

**State of California  
Office of Administrative Law**

**In re:**  
**Board of Parole Hearings**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Regulatory Action: Title 15  
California Code of Regulations**

**Government Code Section 11349.3**

**Adopt section: 2240**

**OAL File No. 2011-0316-01 S**

**SUMMARY OF REGULATORY ACTION**

The Board of Parole Hearings proposed a regulation to formally adopt a procedure that requires the preparation of a Comprehensive Risk Assessment by a psychologist employed by the Board that can be utilized at a life term parole hearing as evidence of a professional's opinion concerning a subject inmate's potential for future violence. The regulation also provides for the transition from previously prepared Psychological Reports that have been used for a similar purpose to the new assessments through the year 2011. On March 16, 2011, the Board submitted the proposed regulation to the Office of Administrative Law ("OAL") for review in accordance with the Administrative Procedure Act ("APA"). On April 28, 2011, OAL disapproved the proposed regulation. This Decision of Disapproval explains the reasons for OAL's action.

**DECISION**

OAL disapproved the proposed regulation for failure to meet the necessity and clarity standards of Government Code section 11349.1, subdivision (a); failure to summarize and respond to public comments offered concerning the proposed regulation; and failure to submit a satisfactory fiscal impact statement for the proposed regulation.

**DISCUSSION**

1) **NECESSITY** - OAL reviews proposed regulations for compliance with the necessity standard pursuant to Government Code section 11349.1. Necessity is defined in Government Code section 11349, subdivision (a):

"Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

The first place one would expect to find evidence of the need for a regulation is in the Initial Statement of Reasons. Along with the notice of proposed rulemaking, Government Code section 11346.2, subdivision (b), requires an agency proposing a regulation to prepare:

[a]n initial statement of reasons for proposing the adoption, amendment, or repeal of a regulation. This statement of reasons shall include, but not be limited to, all of the following:

(1) A statement of the specific purpose of each adoption, amendment, or repeal and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose for which it is proposed. Where the adoption or amendment of a regulation would mandate the use of specific technologies or equipment, a statement of the reasons why the agency believes these mandates or prescriptive standards are required.

(2) An identification of each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies in proposing the adoption, amendment, or repeal of a regulation.

(3) . . . .

The Board prepared an Initial Statement of Reasons, but it does not fulfill the above-mentioned requirements. The introductory paragraph states that the specific purpose of each subsection of the proposed text and the rationale supporting the Board of Parole Hearings' determination that each amendment is reasonably necessary to carry out the purpose for which the regulation is proposed will follow. Instead it proceeds with a summary of the effect of the proposed regulations. In addition, it indicates that the Board did not rely upon any technical, theoretical, or empirical studies in consideration of the regulation and that it has not identified any alternatives to the proposed regulatory change that would fully meet its objectives. Thus we have a summary as a substitute for reasons, no statement of the rationale, no consideration of other possible policies and no identified support. This falls well short of APA requirements.

Public commenters objected to the Board's proposal, correctly noting its failure to provide any evidence of the necessity for this regulation. Presentation of that evidence would be essential for them to effectively offer comments on the basis for the proposed action. Instead of supplementing the record to provide substantial evidence in support of each provision, the Board responded by stating that rulemaking was necessary to assist the Board in determining whether an inmate sentenced to life with the possibility of parole poses a current unreasonable risk of danger to society if released on parole, and because OAL had "determined that the Board's Psychological Report Process contains provisions that meet the definition of a 'regulation' as defined in section 11342.600 that should have been adopted pursuant to the APA." This simple statement of the Board's motivation for undertaking rulemaking does not provide the rationale why each provision is reasonably necessary to carry out the purpose for which it was proposed by the Board. Note that CCR, title 1, section 10, subdivision (b) provides that in order to meet the necessity standard the record of the rulemaking proceeding shall include:

(1) . . .

(2) information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon

policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An "expert" within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

~~In order to adopt this regulation the Board will have to prepare a supplement to its Statement of Reasons that includes substantial evidence of the necessity, add it to the record and provide notice and an opportunity for public comment in accordance with Government Code section 11347.1.~~

2) CLARITY - The specification of the procedure and content of a comprehensive risk assessment in proposed section 2240, subdivision (b), is not clear. "Clarity" means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them. In context, this rulemaking is presented as the solution to a problem noted by OAL in its 2010 Determination No. 27. In that determination OAL examined the Board's psychological evaluation process and found it to be an underground regulation. That process, as described on page 2 of the challenged rule, called for the preparation of a comprehensive risk assessment. It provided:

FAD [Forensic Assessment Division] will use the following instruments to assess the potential for future violence:

- The Historical Clinical Risk Management - 20 (HCR-20)
- The Hare Psychopathy Checklist - Revised (PCL-R)
- Level of Service/Case Management Inventory (LS/CMI)
- Static 99 - (when deemed appropriate by clinician)

The proposed regulation still calls for a comprehensive risk assessment but it does not specify any instruments. Proposed section 2240, subdivision (b), provides as follows:

A Comprehensive Risk Assessment will be completed every five years. It will consist of both static and dynamic factors which may assist a hearing panel or the Board in determining whether the inmate is suitable for parole. It may include, but is not limited to, an evaluation of the commitment offense, institutional programming, the inmate's past and present mental state, and risk factors from the prisoner's history. The Comprehensive Risk Assessment will provide the clinician's opinion, based on the available data, of the inmate's potential for future violence. Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for future violence.

Despite the Board's decision not to specify instruments for evaluation in the regulation, most of the objections of commenters were directed at the instruments that have been used in the past. To those concerns the Board replied that "[t]he Board will only incorporate actuarially derived and structured professional judgment approaches to risk assessment that have excellent technical properties and which provide consistent results." [Final Statement of Reasons, p. 8.] On its face, the regulation appears to be leaving the decision of whether or not to use assessment instruments

and which ones to use to the judgment of the psychologists who will complete the assessments. Psychologists can, of course make professional decisions without methods prescribed in a regulation, but it is not entirely clear whether this decision is being left to the psychologists, as the rule suggests, or whether the selection of instruments for evaluation will still be determined by the Board, as many of the commenters fear and the response to comments suggests. CCR, title 1, section 16, subdivision (a)(2) presumes that a regulation is unclear if the language of the regulation conflicts with the agency's description of the effect of the regulation. This discrepancy may appear to be small, but it is plain that the commenters had a keen interest in the specification of assessment instruments through the adoption of a standard of general application such as would meet the definition of a Board regulation subject to the APA. If that is what the Board intends to do, then it should be included in the proposed regulation and the provision must be supported by an adequate rulemaking record that has been made available for public comment.

3) INCOMPLETE DOCUMENT - Government Code section 11346.5, subdivision (a)(6) requires an agency proposing a regulation to prepare:

An estimate, prepared in accordance with instructions adopted by the Department of Finance, of the cost or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, other nondiscretionary cost or savings imposed on local agencies, and the cost or savings in federal funding to the state. For purposes of this paragraph, "cost or savings" means additional costs or savings, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations.

The instructions of the Department of Finance are set forth in the State Administrative Manual ("SAM"). Section 6603 of SAM provides in part, "[t]he issuing state agencies must include a completed STD. 399 form with each proposed regulation that is submitted to the OAL for publication in the California Regulatory Notice Register." Section 6614 further provides:

A state agency adopting, amending, or repealing a routine or emergency regulation shall use the STD. 399 to make a determination and develop an estimate of that proposed regulation's fiscal impact on local governments. The Fiscal Impact Statement section of the STD. 399 must be completed and signed when a notice of proposed action is submitted for publication in the California Regulatory Notice Register.

The STD. 399 must be approved and signed by (1) the Agency fiscal officer and (2) *the Agency Secretary*; the highest ranking official in the state agency, if it is not under an Agency Secretary; or a designee having a written delegation from the Agency Secretary or the highest ranking official before it is submitted to OAL. Prior to submitting an emergency regulation to OAL for review, the DOF signature is required on the emergency regulation pursuant to Government Code Section 11346.1; however, the signature is not needed at that time. (Emphasis added.)

The STD. 399 submitted with the rulemaking file on March 16, 2011 indicated no local costs of any kind, unspecified state costs that were already budgeted, and no effect on federal funding of state programs. It had not been signed by anyone. The Board provided a replacement STD. 399

prior to the close of OAL's review period with two attached pages of supporting information and the signatures of a Deputy Director and the Executive Officer, Mr. Hoshino. Information included there indicates that it was the STD. 399 submitted in connection with the publication of the notice in December, 2010. Despite the inclusion of these signatures it does not have the necessary approval of the Secretary of the Department of Corrections and Rehabilitation ("CDCR"). ~~OAL has on file a delegation of authority by Matthew L. Cate authorizing Mr. Morgan, Mr. Seale, Mr. Kernan and Ms. Fernandez to review and approve STD. 399 forms but the delegation of authority does not include Mr. Hoshino.~~

#### 4) SUMMARY AND RESPONSE TO PUBLIC COMMENTS

**COST OF THE REGULATION** - A number of commenters objected to what they believed would be the high cost to the state of the Board's administration of a program of comprehensive risk assessments and offered their opinions that the expenditure is a waste of tax dollars. The Board summarized these comments and responded on p. 7 of the Final Statement of Reasons, noting that the "CDCR psychological staff is devoted to providing mental health treatment to inmates." Beyond that, the Board indicated that the money to pay for the program was included in the Budget Act of 2008 and on this basis, offered its rationale that the proposed regulation does not create any new fiscal impact.

Here we have the odd situation where a policy was implemented and money budgeted prior to the adoption of the regulation that would provide a lawful basis for this practice. The Board determined that the regulation providing for comprehensive risk assessment would not require a change in its practices or a supplementary appropriation of state funds. Thus the rulemaking has gone forward with no estimate of its cost presented. A discussion of the comprehensive risk assessment policy that (1) begins with an estimate of no cost; (2) encounters an objection claiming that it costs too much; and (3) ends with the answer that the money has already been budgeted makes the regulation a foregone conclusion. The record does not show that the Board is compelled to adopt this policy and that no other policy is feasible. Since the cost and benefit of a policy are fair subjects of public comment and the Board has not disclosed the cost, the Board must offer a response that addresses the substance of that objection. Since it certainly has the ability to quantify the cost, it seems appropriate that this information would be included in its answer.

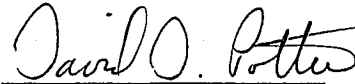
**ASSESSMENT INSTRUMENTS** - The subject of psychological assessment was of interest to many commenters. As noted in the discussion of the clarity of the regulation above, a large proportion of the comments objected to the use of instruments for the psychological evaluation of life inmates being considered for parole. Since the regulation does not specifically provide for the use of any such instruments, it may be possible to address those comments with a simple summary such as the Board has prepared and a direct response. On the other hand, if the Board intends to further specify the manner in which the psychologists must prepare a comprehensive risk assessment, then these comments must be summarized in greater detail and the substance of the commenters' various and detailed objections to those assessment instruments must be addressed with responses that either change the regulation or explain the reason for making no change (Government Code section 11346.9 (a)(3)).

**CONCLUSION**

For the foregoing reasons OAL disapproved the proposed adoption of CCR, title 15, section 2240 by the Board.

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Date: May 5, 2011



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