

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:

BOARD OF PRISON TERMS)	DECISION OF DISAPPROVAL OF REGULATORY ACTION
)	
REGULATORY ACTION:)	(Gov. Code, sec. 11349.3)
)	
Title 15, California Code of Regulations)	OAL File No. 02-1025-11 S
)	
AMEND SECTIONS: 2030, 2247, 2249, AND 2270)	
_____)	

DECISION SUMMARY

This regulatory action clarifies and conforms timelines for presenting prisoner documents at parole suitability hearings and makes related changes. On December 11, 2002, the Office of Administrative Law (“OAL”) disapproved the proposed amendment of sections 2030, 2247, 2249, and 2270, Title 15, California Code of Regulations (“CCR”) for failure to follow the procedures required by the Administrative Procedure Act.¹

DISCUSSION

Regulations adopted by the Board of Prison Terms (“Board”) concerning parole suitability hearing procedures must be adopted pursuant to the Administrative Procedure Act (“APA”). See Penal Code section 5076.2 and Government Code section 11346.5. Any regulatory act a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the APA unless a statute expressly exempts or excludes the act from the requirements of the APA. (Gov. Code section 11346.) No exemption or exclusion applies to the regulatory action here under review. Thus, before the instant regulatory action may become effective, OAL must review it for compliance with both the procedural requirements of the APA and certain substantive standards.

¹ All otherwise unspecified references are to Title 15 of the California Code of Regulations (“CCR”).

A.

PROCEDURE

At its October 9, 2001, Executive Board meeting, the Board of Prison Terms moved to adopt specified proposed changes to sections 2247, 2249, and 2030, Title 15, CCR (see pages 18-19, of October 9, 2001, Minutes, Tab J, Rulemaking Record). On November 9, 2001, the California Regulatory Notice Register (Register 01, #45-Z) carried the Board's notice of proposed rulemaking and designated December 31, 2001, as the closing date for public comments on the proposed amendments. Several persons submitted timely written comments, some rather lengthy. In response, the Board staff rejected some suggestions with explanations, and also made two additional sets of changes to the regulation text as initially proposed. Pursuant to Government Code section 11346.8(c), the staff conducted two additional periods of public availability of the proposed "post-notice" modifications, one from June 3 to July 3, 2002, and the second from August 30 to September 20, 2002. The second period included an amendment to section 2270, not previously part of the proceeding. One belated comment arrived during these two additional comment periods.

Government Code section 11346.8(c) provides that

"(c) No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. If a sufficiently related change is made, the full text of the resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends, or repeals the resulting regulation. Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9."

1. Did the Board Adopt the Regulations as Modified?

The rulemaking record lacks any documentation that the Board reviewed and adopted the proposed modifications to the initially proposed regulations it adopted on October 9, 2001. Apparently the staff determined that the modifications fell under Government Code section 11346.8(c) –that is, that the changes were either "nonsubstantial" (those changes are not at issue here), or they were "substantial"

and also “sufficiently related”--and consequently held the two additional availability periods. Government Code section 11346.8(c)(2) provides in part that these modifications “shall be made available to the public for at least 15 days ***before the agency adopts, amends, or repeals the resulting regulation.***” Emphasis added. The changes were indeed made available, but the record does not reflect that the Board adopted the final, revised regulations following the comments and corresponding changes. The rulemaking record must contain evidence that the Board adopted the substantially revised regulations submitted to OAL.

When the Board resubmits this action, please note that Government Code section 11347.3(b)(8) requires the final rulemaking record submitted to OAL to contain a “transcript, recording, or minutes of any public hearing connected with the adoption, amendment, or repeal of the regulation” such as the meeting at which the Board adopts the amendments.

2. Were All the Post-Notice Changes “Sufficiently Related”?

Most of the changes made after the initial notice are indisputably “substantial” and therefore must also be “sufficiently related” to be included in the final regulation action. All but one of the substantial changes appear to be “sufficiently related” to the original text so that the public was placed on notice that such a change might occur during the rulemaking, including even the proposed change to section 2270.² Only one insufficiently related change is at issue; that is, the final change made in August 2002, which deletes a sentence from section 2030(b). This change is beyond the scope of the original text and notice, and is therefore not “sufficiently related” to permit adoption in this rulemaking action.

Section 42, Title 1, CCR, provides that:

“Changes to the original text of a regulation shall be deemed to be “sufficiently related,” as that term is used in Government Code Section 11346.8, if a reasonable member of the directly affected public could have determined from the notice that these changes to the regulation could have resulted.”

In the Notice, the Informative Digest provides in part (page 2, Notice of Proposed Regulatory Action, Tab A, Rulemaking Record):

² While the original action did not propose amending section 2270 at all, the post-notice modification conforms a deadline to one of the proposed amendments (to section 2247; amendment later dropped) and to another existing section (section 2246). It falls within the Informative Digest description as well.

“ . . . According to Penal Code section 3041.5, a life prisoner is afforded a number of procedural safeguards prior to the various types of parole proceedings conducted for life prisoners. This action is designed to allow the life prisoner an opportunity to review his or her central file at least 30 days prior to the hearing. Under this action, a prisoner shall be required to submit documents not contained in the central file at least 10 days prior to the parole hearing. Additionally, the Classification and Parole Representative (C&PR) from the Department of Corrections (CDC) is required to forward to the prosecutor copies of documents submitted by the prisoner or prisoner’s representative for consideration by the Board hearing panel. This action is also designed to make clear that documents submitted by other parties which bear on the prisoner’s suitability for parole are *not* required to be submitted 10 days prior to the parole hearing. Finally, this action corrects an internal reference to the CDC regulations”

This rulemaking action is entitled and consistently referred to as “Prisoner Presentation of Documents.” The last proposed deletion is to remove the sentence: “The prisoner’s attorney shall be notified that a prosecutor will attend [the hearing]” from section 2030(b) which provides that notice must be given to the prosecutor, who may participate in these hearings, at least 30 days before a scheduled hearing, and the prosecutor, if he wishes to participate, shall “at least two weeks before the hearing, notify the institution hearing coordinator that a representative will attend.” This proposed deletion would remove the next step in the process – notifying the prisoner’s representative that the prosecutor will attend in person. This deletion of notice to the prisoner’s attorney does not relate to presentation of documents, or the time lines affecting documents, nor does it further the procedural safeguards mentioned in the Informative Digest. We also note that the Updated Informative Digest (Tab F, Rulemaking Record) does not mention this substantial change at all. This proposed change is not sufficiently

related either to the text as originally noticed to the public [Government Code section 11346.8(c)], nor to the notice (section 42, Title 1, CCR), and thus cannot be included as part of this rulemaking action.

CONCLUSION

For the reasons set forth above, OAL has disapproved the proposed amendment of sections 2030, 2247, 2249, and 2270 of Title 15 of the CCR. If you have any questions, please contact me at (916) 323-6805.

December 18, 2002

BARBARA STEINHARDT-CARTER
Senior Staff Counsel

For:

SHEILA R. MOHAN
Acting Director/Chief Counsel

Original: Carol A. Daly, Chair
Cc: Lori Manieri