



BOARD OF PAROLE HEARINGS



ADMINISTRATIVE DIRECTIVE NO: 2014-02

SUBJECT: REQUIREMENTS FOR SUBSTITUTION OF COUNSEL AND FOR WAIVER OF COUNSEL

INTRODUCTION

This Administrative Directive discusses the requirements to replace a state appointed attorney with private counsel and the requirements to waive the assistance of counsel.

LEGAL AUTHORITY

The California Supreme Court has held that “the right to effective assistance of counsel encompasses the right to retain counsel of one’s own choosing.” (*People v. Courts*, (1985) 37 Cal.3d 784, 789, quoting *People v. Holland* (1978) 23 Cal.3d 77, 86.) “In view of the importance of these rights and the severe consequences which flow from their violation, the trial courts are required to ‘make all reasonable efforts to ensure that a defendant financially able to retain an attorney of his own choosing can be represented by that attorney.’” (*People v. Courts, supra*, at p. 789, quoting *People v. Crovedi* (1966) 65 Cal.2d 199, 207.)

However, the California Supreme Court has also held that after appointment of a state attorney a person may only substitute counsel when they have “engaged in a good faith, diligent effort to obtain the substitution of counsel before the scheduled trial date.” (*People v. Courts, supra*, at p. 790). If “there is no evidence defendant attempted to retain counsel, or had even taken steps to secure funds to hire private counsel . . . the court’s decision to deny the request for continuance to obtain counsel does not constitute an abuse of discretion or a denial of his Sixth Amendment right to counsel.” (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1367.)

California Code of Regulations, title 15, section 2256, subdivision (c), provides in part, “If a prisoner or parolee is entitled to be represented by an attorney at a hearing, an attorney will be provided at state expense if the prisoner or parolee cannot afford to retain private counsel.”

BACKGROUND

Approximately 180 days (six months) prior to every parole suitability hearing a correctional counselor meets with the inmate to review their hearing rights and complete BPH form 1003 ("Life Prisoner: Request for Attorney/Waiver of Attorney or Withdrawal of Request"). At that time the inmate must elect to retain private counsel, request the assistance of a state appointed attorney or waive their right to an attorney. (BPH form 1003 is attached to this administrative directive for reference.) If the inmate chooses to retain private counsel, written acceptance of the appointment must be received by the Board from private counsel within 60 days.

DIRECTIVE

After requesting the assistance of a state appointed attorney, if an inmate wishes to replace that attorney with private counsel he or she must submit a new BPH form 1003 (signed by the inmate and private counsel) at least 45 days prior to the hearing date. Private counsel shall note on the form whether they are ready to proceed with the hearing as scheduled or not.

- If private counsel is ready to proceed with the hearing as scheduled, the request for substitution of counsel shall be approved.
- If private counsel is not ready to proceed with the hearing as scheduled or the request for substitution of counsel is received less than 45 days prior to the hearing date, a hearing officer shall determine if the inmate "engaged in a good faith, diligent effort to obtain the substitution of counsel before the scheduled [hearing] date" and approve or deny the request accordingly; if received during the week of the hearing then the presiding hearing officer shall make the determination.

After requesting the assistance of a state appointed attorney or retaining private counsel, if an inmate wishes to withdraw their request for an attorney he or she must submit a new BPH form 1003 (signed by the inmate only) as early as possible.

- If the inmate is ready to proceed with the hearing as scheduled, the request shall be approved unless it is determined that legal representation is a required accommodation pursuant to the Americans with Disabilities Act (ADA).



BOARD OF PAROLE HEARINGS




- If the inmate is not ready to proceed with the hearing as scheduled and legal representation is a required accommodation pursuant to the ADA, the request shall be denied.
- If the inmate is not ready to proceed with the hearing as scheduled and legal representation is not a required accommodation pursuant to the ADA, a hearing officer shall determine if good cause exists to postpone the hearing (see Administrative Directive 2013-03); if received during the week of the hearing then the presiding hearing officer shall make the determination.

After waiving their right to an attorney, if an inmate wishes to request the assistance of a state appointed attorney he or she must submit a new BPH form 1003 (signed by the inmate) at least 120 days (four months) prior to the hearing date. If, on the other hand, the inmate wishes to retain private counsel he or she must submit a new BPH form 1003 (signed by the inmate and private counsel) at least 45 days prior to the hearing date. Private counsel shall note on the form whether they are ready to proceed with the hearing as scheduled or not.

- If private counsel is ready to proceed with the hearing as scheduled, the request for substitution of counsel shall be approved.
- If private counsel is not ready to proceed with the hearing as scheduled or the request for substitution of counsel is received less than 45 days prior to the hearing date, a hearing officer shall determine if the inmate "engaged in a good faith, diligent effort to obtain . . . counsel before the scheduled [hearing] date" and approve or deny the request accordingly; if received during the week of the hearing then the presiding hearing officer shall make the determination.

This Administrative Directive shall take effect immediately. If you have any questions concerning the contents of this Administrative Directive please contact the Legal Division at (916) 324-7604.

APPROVED BY:



JENNIFER P. SHAFFER
Executive Officer, BPH

DATE:

8/6/14