

BPH RN 21-01: NOTICE OF PROPOSED ACTION

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

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 amend Sections 2268 and 2270 of the California Code of Regulations, Title 15, Division 2, article 4, concerning Parole Consideration Procedures for Life Prisoners and Nonlife 1168 Prisoners.

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 generally 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 to promulgate, maintain, publish, and make available to the general public a compendium of its rules and regulations.

Penal Code section 3041, subdivisions (a)(2) and (d), and Penal Code section 5076.1, subdivision (c) establish the minimum requirement of two-person hearing panels for parole consideration hearings.

Penal Code section 3041.5 establishes the requirements and conditions concerning parole denial periods.

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, FEBRUARY 5, 2021, AND WILL CLOSE ON MONDAY, MARCH 22, 2021.** 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:

George P. Bakerjian, Senior Staff Attorney

Board of Parole Hearings

P.O. Box 4036

Sacramento, CA 95812-4036

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If George Bakerjian 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 21-01**.

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 written or oral comments presented at a public hearing.

If scheduled, the purpose of a public hearing would be to receive written or 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

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. Marsy's Law amended Penal Code section 3041.5, subdivision (b), 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).)

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.

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). Specifically, these sections are amended to harmonize the conflicting text between the Penal Code and regulations concerning the setting of denial lengths following the enactment of Marsy's Law. Additionally, 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 a panel member from the previous hearing.

ANTICIPATED BENEFITS OF THE PROPOSED REGULATIONS:

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 a 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.

DETERMINATION OF INCONSISTENCY/INCOMPATIBILITY WITH EXISTING STATE REGULATIONS:

The Board has determined that these proposed amendments are 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 selecting denial length periods following a decision to deny parole and they are the only regulations that concern the number of panel members required to conduct a parole hearing.

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**
- 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.

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 requirements in selecting denial length periods following a decision to deny parole.

Small Business Determination: The Board has determined that the proposed regulations do not have a significant adverse economic impact on small business because small businesses are not affected by the setting of denial lengths for inmates denied parole at a parole consideration hearing.

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, 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, and provide greater clarity regarding the number of panel members required to conduct a parole hearing. 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 offenders who remain a current, unreasonable risk to public safety 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.

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, 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.

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 that 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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