance from entities during the parole hearing advancement process and any hearing held as a result of the advancement. However, the creation of these businesses is speculative and the Board has no current knowledge of any impacts to California businesses.

## III. Expansion of Businesses within the State of California

This rulemaking action will not have a significant adverse economic impact directly affecting the expansion of businesses in California, because it is highly unlikely that private businesses will be affected by the Board's continued implementation of parole hearing date advancement processes.

Again, these proposed regulations may lead to expansion of businesses in California to the extent more inmates may need legal assistance and representation and to the extent more victims may need support and assistance from entities during the parole hearing advancement process and any hearing held as a result of the advancement, but this expansion is speculative. These proposed regulations will have no additional effect on business expansion in California.

#### IV. Anticipated Benefits of the Regulations

As explained above in greater detail in the “Anticipated Benefits of the Regulations” section, these proposed regulations will benefit both public safety and the general welfare of all stakeholders by providing greater clarity on the Board’s parole hearing advancement process, preserving the constitutional rights of both inmates and victims, and implementing the will of the People of California in passing Marsy’s Law.

### **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, INITIAL STATEMENT OF REASONS, AND RULEMAKING FILE**

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, the Form 400 (Notice of Submission of Regulation), the Proposed Text of the Regulation, the Initial Statement of Reasons, and the Form 399 Fiscal and Economic Impact Statement. 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](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](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](http://www.cdcr.ca.gov/BOPH/reg_revisions.html).

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