

BPH RN 21-03: PROPOSED REGULATORY TEXT

Proposed additions are indicated by underline and deletions are indicated by ~~strike through~~.

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS
CHAPTER 3. PAROLE RELEASE
ARTICLE 2. INFORMATION CONSIDERED

Section 2240. Comprehensive Risk Assessments is *amended* to read as follows:

§ 2240. Comprehensive Risk Assessments.

(a) Licensed psychologists employed by the Board of Parole Hearings shall prepare comprehensive risk assessments for use by hearing panels. Psychologists shall consider factors impacting an inmate's risk of violence, including but not limited to factors of suitability and unsuitability listed in subdivisions (c) and (d) of sections 2281 and 2402 of this division. The psychologists shall incorporate structured risk assessment instruments like the HCR-20-V3 and STATIC-99R that are commonly used by mental health professionals who assess risk of violence of incarcerated individuals.

(b) When preparing a risk assessment under this section for a youth offender, as defined in Penal Code section 3051, subdivisions (a) and (h), the psychologist shall also take into consideration the youth factors described in Penal Code section 3051, subdivision (f)(1) and their mitigating effects.

(c)(1) A risk assessment shall not be finalized until the Chief Psychologist or a Senior Psychologist has reviewed the risk assessment to ensure that the psychologist's opinions are based upon adequate scientific foundation.

(2) A risk assessment shall become final on the date on which it is first approved by the Chief Psychologist or a Senior Psychologist.

(d)(1) Risk assessments shall be prepared for all initial and subsequent parole consideration hearings and all subsequent parole reconsideration hearings for inmates housed within the State of California if, on the date of the hearing, more than three years will have passed since the most recent risk assessment became ~~final~~-final, except initial or subsequent parole consideration hearings or subsequent parole reconsideration hearings for inmates placed on medical parole supervision on the date of the hearing and for whom the board is not required to consider the results of a risk assessment under Penal Code section 3053.9.

(2) Risk assessments shall be completed, approved, and served on the inmate no later than 60 calendar days prior to the date of the hearing.

(3) Except as required by Penal Code section 3053.9 and notwithstanding paragraph (1) of this subdivision, the board shall not be required to prepare a risk assessment for an initial or subsequent parole consideration hearing or subsequent parole reconsideration hearing that either is scheduled to occur on or between April 1, 2021, and June 30, 2022, or was previously scheduled to occur on or between April 1, 2021, and June 30, 2022, but was postponed and rescheduled to occur on a date after June 30, 2022, if the board determines the inmate for whom the board will conduct the hearing:

(A) was designated by the department as Security Level IV as of January 1, 2021; and

(B) received two or more Rules Violation Reports classified by the department as serious, as specified in subdivision (a) of section 3315 of article 5 of subchapter 4 of chapter 1 of division 3 of this title, for which the department found the inmate guilty at a disciplinary hearing on or between January 1, 2018, and January 1, 2021.

(4) The board shall mail notice to an inmate at least 60 calendar days before the inmate's initial or subsequent parole consideration hearing or subsequent parole reconsideration hearing if the board is not preparing a risk assessment for the hearing under paragraph (3) of this subdivision.

(5)(A) If the board did not prepare a risk assessment for an inmate's hearing under paragraph (3) of this subdivision, the inmate or inmate's attorney of record may challenge a determination the board made under paragraph (3) if the inmate or inmate's attorney of record believes the inmate does not meet the criteria identified in paragraph (3). An inmate or inmate's attorney of record must submit the challenge to the board via mail or electronic message. However, an inmate or inmate's attorney of record may not submit a challenge based on the same grounds as a previous challenge.

(B) The inmate or inmate's attorney of record shall submit the challenge in writing to the board's Chief Counsel explaining why the inmate does not meet the criteria outlined in paragraph (3) of this subdivision.

(C) The challenge must be received by the board at least 30 calendar days before the hearing to be considered timely submitted. The board will deem electronic messages received on the next business day if sent after board business hours or on a non-business day.

(D) Upon receipt of a timely submitted challenge, the Chief Counsel shall review the inmate's records, evaluate whether the inmate meets the criteria identified in paragraph (3) of this subdivision, and issue a decision described in subparagraphs (E) or (F), as appropriate.

(E) If the Chief Counsel determines the inmate meets the criteria identified in paragraph (3) of this subdivision, the Chief Counsel shall issue a decision explaining the result of the review. The board shall promptly provide a copy of the decision to the inmate or inmate's attorney of record, but in no case less than 10 calendar days prior to the date the hearing is scheduled to occur.

(F) If the Chief Counsel determines the inmate does not meet the criteria identified in paragraph (3) of this subdivision, the Chief Counsel shall issue a decision explaining the result of the review and require that the board prepare a risk assessment under this section. The Chief Counsel may postpone the hearing if appropriate under subdivision (d) of section 2253 of article 3 of this chapter. The board shall promptly provide a copy of the decision to the inmate or inmate's attorney of record, but in no case less than 10 calendar days prior to the date the hearing is scheduled to occur.

(G) If the board receives a challenge less than 30 calendar days before the hearing, the Chief Counsel shall determine whether sufficient time exists to complete the review process described in subparagraphs (D), (E), and (F) of this paragraph no later than 10 calendar days prior to the hearing. If the Chief Counsel determines that sufficient time exists, the Chief Counsel shall

complete the review process in the time remaining before the hearing. If the Chief Counsel determines that insufficient time exists, the Chief Counsel shall not complete the review process and shall promptly inform the inmate or inmate's attorney of record of this determination. The Chief Counsel's determination that insufficient time exists to review an untimely challenge is not alone good cause for either a postponement or a waiver under section 2253 of article 3 of this chapter.

(6)(A) If the board did not prepare a risk assessment for an inmate's hearing under paragraph (3) of this subdivision, the inmate or inmate's attorney of record may request the board prepare a risk assessment if, since the inmate's most recent Rules Violation Report, the inmate has experienced a change to the inmate's physical or mental health that would be relevant to determining the inmate's suitability for parole. An inmate or inmate's attorney of record must submit the request to the board via mail or electronic message. However, an inmate or inmate's attorney of record may not submit a request based on the same grounds as a previous request.

(B) The inmate or inmate's attorney of record shall submit the request in writing to the board's Chief Counsel explaining why the board should prepare a risk assessment for the inmate despite the inmate meeting the criteria identified in paragraph (3) of this subdivision. The explanation shall include a description of the inmate's physical or mental health change and how the change is relevant to determining the inmate's suitability for parole.

(C) The request must be received by the board at least 30 calendar days before the hearing to be considered timely submitted. The board will deem electronic messages received on the next business day if sent after board business hours or on a non-business day.

(D) Upon receipt of a timely submitted request, the Chief Counsel shall review the inmate's records, evaluate whether the explanation and inmate's records demonstrate that a risk assessment would provide relevant information necessary for the panel to determine the inmate's suitability for parole, and issue a decision described in subparagraphs (E) or (F), as appropriate.

(E) If the Chief Counsel determines the explanation and information in the inmate's records do not demonstrate that a risk assessment would provide relevant information necessary for the panel to determine the inmate's suitability for parole, the Chief Counsel shall issue a decision explaining the result of the review. The board shall promptly provide a copy of the decision to the inmate or inmate's attorney of record, but in no case less than 10 calendar days prior to the date the hearing is scheduled to occur.

(F) If the Chief Counsel determines the explanation and information in the inmate's records demonstrate that a risk assessment would provide relevant information necessary for the panel to determine the inmate's suitability for parole, the Chief Counsel shall issue a decision explaining the result of the review and require that the board prepare a risk assessment under this section. The Chief Counsel may postpone the hearing if appropriate under subdivision (d) of section 2253 of article 3 of this chapter. The board shall promptly provide a copy of the decision to the inmate or inmate's attorney of record, but in no case less than 10 calendar days prior to the date the hearing is scheduled to occur.

(G) If the board receives a request less than 30 calendar days before the hearing, the Chief Counsel shall determine whether sufficient time exists to complete the review process described in subparagraphs (D), (E), and (F) of this paragraph no later than 10 calendar days prior to the hearing. If the Chief Counsel determines that sufficient time exists, the Chief Counsel shall complete the review process in the time remaining before the hearing. If the Chief Counsel determines that insufficient time exists, the Chief Counsel shall not complete the review process and shall promptly inform the inmate or inmate's attorney of record of this determination. The

Chief Counsel's determination that insufficient time exists to review an untimely request is not alone good cause for either a postponement or a waiver under section 2253 of article 3 of this chapter.

(7) If, while conducting a hearing before which the board did not prepare a risk assessment under paragraph (3) of this subdivision, a hearing panel finds a risk assessment is necessary to reach a determination on the inmate's suitability for parole, the panel shall continue the hearing and require the board prepare a risk assessment. The finding shall constitute good cause for a continuance under subdivision (e) of section 2253 of article 3 of this chapter.

(e)(1) If an inmate or the inmate's attorney of record believes that a risk assessment contains a factual error, the inmate or attorney of record may send a written objection regarding the alleged factual error to the Chief Counsel of the board, postmarked or electronically received no less than 30 calendar days before the date of the hearing. Electronic messages sent after board business hours or on a non-business day will be deemed received on the next business day.

(2) For the purposes of this section, "factual error" is an untrue circumstance or event. A disagreement with clinical observations, opinions, or diagnoses is not a factual error.

(3) The inmate or attorney of record shall address the written objection to "Attention: Chief Counsel / Risk Assessment Objection."

(f)(1) Upon receipt of a written objection to an alleged factual error in the risk assessment, or on the board's own referral, the Chief Counsel shall review the risk assessment and evaluate whether the risk assessment contains a factual error as alleged.

(2) Following the review, the Chief Counsel shall take one of the following actions:

(A) If the Chief Counsel determines that the risk assessment does not contain a factual error as alleged, the Chief Counsel shall overrule the objection, issue a miscellaneous decision explaining the result of the review, and promptly provide a copy of the miscellaneous decision to the inmate or attorney of record when a decision is made, but in no case less than 10 calendar days prior to the hearing.

(B) If the Chief Counsel determines that the risk assessment contains a factual error as alleged, the Chief Counsel shall refer the matter to the Chief Psychologist.

(g)(1) Upon referral from the Chief Counsel, the Chief Psychologist shall review the risk assessment and opine whether the identified factual error materially impacted the risk assessment's conclusions regarding the inmate's risk of violence. Following the review, the Chief Psychologist shall promptly take one of the following actions:

(A) If the Chief Psychologist opines that the factual error did not materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Psychologist shall direct that the risk assessment be revised to correct the factual errors, prepare an addendum to the risk assessment documenting the correction of the error and his or her opinion that correcting the errors had no material impact on the risk assessment's conclusions, and notify the Chief Counsel of the addendum.

(B) If the Chief Psychologist opines that the factual error materially impacted the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Psychologist shall order a new or revised risk assessment, prepare an addendum to the risk assessment documenting the correction of the error and his or her opinion about the material impact of the errors on the risk assessment's conclusions, and notify the Chief Counsel of the addendum.

(2) Upon receipt of the Chief Psychologist's addendum, the Chief Counsel shall promptly, but in no case less than 10 calendar days prior to the hearing, take one of the following actions:

(A) If the Chief Psychologist opined that the factual error did not materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Counsel shall issue a miscellaneous decision explaining the result of the review, and provide a copy of the miscellaneous decision, the revised risk assessment, and the Chief Psychologist's addendum to the inmate or attorney of record prior to the hearing.

(B) If the Chief Psychologist opined that the factual error did materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Counsel shall issue a miscellaneous decision explaining the result of the review, postpone the hearing if appropriate under section 2253, subdivision (d) of these regulations, and provide a copy of the miscellaneous decision, the new or revised risk assessment, and Chief Psychologist's addendum to the inmate or attorney of record.

(3) The board shall request that the department permanently remove any risk assessments that are revised under paragraph (1)(A) of this subdivision, or revised or redone under paragraph (1)(B) of this subdivision, from the inmate's central file.

(h) If the Chief Counsel receives a written objection to an alleged factual error in the risk assessment that is postmarked or electronically received less than 30 calendar days before the hearing, the Chief Counsel shall determine whether sufficient time exists to complete the review process described in subdivisions (f) and (g) of this section no later than 10 calendar days prior to the hearing. If the Chief Counsel determines that sufficient time exists, the Chief Counsel and Chief Psychologist shall complete the review process in the time remaining before the hearing. If the Chief Counsel determines that insufficient time exists, the Chief Counsel shall refer the objection to the hearing panel for consideration. The Chief Counsel's decision not to respond to an untimely objection is not alone good cause for either a postponement or a waiver under section 2253 of these regulations.

(i)(1) If an inmate or the inmate's attorney of record raises an objection to an alleged factual error in a risk assessment for the first time at the hearing or the Chief Counsel has referred an objection to the hearing panel under subdivision (h) of this section, the hearing panel shall first determine whether the inmate has demonstrated good cause for failing to submit a written objection 30 or more calendar days before the hearing. If the inmate has not demonstrated good cause, the presiding hearing officer may overrule the objection on that basis alone. If good cause

is established, the hearing panel shall consider the objection and proceed with either paragraph (2) or (3) of this subdivision.

(2) If the hearing panel determines the risk assessment may contain a factual error, the presiding hearing officer shall identify each alleged factual error in question and refer the risk assessment to the Chief Counsel for review under subdivision (f) of this section.

(A) If other evidence before the hearing panel is sufficient to evaluate the inmate's suitability for parole, the hearing panel shall disregard the alleged factual error, as well as any conclusions affected by the alleged factual error, and complete the hearing.

(B) If other evidence before the hearing panel is insufficient to evaluate the inmate's suitability for parole, the presiding hearing officer shall postpone the hearing under section 2253, subdivision (d) of these regulations pending the review process described in subdivisions (f) and (g) of this section.

(3) If the hearing panel determines the risk assessment does not contain a factual error, the presiding hearing officer shall overrule the objection and the hearing panel shall complete the hearing.

(j) Notwithstanding subdivision (i), an inmate shall have the opportunity at a hearing to object or respond to any clinical observations, opinions, or diagnoses in a risk assessment.

Note: Authority cited: Section 12838.4, Government Code; and Sections 3052 and 5076.2, Penal Code. Reference: Sections 3041, 3041.5, 3051, 3053.9, 3550, 11190 and 11193, Penal Code; Coleman v. Brown (E.D. Cal. February 10, 2014) No. 2:90-cv-0520, Doc. 2766; Plata v. Brown (N.D. Cal. February 10, 2014) No. C01-1351, Doc. 2766; Johnson v. Shaffer (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement]; and Sherman-Bey v. Shaffer, 2016 WL 193508, Case No. C077499.