

**State of California
Office of Administrative Law**

In re:
Board of Parole Hearings

Regulatory Action:

Title 15, California Code of Regulations

Adopt section: 2240

Repeal section: 2240

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2017-0920-05

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

This rulemaking action proposes to repeal existing, and adopt new, section 2240 of Title 15 of the California Code of Regulations concerning Comprehensive Risk Assessments which are used in life-term inmate parole hearings as evidence of an inmate's potential for future violence.

DECISION

The Office of Administrative Law (OAL) disapproved the proposed rulemaking action for failure to comply with the clarity and necessity standards of the Administrative Procedure Act (APA) and for failure to comply with certain procedural requirements of the APA, pursuant to Government Code sections 11349, 11349.1, 11346.2, 11346.8, 11346.9, 11347.1, and 11347.3.

DISCUSSION

Any regulation amended or adopted by a state agency through its exercise of quasi-legislative power delegated to it by statute to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from the APA. (Gov. Code, secs. 11340.5 and 11346.) OAL reviews regulatory actions for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards, a regulation must be legally valid, supported by an adequate record, and easy to understand. In its review, OAL may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. OAL review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure that required procedures are followed in order to provide a meaningful opportunity for public participation in the rulemaking process before regulations become effective.

A. Clarity.

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with the regulations. (Gov. Code, sec. 11340(b).) Government Code section 11349.1(a)(3) requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349(c) defines “clarity” to mean “...written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them.” Moreover, it is presumed that a regulation does not comply with the clarity standard if any of the following conditions exist: the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; the language of the regulation conflicts with the agency’s description of the effect of the regulation; or the regulation uses language incorrectly. (Title 1, Cal. Code Regs., sec. 16(a).) As a result of its review, OAL found that the following proposed provisions failed to meet the clarity standard.

(1) Section 2240(a).

As proposed, new section 2240(a) states:

Licensed psychologists employed by the Board of Parole Hearings shall prepare comprehensive risk assessments for use by hearing panels. The psychologists shall consider the current relevance of any risk factors impacting an inmate’s risk of violence. The psychologists shall incorporate standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate’s risk of violence.

This language would not be easily understood by those persons directly affected by section 2240(a) and can be reasonably and logically interpreted to have more than one meaning. It is unclear what the risk factors impacting an inmate’s risk of violence are which psychologists must consider. It is unclear what an approach is and how an approach becomes standardized. It is unclear how a standardized approach gains general acceptance. In addition, it is unclear who or what is referred to as the psychological community.

(2) Section 2240(c).

As proposed, new section 2240(c) states:

A risk assessment shall not be finalized until the Chief Psychologist or a Senior Psychologist has reviewed the assessment to ensure that the psychologist’s opinions are based upon adequate scientific foundation, and reliable and valid principles and methods have been appropriately applied to the facts of the case.

This language would not be easily understood by those persons directly affected by section 2240(a) and can be reasonably and logically interpreted to have more than one meaning. It is unclear what “principles and methods” means in this provision.

(3) Section 2240(d)(2).

As proposed, new section 2240(d)(2) states:

The board may prepare a risk assessment for inmates housed outside of California.

This language would not be easily understood by those persons directly affected by section 2240(a), because it can be reasonably and logically interpreted to have more than one meaning and conflicts with the agency's description of the effect of the regulation. It is unclear what criteria will be applied by the Board in determining whether to prepare a risk assessment for inmates housed outside of California. Also, the language conflicts with the Board's description of the effect of the regulation. In its Initial Statement of Reasons (ISR), the Board states: "The board needed to clarify that the board retained discretion to complete a risk assessment for an inmate housed out of the state if licensing, confidentiality laws, and other restraints permitted." This description suggests that the board will use the criteria of licensing and confidentiality laws in determining whether to prepare risk assessments for out-of-state inmates. However, the language of the regulation contains no standards for the exercise of this discretion and, therefore, makes the provision different from its description in the ISR. Under the language of the regulation, the Board could use these criteria, other criteria, or no standardized criteria in exercising this discretion.

(4) Section 2240(h).

As proposed, new section 2240(h) states:

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 days prior to the hearing. If the Chief Counsel determines that sufficient time exists, the Chief Counsel and Chief Psychologist may complete the review process in the time remaining before the hearing. If the Chief Counsel determines that insufficient time exists, the Chief Counsel may refer the objection to the hearing panel for consideration. [Emphasis added.]

This language would not be easily understood by those persons directly affected by section 2240(a), because it can be reasonably and logically interpreted to have more than one meaning. In the second sentence, if the Chief Counsel has determined that there is sufficient time to complete the review process described in subdivisions (f) and (g), the Chief Counsel and Chief Psychologist *may* complete the process in the remaining time. If time is not a factor in the Chief Counsel's and Chief Psychologist's decision to complete the review process before the hearing, it is unclear what other criteria they will use to determine whether to complete the review process. Similarly, in the third sentence, if the Chief Counsel has determined that insufficient time exists for him/her and the Chief Psychologist to complete the review process before the hearing, it is unclear what criteria the Chief Counsel will use to determine whether to refer the objection to the hearing panel for consideration.

B. Necessity.

The Necessity standard of the APA is primarily addressed in an agency's Initial Statement of Reasons (ISR). Government Code section 11346.2(b)(1) requires that the ISR contain, among other things, the rationale for the determination by the agency that each adoption, amendment, or repeal of a regulation is reasonably necessary to carry out the purpose and address the problem for which it is proposed. Government Code section 11349.1(a) defines "necessity" for purposes of the APA as meaning that the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the law being implemented, interpreted, or made specific, taking into account the totality of the record. In this action, the Board's ISR and its rulemaking record lacked the Board's rationale for the determination that certain provisions were reasonably necessary to carry out the purpose and address the problem for which the provisions were proposed.

The following proposed provisions lacked explanations of their necessity to implement the statutes or other provisions of law which the Board identifies as being implemented, interpreted, or made specific by section 2240.

(1) Section 2240(c).

As proposed, new section 2240(c) states:

A risk assessment shall not be finalized until the Chief Psychologist or a Senior Psychologist has reviewed the assessment to ensure that the psychologist's opinions are based upon adequate scientific foundation, and reliable and valid principles and methods have been appropriately applied to the facts of the case. A risk assessment shall become final on the date on which it is first approved by the Chief Psychologist or a Senior Psychologist.

The necessity for the review of the assessment by the Chief or Senior Psychologist before it can become final, and of the selection of the date the assessment is first approved by the Chief or Senior Psychologist as the date it becomes final, was not provided in the ISR or rulemaking record.

(2) New section 2240(d)(2) and existing subdivision (g).

The repeal of criteria in existing subdivision (g) that the Board would otherwise use in determining whether to prepare comprehensive risk assessments for inmates housed outside of California and the adoption of subdivision (d)(2), which contains no criteria for the Board's exercise of discretion with respect to conducting comprehensive risk assessments for out-of-state inmates, were not explained in the ISR or rulemaking record.

Prior to resubmission of this rulemaking action to OAL for review, the Board must prepare a supplement to the ISR which includes an explanation of why the provisions discussed above are necessary to carry out the purpose for which they are proposed and must make the document available for at least 15 days for public comment pursuant to Government Code section 11347.1.

C. Administrative Procedure Act Procedural Requirements.

The Board failed to comply with the APA procedural requirements discussed below.

(1) Failure to comply with Government Code section 11347.1.

Government Code section 11346.2(b)(3) requires that the ISR identify each technical, theoretical, and empirical study, report, or similar document, if any, upon which the rulemaking agency relies in proposing a rulemaking action. Government Code section 11347.1 requires that an agency that adds any such document to the rulemaking record after publication of its notice of proposed action shall mail a notice of the addition of the document to the record to those persons specified in Government Code section 11347.1(b)(1)-(4). In its Updated Informative Digest, the Board identified ten documents as documents it relied upon in this action. Nine of these documents were not identified in the ISR, and the Board did not provide notice concerning the addition of these documents pursuant to Government Code section 11347.1. If the Board wishes to add all or any of these documents to the rulemaking record as documents upon which it relied in proposing this action, it must comply with the notice requirements of section 11347.1 prior to resubmission of this action to OAL.

(2) Failure to comply with Government Code section 11346.2(a)(2).

Government Code section 11346.2(a)(2) requires that a rulemaking agency include a notation following each regulation listing the specific statutes or other provisions of law being implemented, interpreted, or made specific by that regulation. Following section 2240, the Board listed two judicial decisions (*In re Lugo* and *In re Rutherford*) which OAL determined section 2240 does not implement, interpret, or make specific, and which are, therefore, not appropriate Reference citations and must be removed.

(3) Failure to comply with Government Code section 11346.9(a)(3).

Government Code section 11346.9(a)(3) requires that a rulemaking agency's Final Statement of Reasons (FSR) includes a summary of each objection and recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. In its FSR, the Board failed to summarize and/or adequately respond to 16 public comments which have been separately listed for the Board by OAL.

(4) Failure to comply with Government Code section 11347.3(b)(7).

Government Code section 11347.3(b)(7) requires that all documents upon which an agency relies in proposing a rulemaking action be included in the rulemaking record. The rulemaking record in this action failed to include copies of five such documents (items 2 through 6 of the Board's Updated Informative Digest).

(5) Failure to comply with Government Code sections 11346.8(a) and 11347.3(b)(6)&(11).

Pursuant to the above-listed sections, all material which is presented to the rulemaking agency and which it is required to consider must be included in the rulemaking record. The Board failed to include in the record the powerpoint slides which were presented to the Board and which it considered at its August 15, 2016 meeting concerning the adoption of section 2240.

(6) Failure to comply with Government Code section 11347.3(b)(8) and Title 1 CCR section 90(a).

Government Code section 11347.3(b)(8) and Title 1 CCR section 90(a) require that a transcript, recording, or minutes of any public hearing connected with the adoption of a regulation be included in the rulemaking record. The Board failed to include any documentation pursuant to section 90(a) of its September 19, 2016 hearing at which public comments were received and the Board voted to adopt section 2240.

(7) Failure to comply with Government Code section 11347.3(b)(6).

Government Code section 11347.3(b)(6) requires that all written comments submitted to a rulemaking agency in connection with the adoption of a regulation be included in the rulemaking record. The Board failed to include with the letter of commenter #45 the four attachments referenced in that letter.

D. Miscellaneous.

OAL also notes the following items with regard to this rulemaking action.


- (1) The failure of the Board to include with the ISR, the attachments A and B referenced in the ISR;
- (2) The incomplete description on the Table of Contents for the rulemaking record of the documents included at Tab E;
- (3) The failure of the Board to list section 2240 as being both repealed and adopted on the STD. Form 400.

CONCLUSION

For the foregoing reasons, OAL disapproved the proposed rulemaking action. Pursuant to Government Code section 11349.4(a), the Board may resubmit this action within 120 days of its receipt of this Decision of Disapproval. Prior to that, the Board shall mail a notice, pursuant to Government Code sections 11346.8(c), Title 1 CCR section 44, and Government Code section 11347.1, together with all substantial regulatory text changes which are sufficiently related to the originally proposed text, and shall make available for public comment for at least 15 days a supplement to the Initial Statement of Reasons and the nine documents described in section C.(1)

above. The Board must document in the rulemaking file its approval of the final text after consideration of all public comments and relevant information, as well as resolve all other issues raised in this Decision of Disapproval, before resubmitting the action to OAL for review. OAL reserves the right to review the Board's resubmitted regulations and the rulemaking record for compliance with all substantive and procedural requirements of the APA. A copy of this Decision will be emailed to the Board on the date indicated below.

Date: November 8, 2017



Dale P. Mentink
Senior Attorney

For: Debra M. Cornez
Director

Original: Jennifer Shaffer, Executive Officer
Copy: Heather McCray, Assistant Chief
Counsel