

BPH RN 21-01: INITIAL STATEMENT OF REASONS

TITLE 15. CRIME PREVENTION AND CORRECTIONS DIVISION 2. BOARD OF PAROLE HEARINGS CHAPTER 3. PAROLE RELEASE ARTICLE 4. PAROLE CONSIDERATION PROCEDURES FOR LIFE PRISONERS AND NONLIFE 1168 PRISONERS

Amendment of Sections 2268 Initial Parole Hearing and 2270 Subsequent Parole Hearing

INTRODUCTION:

On November 4, 2008, the People of the State of California approved Proposition 9, the Victims' Bill of Rights Act of 2008, otherwise known as Marsy's Law. This measure amended the California Constitution and Penal Code to provide additional rights to victims during criminal, juvenile, and parole matters. Of relevance, Marsy's Law amended Penal Code section 3041.5, subdivision (b), by changing the period for scheduling an inmate's subsequent parole consideration hearing following a denial of parole. Prior to Marsy's Law, inmates denied parole were eligible to receive annual parole consideration hearings; however, the Board had discretion to deny parole for up to two years for non-murderers and up to five years for murderers. Following Marsy's Law, Penal Code section 3041.5, subdivision (b), was amended to require the Board to set a denial length of 15, 10, 7, 5, or 3 years following a decision to deny parole.

Drafted prior to Marsy's Law, California Code of Regulations, title 15, sections 2268, subdivision (b), and 2270, subdivision (d), currently permit the Board, when denying parole for more than one year, to defer an inmate's subsequent parole consideration hearing for two, three, four, or five years, in conflict with the Marsy's Law amendments to Penal Code section 3041.5, subdivision (b)(3). Sections 2268, subdivision (b), and 2270, subdivision (d), state in pertinent part, "[the panel] shall make specific written findings stating the bases for the decision to defer the subsequent suitability hearing for two, three, four, or five years." (Cal. Code Regs., tit. 15, §§ 2268, subd. (b), 2270, subd. (d).) This proposed regulation package is submitted to bring Sections 2268, subdivision (b), and 2270, subdivision (d), into compliance with the denial length requirements outlined in Penal Code section 3041.5, subdivision (b)(3).

Additionally, prior to 2004, hearing panels were comprised of three members. In accordance, the California Code of Regulations, title 15, section 2270, subdivision (b) still references this prior requirement for three-person panels. However, to reduce a backlog of hearings, the California Legislature amended the Penal Code in 2004 to allow for two-person panels. Penal Code section 3041, subdivision (a)(2), now provides that a hearing panel at a parole consideration hearing must be composed of, at minimum, two or more commissioners or deputy commissioners, only one of which can be a deputy commissioner. Similarly, Penal Code section 5076.1 specifies that the Board may meet and transact business in panels, each of which shall consist of two or more persons, subject to subdivision (d) of Penal Code section 3041. Penal Code section 3041, subdivision (d), provides that, during times when there is no backlog of inmates awaiting parole hearings, hearings will be conducted by a panel of three or more members, the majority of whom shall be commissioners. Thus, this proposed regulation package is also

submitted to remove Section 2270, subdivision (b), as it is inconsistent with changes to the Penal Code made after its enactment.

PROBLEM STATEMENT:

The statutory language in Penal Code section 3041.5, subdivision (b)(3) makes clear that, following a decision to deny parole, a panel must schedule an inmate's subsequent parole consideration hearing in 15, 10, 7, 5, or 3 years. Therefore, California Code of Regulations, title 15, sections 2268, subdivision (b) and 2270, subdivision (d), which permit the Board to schedule an inmate's subsequent parole consideration hearing in two, three, four, or five years, conflict with statutory law.

In addition, California Code of Regulations, title 15, section 2270, subdivision (b) requires subsequent parole consideration hearings to be conducted by a panel of three hearing officers, two of whom shall be commissioners. As explained above, this subdivision is now inconsistent with legislative changes to the Penal Code in 2004. Specifically, Penal Code section 3041, subdivision (a)(2) states, "[O]ne year before the inmate's minimum eligible parole date *a panel of two or more commissioners or deputy commissioners* shall again meet with the inmate and shall normally grant parole as provided in Section 3041.5. No more than one member of the panel shall be a deputy commissioner." (Emphasis added.) Penal Code section 5076.1 similarly states, "[T]he board may meet and transact business in panels. Each panel shall consist of *two or more persons*, subject to subdivision (d) of Section 3041 (emphasis added)." Penal Code section 3041, subdivision (d), states, "[I]t is the intent of the Legislature that, *during times when there is no backlog of inmates awaiting parole hearings*, life parole consideration hearings, or life rescission hearings, hearings will be conducted by a panel of three or more members, the majority of whom shall be commissioners (emphasis added)." Thus, section 2270, subdivision (b) now conflicts with statutory law.

Additionally, the Board does not anticipate having the resources to conduct three-person panels under Penal Code section 3041, subdivision (d), within the foreseeable future. The Board has scheduled an average of 5,400 hearings annually since 2004, when Penal Code section 3041, subdivision (d), was first enacted. However, Penal Code section 5075 limits the number of commissioners to 17, which restricts the Board's ability to schedule more than one commissioner per hearing. Moreover, while the Board's backlog of inmates awaiting hearings has been significantly reduced since 2004, it has not been eliminated due to the enactment of new legislation related to youth offenders, elderly inmates, and nonviolent offenders. Due to the Board's consistent and continuing need to schedule thousands of hearings annually and the Board's ongoing backlog of inmates awaiting their hearings, the regulations' more stringent requirement of a three-member hearing panel is not feasible. As a result, the Board will conduct parole hearings using three-person panels, comprised of at least two commissioners whenever possible. However, it is anticipated the majority of parole hearings will continue to be conducted by two-person panels for the foreseeable future.

Finally, section 2270, subdivision (b) requires for subsequent hearings that "[a]t least one person on the new panel shall have been present at the last parole consideration hearing unless it is not feasible to do so." Given the number of hearings to be scheduled as well as the matriculation of hearing officers, scheduling subsequent hearings to include a hearing officer from a previous panel is rarely feasible without contributing to a hearing backlog because it significantly limits the panel members eligible to be assigned to each case. Thus, to meet the Board's ongoing requirements to reduce and eventually eliminate the hearing backlog, the Board must remove this requirement.

Thus, California Code of Regulations, title 15, section 2270, subdivision (b) must be amended to bring the regulation within the statutory parameters of Penal Code section 3041, subdivisions (a)(2) and (d) and Penal Code section 5076.1, subdivision (c), and to allow the Board to timely conduct future hearings.

PURPOSE:

The Board proposes to amend California Code of Regulations, title 15, article 4, sections 2268 and 2270 to comply with Marsy's Law denial lengths as outlined in Penal Code section 3041.5, subdivision (b)(3) and to remove the Board's requirement of three-member hearing panels as follows:

Section 2268, subdivision (b) is *amended* to clarify that, following a decision to deny parole at an initial parole consideration hearing, the Board must schedule the inmate's next parole hearing in 15 years, unless the Board finds, by clear and convincing evidence, that the criteria relevant to the decision denying parole are such that consideration of the public and victim's safety does not require a more lengthy period of incarceration for the inmate than 10 additional years. If the Board makes such a finding, the next hearing shall be in 10 years, unless the Board finds by clear and convincing evidence and considering the same criteria and considerations, that a period of not more than seven years is required. If the Board makes such a finding, the inmate's next parole hearing will be scheduled in three, five, or seven years.

Section 2270, subdivision (b) is *removed* to relieve the Board from the regulation's requirement of three-member hearing panels. The removal of this subdivision will leave Penal Code section 3041, subdivisions (a)(2) and (d), and Penal Code section 5076.1, subdivision (c) as the only controlling law governing this issue. This subdivision also removes the requirement for a hearing panel at a subsequent hearing to include a panel member from the prior hearing to allow the Board flexibility to efficiently assign hearing officers and timely hold hearings.

Section 2270, subdivision (c) is *amended* to Section 2270, subdivision (b), and remains otherwise unchanged.

Section 2270, subdivision (d) is *amended* to clarify that, following a decision to deny parole at a subsequent parole consideration hearing, the Board must schedule the inmate's next parole hearing in 15 years, unless the Board finds, by clear and convincing evidence, that the criteria relevant to the decision denying parole are such that consideration of the public and victim's safety does not require a more lengthy period of incarceration for the inmate than 10 additional years. If the Board makes such a finding, the next hearing shall be in 10 years, unless the Board finds, again by clear and convincing evidence and considering the same criteria and considerations, that a period of not more than seven years is required. In that event, the panel may set the next hearing in three, five, or seven years. Section 2270, subdivision (d) is amended to Section 2270, subdivision (c).

Section 2270, subdivision (e) is *amended* to Section 2270, subdivision (d), and remains otherwise unchanged.

Section 2270, subdivision (f) is *amended* to Section 2270, subdivision (e), and remains otherwise unchanged.

NECESSITY:

These amendments are necessary because the Board must ensure its regulations are in harmony with statutory law. Currently as written, California Code of Regulations, title 15, sections 2268, subdivision (b), and 2270, subdivision (d), conflict with Penal Code section 3041.5, subdivision (b)(3), as the regulations permit denial lengths inconsistent with the current requirements outlined in the Penal Code. As amended, the denial length guidelines in the regulations are consistent with the guidelines in the statute. The Penal Code makes clear that, following a decision to deny parole, the Board must schedule the inmate's next parole hearing in 15 years, unless the Board finds, by clear and convincing evidence, that the criteria relevant the decision denying parole are such that consideration of the public and victim's safety does not require a more lengthy period of incarceration for the inmate than 10 additional years. If the Board makes such a finding, the next hearing shall be in 10 years, unless the Board finds, again by clear and convincing evidence and considering the same criteria and considerations, that a period of not more than seven years is required. In that event, the Board may set the next hearing in three, five, or seven years. These amendments mirror the statutory requirements, but are necessary to better clarify how the Board is implementing these requirements.

In addition, the Board's hearing schedule is such that, since 2004 when Penal Code section 3041, subdivision (d) was enacted, the Board has scheduled an average of 5,400 hearings annually, with about 7,800 hearings projected to be scheduled each of the next two years. The Board does not anticipate experiencing a significant decline in hearings such that it would be feasible to return to three-person panels for all hearings. Doing so would immediately result in a dramatic increase the backlog of inmates awaiting a hearing. Additionally, to timely hold hearings and continue to reduce the backlog, the Board must have maximum flexibility to assign panels to each hearing. As a result, repealing California Code of Regulations, title 15, section 2270, subdivision (b) is necessary to allow the Board to conduct parole hearings using two-person panels and to schedule subsequent hearings without requiring assignment of a panel member from the previous hearing. As noted above, in accordance with statutory law, the Board will strive to conduct hearings using three-person panels, comprised of at least two commissioners whenever possible. However, as previously explained, the Board anticipates the majority of parole hearings will continue to be conducted by two-person panels for the foreseeable future.

ANTICIPATED BENEFITS:

These amendments will bring the Board's regulations regarding the setting of a denial length in harmony with Penal Code section 3041.5, subdivision (b)(3). Clarifying the process for setting a parole denial length benefits commissioners, hearing participants, and all stakeholders because it provides transparency to the Board's process of setting a denial length following a finding of parole unsuitability, and clarifies how that process will be implemented. This will benefit all stakeholders by clarifying how the Board imposes parole denial lengths.

In addition, these amendments would remove the currently unfeasible requirements of three-member hearing panels and scheduling subsequent hearing panels to include a member of a prior panel. These changes will benefit all parties by providing the flexibility needed for the Board to conduct hearings as timely as possible and continue to reduce the parole consideration hearing backlog.

DOCUMENTS RELIED UPON:

The Board has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document in making its findings regarding this rulemaking package.

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 Penal Code section 3041.5, subdivision (b)(3). 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 because the regulations will not have impact on Board staffing. The Board has been implementing its process of setting denial lengths since the enactment of Marsy's Law, in accordance with statutory requirements.

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

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 setting of denial lengths for inmates denied parole or by the size of a hearing panel at a parole consideration hearing. 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

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 setting of denial lengths for inmates denied parole or by the size of a hearing panel at a parole consideration hearing. These proposed regulations will have no additional effect on business expansion in California.

Anticipated Benefits to the Health and Welfare of California Residents, Worker Safety, and the State's Environment

As explained above in greater detail, these proposed amendments will bring the Board's regulations in harmony with statutory law. In addition, the amendments will benefit all stakeholders by providing greater clarity and transparency regarding the process of setting a denial length following the Board's decision to deny parole. Ensuring that parole denial lengths are properly imposed in accordance with Marsy's Law helps the Board protect and preserve public safety by setting appropriate denial lengths for inmates who continue to pose a current, unreasonable risk to the public, while ensuring due process to all offenders who come under the Board's jurisdiction. This would allow the Board to maintain a high-performing and professional parole hearing and review system that protects California's communities and is fair to all offenders.

ADDITIONAL FINDINGS:

The Board has made an initial determination this regulatory action will not have a significant adverse economic impact on business. The process of setting denial lengths for inmates denied parole at parole consideration hearings has no effect on the 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 mandates which require 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.

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