STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

AGENCY: BOARD OF PAROLE HEARINGS	**DECISION OF DISAPPROVAL OF EMERGENCY REGULATORY ACTION**
	(Gov. Code, sec. 11349.6)
ACTION: Amend SECTION 2253 of Title 15 of the California Code of Regulations	**OAL File No. 07-0810-03 E**

SUMMARY OF RULEMAKING ACTION

This proposed emergency rulemaking action seeks to amend Title 15 of the California Code of Regulations, section 2253 to specify the circumstances and conditions under which life parole consideration hearings will be rescheduled for voluntary waivers, stipulations of unsuitability, postponements and continuances. It was submitted by the Board of Parole Hearings as an emergency at the direction of the Marin County Superior Court (*In re Inez Lugo (*formerly *In re Rutherford)*, 2007, No. SC135399A).

SUMMARY OF DECISION

On August 10, 2007, the Board of Parole Hearings (Board) submitted to the Office of Administrative Law (OAL) a proposed emergency action to make amendments to requirements regarding requests for and rescheduling of voluntary waivers, stipulations of unsuitability, postponements and continuances of life consideration parole hearings.

On August 20, 2007 OAL notified the Board that OAL disapproved this emergency regulatory action for failure to comply with specified standards and procedures of the California Administrative Procedures Act (APA). The reasons for the disapproval are summarized below:

A. The Finding of Emergency does not demonstrate the existence of an emergency and the need for immediate action (Government Code sections 11342.545, 11346.1, and 11349.6[1]);
B. The proposed text does not meet the APA clarity standard (Section 11349.1);
C. The rulemaking record does not meet the APA necessity standard (Section 11349.1); and
D. Failure to follow required APA procedures (Section 11349.1).

[1] Unless stated otherwise, all California Code references are to the Government Code.

DISCUSSION

The adoption of regulations by the Board must satisfy requirements established by the part of the APA that governs rulemaking by a state agency, and must satisfy applicable requirements established by the Penal Code. Any rule or regulation adopted by a state agency 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 APA coverage.

In its review, OAL is limited to the proposed regulation and the record of the rulemaking proceeding and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. The 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 rules and regulations that implement, interpret and make specific statutory law, and to ensure that required procedures are followed and that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

The use of emergency regulations circumvents one of the key purposes of the APA – public participation in the rulemaking process. Since emergency regulations require the regulated public to obey rules that it had little or no opportunity to review and comment upon, the APA limits the use of emergency regulations. Proposed emergency regulations must be submitted with a Finding of Emergency. If the Finding of Emergency does not include a description of specific facts demonstrating the existence of an emergency and the need for immediate action to avoid serious harm, OAL must disapprove the proposed emergency regulation.

The emergency regulation proposed by the Board concerning voluntary waivers, stipulations to unsuitability, postponements and continuances must be adopted pursuant to the APA unless a statute expressly exempts or excludes it from APA requirements (Sections 11340.5 and 11346). No express statutory exemption applies to this proposed emergency regulation. Thus, before it may become effective, it must be reviewed and approved by OAL for compliance with the APA. OAL reviews emergency regulations for compliance with: (a) the emergency standard in sections 11342.545, 11346.1, and 11349.6; (b) the six standards for administrative regulations in section 11349.1; and (c) the applicable APA procedural requirements.

A. The Finding of Emergency does not demonstrate the existence of an emergency and the need for immediate action.

The first comprehensive changes in the adoption of emergency regulations since the 1980s became effective January 1, 2007 as part of AB 1302 (Chapter 713, Statutes of 2006). Section 11342.545 now defines an "emergency" as "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." The adoption of an emergency regulation by the Board must satisfy new requirements established by section 11346.1, which provides in part:

> "(b)(1) ...[I]f a state agency makes a finding that the adoption of a regulation or order of repeal is necessary to address an emergency, the regulation or order of repeal may be adopted as an emergency regulation or order of repeal.
> (2) Any finding of an emergency *shall include a written statement that contains ...a description of the specific facts demonstrating the existence of an emergency and the need for immediate action, and demonstrating, by substantial evidence, the need for the proposed regulation* to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency." (Emphasis added.)

An agency must provide specific facts that an emergency exists and immediate action is needed. If this threshold showing is not made, section 11349.6(b) provides:

> "(b) ... The office *shall disapprove* the emergency regulations if it determines that the situation addressed by the regulations is not an emergency, or if it determines that the regulation fails to meet the standards set forth in Section 11349.1, or if it determines the agency failed to comply with Section 11346.1." (Emphasis added.)

In this rulemaking, the Finding of Emergency submitted by the Board is part of a three page document titled "Statement of Emergency." The Board's Finding of Emergency contains only the fact that the file was submitted as an emergency at the direction of the Marin County Superior Court (*In re Inez Lugo (*formerly *In re Rutherford)*, 2007, No. SC135399A). No specific facts or documentation were provided to meet the emergency standard. Neither the Finding of Emergency nor the Statement of Emergency as a whole meet the emergency standard. OAL informed the Board of this fact and requested additional information concerning the specific harm that would be avoided if the regulation was adopted immediately. OAL requested that the Board supplement the Finding of Emergency with such specific facts in order to demonstrate the existence of an emergency and the need for immediate action.

The Board did not supplement the Finding of Emergency, but did provide the following from the *In re Inez Lugo (*formerly *In re Rutherford)* matter: (1) a copy of a January 18, 2007 hearing transcript; (2) the court's Order Regarding Disputed Policies and Procedures; and (3) a copy of the regulatory text which was labeled as "Form of Proposed Amended Regulation Approved by the Court on January 18, 2007." The hearing transcript and a subsequent July 11, 2007 hearing transcript that had been included in the original submission of the rulemaking record to OAL do not provide specific facts to meet the emergency standard. The Board made one change to its Statement of Emergency document by adding one sentence to the Informative Digest: "The objective in submitting the amendments to 15 CCR 2253 as an emergency is to comply with the Marin County Superior Court's order of July 11, 2007."

Based upon a review of the documents provided by the Board, OAL concludes that the rulemaking file does not demonstrate the existence of an emergency and the need for immediate action.

B. The proposed text does not meet the CLARITY standard.

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to the persons who must comply with the regulations (Section 11340(b)). Section 11349.1(a)(3) requires that OAL review all regulations for compliance with the "clarity" standard. Section 11349(c) defines "clarity" to mean "...written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them."

Section 16 of Title 1 of the California Code of Regulations (CCR) declares in part:

> "In examining a regulation for compliance with the 'clarity' requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:
> (a) A regulation shall be presumed not to comply with the 'clarity' standard if any of the following conditions exist:
> (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or ...
> (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
> (5) the regulation presents information in a format that is not readily understandable by persons 'directly affected;' ...
>
> (b) Persons shall be presumed to be 'directly affected' if they:
> (1) are legally required to comply with the regulation; or
> (2) are legally required to enforce the regulation; or
> (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
> (4) incur from the enforcement of the regulation a detriment that is not common to the public in general."

In this rulemaking, OAL determines that several regulatory provisions do not satisfy the "clarity" standard, as discussed below.

1. "Should" - Proposed section 2253, subsection (b), in two separate paragraphs (one which is effective until October 1, 2007 and the other which is effective on October 1, 2007) provides in part:

> "A request for a voluntary *hearing* waiver of a life parole consideration hearing *should be submitted* at the earliest possible date that the prisoner becomes aware of the circumstances leading to the request, but no later than ['10 working' or '45 calendar' depending on effective date] days prior to the scheduled hearing." (Emphasis added.)

In common usage, the reasonable inference of the use of "should" is that a recommendation is intended, rather than a legal obligation. The Board may have intended to allow for discretion in the context of the independent clause before the conjunction "but." However, applying "should"

instead of "shall" to the dependent clause, "no later than ['10 working' or '45 calendar' depending on effective date] days prior to the scheduled hearing" makes the provision ambiguous and therefore the meaning is unclear. Is a requirement being established or only a suggestion? Prisoners ("directly affected" persons because they are legally required to comply with the regulation) cannot determine with certainty whether or not they are required to submit the request no later than 10 working/45 calendar days prior to the scheduled hearing. Similarly, the members of the parole board ("directly affected" persons because they derive from the enforcement of the regulation a benefit that is not common to the public in general) cannot determine with certainty whether they must accept requests that are made within the 10 working/45 calendar days prior to the scheduled hearing.

2. "Hearing" - In proposed section 2253, subsection (b), in two separate paragraphs (one which is effective until October 1, 2007 and the other which is effective on October 1, 2007) the word "hearing" is unnecessarily duplicated in the first sentence of both paragraphs so its first appearance in each should be deleted. (See quoted language above.)

3. "Which was Unknown, or Reasonably Could not Have Been Known" - Proposed section 2253, subsection (b), in two separate paragraphs (one which is effective until October 1, 2007 and the other which is effective on October 1, 2007) provides in part:

> "A request for a voluntary waiver of a life parole consideration hearing submitted ['less than 10 working' or 'within 45 calendar' depending on effective date] days prior to the scheduled hearing shall be presumed to be invalid and shall be denied by the board *unless the reasons given were not or reasonably could not have been known*." (Emphasis added.)

In addition, proposed section 2253, subsection (e) provides in part:

> "After the commencement of a life parole consideration hearing, the Hearing Panel Chair may continue a hearing for *good cause which was unknown, or reasonably could not have been known,* prior to the commencement of the hearing." (Emphasis added.)

In all three of these instances, it is unclear to whom the reasons should have been known. Were the reasons either unknown or reasonably could not have been known by the parole board, the Hearing Panel Chair or by the prisoner? As "directly affected" persons, neither the parole board, the Chair nor the prisoner can determine with certainty whether the requirement is that the reasons given for an untimely request "were not or reasonably could not have been known" by the parole board, by the Chair or by the prisoner.

4. "Will" - Proposed section 2253, subsection (d) provides in part:

> "Reasonable efforts *will be* made to postpone life parole consideration hearings in sufficient time to notify affected parties." (Emphasis added.)

Similarly, proposed section 2253, subsection (e) provides in part:

> "In considering a continuance, the Hearing Panel Chair *will weigh* the reasons and the need for the continuance, any inconvenience to the board, department, or appearing parties and *determine* what will best serve the interest of justice." (Emphasis added.)

The use of "will" is generally considered the simple future indicative in that it only indicates an intent to do something or predicts that something is going to happen. Whereas, "shall" is used to express an explicit obligation or requirement. Use of the future tense "will" in legislation or a regulation is not correct because it ignores the principle that legislation or a regulation always speaks at the time it is applied to specific facts. For legislation or a regulation, the time is always now for any operative provision. The statements "[r]easonable efforts will be made," or "the Hearing Panel Chair will weigh the reasons and the need," or "[will] determine what will best serve the interest of justice," are unclear since they do not indicate the imperative to make reasonable efforts, or weigh reasons and need, or determine what best serves the interest of justice in each applicable situation, but only that these things will occur at some future time.

5. "Hearing Week" - Subsection (e) uses the term "hearing week." The whole paragraph, for context purposes, states:

> "Continuance. After the commencement of a life parole consideration hearing, the Hearing Panel Chair may continue a hearing for good cause which was unknown, or reasonably could not have been known, prior to the commencement of the hearing. Life parole consideration hearings shall only be continued if they can be conducted during the *hearing week*." (Emphasis added.)

OAL requested clarification on the term, however none was provided. Unless "hearing week" is defined in statute or regulation to mean something different, the common understanding would be that it means the same week during which a particular hearing had been originally scheduled. OAL cannot substitute its judgment for that of the rulemaking agency in the substantive content of adopted regulations (Section 11349.1). However, given practical considerations, it seems unlikely that "hearing week" could be implemented as such. For example, if a hearing had originally been scheduled for Friday afternoon, it seems very unlikely that it could be continued for later that day in order to keep it within the "hearing week."

6. Run-on Sentence - The last sentence in the second paragraph of proposed section 2253, subsection (c) is too long, creating confusion for those directly affected. It would be more easily understood if it were divided into two sentences. It currently states:

> "If an offer to stipulate to unsuitability is made on the day of the scheduled life parole consideration hearing, statements of the District Attorney and/or from a victim, or victim's next of kin or representative shall be taken by the hearing panel, a transcript made and such statements shall be considered in accepting the stipulation, setting the next scheduled hearing, and by the next hearing panel."

7. Grammar and Punctuation - The following grammatical and punctuation corrections should also be made:

(a) Throughout section 2253, the proposed text predominantly uses the term "prisoner" and its derivations. However, in two instances (the third sentence of the fourth and sixth paragraphs of subsection (b) regarding what occurs when a request for voluntary waiver is presumed invalid), the word "inmate's" is used. This should be corrected for parallel construction and consistency with the remainder of the section.

(b) In two instances the proposed text provides that a statement shall be taken or received "...*from* the District Attorney...." but in two other instances it is "...*of* the District Attorney...." (Emphasis added.) For purposes of parallel construction and consistency, this should be corrected to be "... from the District Attorney..." in all four instances, especially since the next phrase in all four instances is "... and/or *from* a victim...." (Emphasis added.)

(c) In the first sentence of the second paragraph of proposed section 2253, subsection (c), there should be a comma after the word "unsuitability." In the second sentence of the same paragraph, there should be a comma after "representative."

(d) In the first sentence of proposed section 2253, subsection (e), there should be a comma after "known."

(e) Proposed section 2253, subsection (e) provides in part:

> "In considering a continuance, the Hearing Panel Chair will weigh the reasons and the need for the continuance, any inconvenience to the board, department, or appearing parties and determine what will best serve the interest of justice."

Instead of a comma after "the need for the continuance," the conjunction "and" should be inserted, since there are only two issues that the Chair is weighing: "... the reasons and the need for the continuance..." and "... any inconvenience to the board, department or appearing parties...."

C. The rulemaking record does not meet the NECESSITY standard.

Section 11349.1(a)(1) requires that OAL review all regulations for compliance with the "necessity" standard. In the record of a rulemaking proceeding, an agency must state the specific purpose of each regulatory provision, and explain why the provision is reasonably necessary to accomplish that purpose. The "necessity" standard set forth in section 11349(a) provides:

> "'Necessity' means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation ... 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."

In order to demonstrate the need for a regulatory provision, two elements must be present in the rulemaking record (1 CCR 10(b)(2)): first, the specific purpose for each adoption, amendment, or repeal, and second, the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed. When the rationale is based on policies, conclusions, speculation, or conjecture, the rulemaking record must include supporting facts, studies, expert opinion, or other information. The necessity for a rulemaking must be demonstrated by "substantial evidence" (11346.1(b)(2) and 11349(a)).

The proposed emergency regulation addresses four circumstances that would result in the rescheduling of life parole consideration hearings: voluntary waivers, postponements, stipulations of unsuitability and continuances. The procedures for these four circumstances are described in one new subsection for voluntary waivers and amendments to three subsections – one each for postponements, stipulations of unsuitability and continuances. The rulemaking proposes three prominent changes: 1) establish procedures to allow voluntary waivers; 2) allow the taking of statements from properly appearing parties for any of the four circumstances when a hearing is to be rescheduled; and 3) create a differentiation in time periods for voluntary waivers if prior to October 1, 2007.

One section of the Statement of Emergency document in the rulemaking record is titled "Necessity." This section merely states:

> "An amendment to section 2253 is necessary to specify the circumstances under which hearings will be rescheduled to avoid confusing and unnecessary postponements. The court has ordered that this version of the amendment be submitted to OAL as an emergency."

The two sentences above do not address the requirement for substantiation of "necessity" as to each provision, but simply describe the purpose for the subsection related to postponement. It also does not demonstrate by substantial evidence the need for that subsection. The subsections on voluntary waivers, stipulations of unsuitability and continuances are not mentioned in the Statement of Emergency.

Given the almost complete lack of information in the record in regards to necessity for the new subsection and amendments to the existing subsections, OAL requested that the Board also supplement the record to meet the necessity standard. As discussed above in part A, the Board supplemented the record with (1) the January 18, 2007 hearing transcript; (2) Order; (3) an accompanying draft of the regulation; and (4) adding a sentence to the Informative Digest. There is still sparse indication in the totality of the record of the need for each new provision or amended provision to implement, interpret, or make specific the related statutes.

For example, the record does not adequately demonstrate necessity for the differentiation in time periods for voluntary waivers in section 2253, subsection (b), which was referenced in Part A above. One set of requirements, effective until October 1, 2007, requires the request to be made no later than 10 working days prior to the hearing to be presumed valid. Another set, effective on October 1, 2007, requires the request to be made no later than 45 calendar days prior to the hearing to be presumed valid. Since there is no statutory authority for this differentiation, the

Board must provide a demonstration of necessity for it. There was nothing in the record that mentions this date or the reasons for the differentiation in time periods for making a request. Taking into account the totality of the record, the Board has not demonstrated by substantial evidence the necessity for this regulation.

D. Failure to follow the required APA procedures.

OAL must review rulemaking records submitted to it in order to determine whether all of the procedural requirements of the APA have been satisfied (11349.1(a)).

1. Form 400: The APA requires a rulemaking agency to correctly complete the Form 400. In this rulemaking action, the block on the Form 400 for "Agency with Rulemaking Authority" contained the name, "Department of Corrections and Rehabilitation" (CDCR) which does not have rulemaking authority in this matter. The appropriate agency with rulemaking authority is the "Board of Parole Hearings."

Section 12838.4 vested with the Board the powers, duties, and responsibilities previously held by the Board of Prison Terms.

Penal Code section 3052 states:

> "The Board of Prison Terms shall have the power to establish and enforce rules and regulations under which prisoners committed to state prisons may be allowed to go upon parole outside the prison buildings and enclosures when eligible for parole."

Penal Code section 5076.2(a) provides:

> "Any rule and regulations, including any resolutions and policy statements, promulgated by the Board of Prison Terms, shall be promulgated and filed pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, and shall, to the extent practical, be stated in language that is easily understood by the general public."

Additionally, Penal Code section 5055 makes it clear that the Legislature intended that the Board retain powers and duties separate from CDCR. It states in part:

> "Commencing July 1, 2005, all powers and duties previously granted to and imposed upon the Department of Corrections shall be exercised by the Secretary of the Department of Corrections and Rehabilitation, except where those powers and duties are expressly vested by law in the Board of Parole Hearings...."

The Board of Parole Hearings is the only agency that has been granted the statutory authority to promulgate regulations in regards to the subject of these regulations. Therefore, the Board of

Parole Hearings is the agency with rulemaking authority and its name must be entered as such in the proper block on the Form 400. (1 CCR 6(b)(10).)

2. Underline/Strikeout: With respect to the regulation section being amended in this rulemaking, the final regulation text submitted to OAL for review contains a number of minor discrepancies in showing the changes to the text of existing regulation as currently printed in the CCR in underline and strikeout format.

(a) In proposed section 2253, subsection (d), the second to the last sentence in the paragraph shows the word "parties" and the letter "es" of the word "these" with a strikeout marking. Since these are new and not in the current CCR, they should be deleted rather than shown with the strikeout marking.

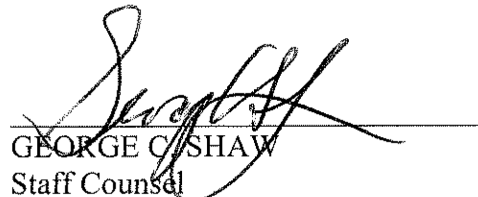
(b) In the heading on the first page of the proposed text, "Board of Parole Hearings" must be shown with an underline, "Board of Prison Terms" must be shown with a strikeout, and the parenthetical information "(formerly known as "Board of Prison Terms")" must be deleted.

3. Form 399: Section 11347.3(b)(5) and the State Administrative Manual section 6680 require that the rulemaking file contain a completed STD. 399 Economic and Fiscal Impact Statement signed by the Agency Secretary of the California Department of Corrections and Rehabilitation. It appears that the person with delegated authority to sign for the Secretary inadvertently signed and dated in the block for the Department of Finance signature. This must be corrected upon resubmission.

CONCLUSION

For these reasons OAL disapproved the above-referenced rulemaking action. If you have any questions, please do not hesitate to contact me at (916) 323-4217.

Date: August 27, 2007



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