

# **BPH RN 21-04: NOTICE OF PROPOSED ACTION**

## **TITLE 15. CRIME PREVENTION AND CORRECTIONS DIVISION 2. BOARD OF PAROLE HEARINGS CHAPTER 3. PAROLE RELEASE**

### **Enactment of:**

#### **ARTICLE 17. PAROLE CONSIDERATION HEARINGS FOR ELDERLY INMATES**

##### **Enactment of Sections 2449.40 – 2449.43, governing parole consideration hearings for elderly inmates.**

**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 2449.40 through 2449.43 of the California Code of Regulations, Title 15, Division 2, concerning Elderly Parole Consideration Hearings.

#### **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 3055, subdivisions (a)-(j), establishes the criteria for conducting statutory elderly parole hearings, and the procedures for reviewing parole suitability of any inmate who is 50 years old or older and who has served 20 years of continuous incarceration.

Penal Code section 667 contains prior felony or “strike” sentencing requirements for persons sentenced to felonies who have already been convicted of prior serious or violent felonies.

Penal Code section 1170.12 contains prior felony or “strike” sentencing requirements for persons sentenced to felonies who have already been convicted of prior serious or violent felonies.

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

Penal Code section 3041 establishes the timing mechanism for providing a suitability hearing to an inmate, the requirement for meeting with an inmate the sixth year before parole eligibility for a consultation, and the procedures for granting or denying an inmate parole.

Penal Code section 3046 establishes the requirement for elderly inmates to be paroled upon receiving a grant from the board, subject to the board and Governor's statutory decision review periods, regardless of how the board would normally calculate an inmate's parole date.

In the case *In re Lawrence* (2008) 44 Cal.4th 1181, 1214, the California Supreme Court held that, when a board hearing panel conducts a parole consideration hearing, the panel members must grant the inmate's parole unless they find evidence that the inmate continues to pose a current unreasonable risk of danger to the public safety if released on parole.

In *People v. Culp* (2002) 100 Cal.App.4th 1278, the California Court of Appeals for the 5th district held that, the trial court must add the total time the inmate spent in his two, separate periods of custody, for the purposes of calculating "good behavior and work performance credits" before sentencing. *Culp* indicates "continuous incarceration" means an uninterrupted period of detention in one or more facilities described in Penal Code section 3055, subdivision (b).

In the class action lawsuit *Coleman/Plata v. Newsom*, the court ordered the board to "finalize and implement a new parole process whereby inmates who are 60 years of age and have served a minimum of [25] years of their sentence" to be referred to the board for parole consideration. This order created the board's Elderly Parole Program.

### **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, SEPTEMBER 10, 2021, AND WILL CLOSE ON MONDAY, OCTOBER 25, 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:

**Chancellor Veal, Staff Attorney**  
Board of Parole Hearings  
P.O. Box 4036  
Sacramento, CA 95812-4036  
Phone: (916) 322-6729  
Facsimile: (916) 322-3475  
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If Chancellor Veal is unavailable, please contact Assistant Chief Counsel, Heather L. McCray at [Heather.McCray@cdcr.ca.gov](mailto:Heather.McCray@cdcr.ca.gov). In any such inquiries, please identify the action by using the board's regulation control number **BPH RN 21-04**.

### **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**

Through ongoing litigation in *Coleman v. Newsom*, and *Plata v. Newsom*, prisoners with serious medical and mental health conditions filed suit asserting their constitutional rights were violated due to prison overcrowding, resulting in their receiving inadequate medical and mental health care. The court found that the deficiencies in prison medical and mental health care violated prisoners' Eighth Amendment Rights. Plaintiffs' in both cases requested a three-judge court be convened pursuant to the Prison Litigation Reform Act (PLRA). The two district judges in each case independently granted those requests, and The Chief Judge of the Court of Appeals for the Ninth Circuit convened a three-judge court to preside over the consolidated class action.

On August 4, 2009, the three-judge court issued an order that required the State to submit a plan to reach a prison population cap of 137.5% design capacity in two years. According to the three-judge court's order, the population reduction was necessary because, at the time, the State's prisons housed twice as many prisoners as they were designed for, making the prisons unsafe for prisoners and staff. The three-judge court found that prisoners were unable to obtain life-saving medical and psychiatric care in these overcrowded prisons.

As an additional measure to reduce overcrowding, on February 10, 2014, the three-judge court directed the Board of Parole Hearings (board) to "finalize and implement a new parole process whereby inmates who are 60 years of age and have served a minimum of [25] years of their sentence" to be referred to the board for parole consideration. This process excluded from eligibility inmates who were either sentenced to life without the possibility of parole or condemned.

On June 16, 2014, the board issued a memorandum providing guidance on how the board would implement the court-ordered Elderly Parole Program. This memorandum also outlined that risk assessments performed by the board's forensic psychologists would incorporate how an inmate's age, long-term confinement, and diminished physical condition, if any, reduce the inmate's risk of

future violence. The court-ordered Elderly Parole Program was fully implemented on October 1, 2014.

On January 1, 2018, the California Legislature enacted Assembly Bill 1448 (2017-2018 Reg. Session) (AB 1448), which codified into law the Elderly Parole Program by adding section 3055 to the Penal Code. The statutory version of the Elderly Parole Program differed from the Court-Ordered Elderly Parole Program in several respects. First, in addition to excluding condemned inmates or inmates sentenced to life without the possibility of parole, the statutory Elderly Parole Program also excluded inmates sentenced on any current offense under the strike laws in Penal Code sections 1170.12 or 667, subdivisions (b) through (i). Second, the statutory Elderly Parole Program also excluded any inmate convicted of first-degree murder of a peace officer, where the individual knows or reasonable should have known the victim was a police officer.

In signing AB 1448, Governor Brown commented that the Elderly Parole Program “has been a successful program that saves [California] a significant amount of money that would be otherwise spent for geriatric prisoners who no longer pose a risk to public safety,” and that he believed “the pool of eligible inmates can and should be broadened.” On January 1, 2021, the California Legislature enacted Assembly Bill 3234 (2019-2020 Reg. Session) (AB 3234), which amended Penal Code section 3055 to encompass a broader version of the statutory Elderly Parole Program to include inmates who are 50 years old and have served 20 years of continuous incarceration. The additional exclusions still apply.

This proposed regulation package is submitted to comply with the statutory mandate to regulate the board’s process for providing parole consideration hearings for qualified elderly inmates. In this package, the board is providing clarity on elderly inmate qualification, the board’s process for scheduling and holding elderly parole consideration hearings, and the elderly inmate factors that require different levels of consideration throughout the hearing process.

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

Defining who qualifies as an elderly inmate benefits all stakeholders by resolving several ambiguities and clarifying how to determine whether an inmate will qualify for elderly inmate consideration. These processes also benefit public safety by ensuring the greatest possible accuracy in qualifying inmates for elderly parole consideration and calculating their parole eligibility dates.

Clarifying the process for calculating an elderly parole eligible date (EPED) as well as how initial and subsequent hearings will be scheduled benefits inmates, victims, and other hearing participants because each stakeholder will have a better understanding of when to prepare for an elderly inmate’s initial or subsequent parole consideration hearing. Placing each of the at-hearing rights and requirements into a single section is necessary to simplify for hearing panels, inmates, and the public all of the variations for parole consideration hearings for elderly inmates. Interpreting the three elderly factors also benefits each stakeholder by clarifying what information will be discussed and given special consideration at hearings for elderly inmates. Moreover, collating each of the at-hearing rights and requirements into a single subdivision further benefits these stakeholders by providing a single location from which to identify all of the ways in which hearings for elderly inmates differ from other parole consideration hearings, which allows each hearing participant to better prepare for their role in the hearings.

## **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 conducting parole hearings for elderly inmates. The CDCR has promulgated regulations in Division 3, Article 3, sections 3499 to 3499.2 in title 15 of the California Code of Regulations. CDCR's regulations govern who is eligible for the Statutory Elderly Parole Program, the criteria for calculating an EPED, and the appeals process for elderly inmates who disagree with the calculation of their EPED or their exclusion from the Statutory Elderly Parole Program; these regulations do not infringe on the board's requirements for conducting parole hearings for elderly inmates.

## **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: **\$0: A budget increase was already granted to the board prior to the filing of this regulation package that was based in small part on additional staffing and funds needed to implement statutory elderly parole requirements. The implementation of these regulations will be absorbed by the current already increased budget and resources and should not result in any additional costs or savings to the board.**

Specifically, for the current fiscal year, additional resources were not necessary to implement these regulations. However, in the prior fiscal year, the board requested, and was granted, additional funding beginning in the current fiscal year to effectively carry out all general board functions, which includes the board's new statutory obligation under AB 3234 to provide Elderly Parole hearings to qualified elderly inmates.

The additional resources were also intended to address an increase in projected workload associated with youth offender hearings under Penal Code section 3051, the rescheduling of hearings that had to be postponed due to COVID-19, and hearings for nonviolent offenders required to be scheduled under Proposition 57. Thus, this regulation package is not expected to create or eliminate jobs in California because staffing needs have been absorbed within existing allocated resources.

- 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 the proposed regulations 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. As noted above, while the enactment of AB 3234, amending the elderly parole statute, contributed in small part to an overall need for additional resources, the adoption of these regulations will not result in the creation or elimination of 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 requirements in conducting parole consideration hearings or parole reconsideration hearings for elderly inmates.

**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 internal processes governing the board's requirements in conducting parole consideration hearings or parole reconsideration hearings for elderly inmates.

## **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 regulations will benefit all stakeholders by providing greater clarity on how to determine which inmates qualify for elderly parole consideration and when each hearing participant should prepare for the elderly inmate's initial hearing. We anticipate that having a better understanding for how to prepare for these hearings will ultimately help reduce some of the risk and anxiety hearing participants experience when faced with these hearings. Additionally, the proposed regulations ensure greater uniformity in how the elderly factors are considered and applied to inmate cases. This will ultimately benefit public safety and welfare by ensuring that the candidates most suitable for parole will be released. The board has determined the proposed regulations will not have any effect on the state's environment.

## **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](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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