



FOR INFORMATIONAL PURPOSES
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BPH RN 21-04: ELDERLY PAROLE REGULATIONS

Summary of Public Comments Received¹

During the 45-day public comment period regarding Regulation Number (RN) 21-04, governing regulations to comply with Penal Code section 3055, which ended on October 25, 2021, the Board of Parole Hearings (board) received comments from one member of the public. The board did not receive comments after the 45-day public comment period ended. No public hearing was requested; therefore the board did not hold a public hearing for this regulation packet.

The board considered each public comment received during the 45-day public comment period regarding RN 21-04. Following the comments, the board declined to make substantive amendments to the original proposed regulations.

The board received written comments from one member of the public (an inmate) during the public comment period of September 10, 2021, through October 25, 2021. Each comment from the commenter was individually identified with a unique identification ("ID") number as follows: [the number of the commenter in order of receipt]-[the number of the comment in order of the comments received from that commenter]. (For example, the comment identified as **01-02** would indicate that comment was made in or by the **first** letter/speaker received and was the **second** comment from the author of that letter/speaker.) The board received a total of two individual comments from the one written commenter. The comment ID numbers for comments received during the public comment period ranged from 01-01 through 01-02. A copy of the commenter's submission is included in the Written Comments Submitted tab for comments received during the 45-day public comment period.

Below, the board identifies the specific comment ID numbers for each public comment and then addresses each comment individually.

¹ The comments and responses here are excerpted from the Final Statement of Reasons which will be filed with the Office of Administrative Law.

COMMENT ID: 01-01

COMMENT:

This commenter requested the board add a subdivision to section 2449.43 that clarified the elderly inmate factors can only be used to grant an inmate parole. The commenter expressed concern that, without adding the clarifying text, the elderly inmate factors could be used to aggravate an inmate's risk of violence to support a denial of parole.

RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

Section 2449.42, subdivision (b), in the "Elderly Parole Hearings" section states: "In considering an elderly inmate's suitability for parole, the hearing panel shall give special consideration to whether the elderly inmate factors described in section 2449.43 of this article *have reduced the inmate's risk of violence*" (Emphasis added). The board expressly stated that the elderly inmate factors shall only be used to mitigate an inmate's risk of future violence. Thus, adopting the commenter's suggestion is not necessary because the board has already addressed the commenter's concern.

COMMENT ID: 01-02

COMMENT:

This commenter suggested the board add a factor to section 2449.43, subdivision (b), "Time Served," that directs hearing panels "consider any instances in which the [b]oard previously established an inmate's adjusted base term" to determine if the inmate requires further retention in prison.

RESPONSE: DECLINED IN FULL BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The Penal Code previously required the board to "establish criteria for the setting of parole release dates" for inmates within the board's jurisdiction housed in the California Department of Corrections and Rehabilitations (department). (Penal Code section 3041(a).) The purpose of setting the parole release dates was to establish a minimum amount of time the inmate would be required to serve upon being independently found suitable for parole that would "provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public." (See former Pen. Code, § 3041, subd. (a) as amended by Stats. 2013, c. 312.). A term calculation consisted of four steps: (1) the panel selected a middle, mitigated (lower), or aggravated (upper) base term; (2) the panel adjusted the base term for additional crimes or enhancements, if any, and calculated the adjusted base term; (3) the panel awarded post-conviction credit; and (4) the panel subtracted the post-conviction credit from the adjusted base term and calculated the proposed life term, which the board subsequently verified during its statutory decision review process.

In its regulations, the board originally authorized a panel to complete each of these steps and calculate a life inmate's life term only at a hearing when the panel had found the inmate suitable for parole, since Penal Code section 3041 still required a separate finding of suitability before an inmate was eligible for release, regardless of whether the inmate had completed the minimum calculated term. However, on January 1, 2016, the California Legislature amended Penal Code section 3041, subdivision (a) to relieve the board from its duty to establish a release date. Specifically, following the 2016 revision, section 3041, subdivision (a)(4) stated, "Upon a grant of parole, the inmate shall be released subject to all applicable review periods. However, an inmate shall not be released before reaching his or her minimum eligible parole date as set pursuant to Section 3046 unless the inmate is eligible for earlier release pursuant to his or her youth offender parole eligibility date." (Sen. Bill No. 230 (2015-2016 Reg. Sess. §3041.) Moreover, on January 1, 2018, the Legislature again amended section 3041, subdivision (a)(4) to state, "Upon a grant of parole, the inmate shall be released subject to all applicable review periods. However, an inmate shall not be released before reaching his or her minimum eligible parole date as set pursuant to Section 3046 unless the inmate is eligible for earlier release pursuant to his or her youth offender parole eligibility date or elderly parole eligible date." (Assem. Bill No. 1448 (2017-2018 Reg. Sess. §3041.) Under these amendments, the board no longer retained legal authority to calculate parole release dates; instead, inmates must be released upon a finding of suitability once the inmate has passed at least one statutory parole eligibility date.

Following these legislative amendments, the board ceased calculating terms; however, the First Appellate District Court initially ordered the board to continue this practice, despite no remaining statutory authority to do so. (See *In re Butler* (2015) 236 Cal.App.4th 1222.) After granting certiorari, on April 2, 2018, the California Supreme Court ruled that the board was not required to continue setting base terms for inmates. Specifically, the court held:

The settlement agreement approved by the parties in 2013 required the board to calculate an inmate's base term at his or her initial parole hearing. At the time the parties ratified that agreement, a calculated base term directly impacted the release date for inmates serving indeterminate life sentences. Not so today. Instead, the release date for indeterminately-sentenced adult inmates—like *Butler*—is now guided by the date when an inmate has served the statutory minimum term and is found suitable for parole based on statutory public safety-related criteria, subject to limited exception. These changes to California's criminal justice system do not diminish the societal interest in avoiding arbitrary parole determinations. They do, however, dictate that base terms no longer directly control the release date for prisoners subject to indeterminate sentences. That these statutory changes are material to these parties' agreement requires, legally and practically, modification of the injunctive order by the Court of Appeal. Moreover, sentencing in California involves primarily determinate sentences and parole determinations involving public safety considerations—so specific base term calculations are not a constitutionally necessary measure for guarding inmates serving indeterminate sentences

against disproportionate punishment. (*In re Butler* (2018) 4 Cal.5th 728, 747.)

Therefore, following the California Supreme Court's decision, the board no longer retains legal authority to calculate "terms" or "release dates" for inmates, because the legislative amendments removed any legal effect of these terms. Instead, the inmate's release date is determined by the date when an inmate has both served the statutory minimum term and is found suitable for parole based on statutory public safety-related criteria. Thus, since prior base terms or adjusted base terms were deemed to have no legal effect and the board no longer has any authority to calculate these terms, the board declines to adopt this comment.

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