TO BE FILED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 81-607
of	:	OCTOBER 9, 1981
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THE BOARD OF PRISON TERMS has requested an opinion on the following question.

May the board provide for the postponement of a parole consideration hearing beyond the time specified in Penal Code sections 3041 and 3041.5(b)(2) in the case of a life prisoner who is facing new criminal or serious disciplinary charges?

CONCLUSION

The board may not provide for the postponement of a parole consideration hearing beyond the time specified in Penal Code sections 3041 and 3041.5(b)(2) in the case of a life prisoner who is facing new criminal or serious disciplinary charges.

ANALYSIS

Effective July 1, 1977, the Legislature repealed the 60-year-old Indeterminate Sentence Law (ISL) and replaced it with the Uniform Determinate Sentencing Act of 1976 (UDSA), also known as the Determinate Sentencing Law (DSL). (*Way* v. *Superior Court* (1977) 74 Cal. App. 3d 165, 168–169.) While the purpose of the ISL was to mitigate punishment and place emphasis upon the reformation of the offender, the DSL declares that "the purpose of imprisonment for crime is punishment." (Pen. Code, § 1170(a)(1);[1] *Way*, *supra*, at p. 169.) Under the DSL:

> "Felonies are divided into two categories, those for which sentence is imposed under section 1168, subdivision (b), and those for which sentence is imposed under section 1170. Persons convicted of crimes for which three periods of imprisonment are specified as punishment, and this includes the vast majority of felonies, are sentenced under section 1170. For convenience, we will refer to this group as the determinate sentence offenses, the remaining crimes, for which sentence is imposed under section 1170. For convenience, we will refer to this group as the determinate sentence offenses. The remaining crimes, for which sentence is imposed under section 1168, subdivision (b), are those felonies punishable by death, by life imprisonment, or by imprisonment for not more than a year and a day. We will call these the indeterminate sentence crimes. A life sentence with possibility of parole under the new law combines features of the determinate and indeterminate sentencing systems. . . ." (*People* v. *Community Release Bd.* (1979) 96 Cal. App. 3d 792, 796)

The DSL Provisions for parole of a life prisoner are set forth in sections 3040, 3041, 3041.5, 3041.7, 3042, and 3046.

The principal provisions of the enabling law which underlies the parole-granting power of the Board of Prison Terms ("board") are in sections 3040, 3041, and 3041.5.[2] (See *In re Fain* (1976) 65 Cal. App. 3d 376, 390)

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[1]Hereafter all section references will be to the Penal Code unless otherwise specified.

[2]Of the remaining DSL provisions affecting parole for life prisoners, section 3041.7 states in part:

> "At any hearing for the purpose of setting, postponing, ,it rescinding a parole release date of a prisoner under a life sentence . . . the provisions of section 30415 shall apply. . . ."

Section 3042 provides for notice to be given to certain officials with respect to the parole suitability hearing of a life prisoner, recordation of the hearing, nonrelease of the prisoner prior to 60 days from the hearing date, findings and supporting reasons to be stated on the record, and nondisclosure of confidential

Section 3040 reads in part:

"The Board of Prison Terms shall have the power to allow prisoners imprisoned in the state prisons pursuant to subdivision (b) of Section 1168 to go upon parole outside the prison walls and enclosures.

Section 3041 states in part:

"(a) In the case of any prisoner sentenced pursuant to any provision of law, other than Chapter 4.3 (commencing with Section 1170 of Tide 7 of Part 2), the Board of Prison Terms shall meet with each such inmate within the first year of incarceration solely for the purposes of reviewing the inmate's file and making recommendations. *One year prior to the inmate's minimum eligible parole release date a panel consisting of at least two members of the Board of Prison Terms shall again meet with the inmate and shall normally set a parole release date as provided in Section 3041.5*. The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates. The board shall establish criteria for the setting of parole release dates . . .

"(b) The panel or board shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.

". . . . . ."

(Emphasis added.)

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material to protect institutional security or those who might be endangered by disclosure.

Section 3046 sets the minimum eligible parole date (MEPD) of a life prisoner at seven calendar years with an additional seven years for each consecutive life sentence, if any. Additionally it requires the board to consider the statements submitted by some of the officials given notice under section 3042 (trial lodge, district attorney and sheriff) and the recommendations of other persons interested in the granting or denying of such parole.

Section 3041.5(b)(2) reads.

> "Within 20 days following any meeting where a parole date has not been set for the reasons stated in subdivision (b) of Section 3041, the board shall send the prisoner a written statement setting forth the reason or reasons for refusal to set a parole date; and suggest activities in which he might participate that will benefit him while he is incarcerated. *The board shall hear each such ease annually thereafter*." (Emphases added.)

Pursuant to section 3041(a) and 3076.2, requiring the board to promulgate and file any of its rules and regulations in compliance with the Administrative Procedures Act (former ch. 4.3 of pt. 1 of div. 3 of tit. 2 of the Gov. Code, repealed by Stats. 1979, ch. 367, § 2 and replaced by ch. 3.5, added by Stats. 1979, ch. 567, § 1 (Gov. Code, § 11340 *et seq*.)), the board promulgated regulations on parole consideration procedures for life prisoners.[3]

When an administrative agency has been granted the authority to adopt rules and regulations, such rules and regulations must be (1) consistent and not in conflict with the provisions of the enabling legislation and (2) reasonably necessary to effectuate its purpose. (§ 11342.2; *Mooney* v. *Pickett* (1971) 4 Cal. 3d 669, 679; *Mission Pak Co.* v. *State Bd. of Equalization* (1972) 23 Cal. App. 3d 120, 124–125.) The administrative agency may not vary or enlarge the terms of such legislation, i e., its rules and regulations must come within the scope of the authority conferred in order for the rule or regulation to be valid. (§ 11342.1; *Credit Ins. Gen. Agents Assn.* v. *Payne* (1976) 16 Cal. 3d 651, 656–657; *Mooney* v. *Pickett*, *supra*, 4 Cal. 3d at p. 681; *Bank of Italy* v. *Johnson* (1926) 200 Cal. 1, 21; *Graves* v. *Commission on Professional Competence* (1976) 63 Cal. App. 3d 970, 976; 60 Ops. Cal. Atty. Gen. 1, 3 (1977).)

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[3]Section 2272(a) of title 15 of the California Administrative Code sets forth the boards present regulations with respect to parole consideration procedures for life prisoners who have new criminal or serious disciplinary charges pending prior to the initial parole hearing or subsequent parole heating. (See 15 C.A.C. § 2265.) The validity of such regulations do not fall within the scope of the question or this analysis. Section 2272(a) of title 15 provides:

> "Initial Parole Hearing and Subsequent Parole Hearing. A prisoner with new criminal or disciplinary charges pending prior to the initial parole hearing or subsequent parole hearing shall be scheduled for the hearing as provided in this article. If it is determined during the course of the hearing that a decision regarding parole cannot be made because of the pending charges, the hearing panel shall continue the hearing. Department staff shall place the case on the miscellaneous proceedings calendar every 90 days from the date of the originally scheduled heating with a report of the status of the case. Following conclusion of the criminal or disciplinary charges, the case shall be scheduled for the next regular calendar."

We must determine whether a regulation authorizing the board to postpone a life prisoner's initial parole hearing or a subsequent parole hearing, without scheduling and convening the hearing when the prisoner has new criminal or serious disciplinary charges pending, may be adopted.

The "initial parole hearing" is the hearing where the prisoner is considered for parole for the first time. (§ 3041(a); Cal. Admin. Code, tit. 15. § 2268.) The "subsequent parole heating" is held no sooner than 12 months and no later than 14 months following any parole consideration heating at which parole was denied; its purpose is to reconsider the prisoner for parole. (§ 3041.5(b)(2); Cal. Admin. Code. tit. 15. § 2270.)

Section 3041(b) provides that the board "shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of *current* or past convicted *offense or offenses*, is such that consideration of the public safety requires a more lengthy period of incarceration . . ." (Emphasis added.) For a parole release date *not* to be set at either an initial or subsequent parole hearing on the basis of pending criminal or serious disciplinary charges, the emphasized phrase must be construed as referring to pending charges, not to offenses for which the prisoner has been convicted This is the construction placed on the phrase by the board's predecessor as early as 1977 (Cal. Admin. Register 77, No. 44 [former 15 C.A.C. § 2284 (b) and § 2291];[4] see

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[4]Former 15 C.A.C. section 2284(b) stated in part:

"Specific Factors Relating to the Prisoner Specific factors relating to the prisoner shall be considered in order to evaluate the prisoner's potential for succeeding under parole supervision in the community. They include factors relating to behavior occurring before and after the commitment offense and shall be considered by the hearing panel in conjunction with the criteria of § 2283 in determining the total period of confinement. Aggravating or mitigating factors should normally result in some adjustment, either upward or downward, to the time to be served for the elements of she crime itself.

". . . . . .

"(b) Postconviction Factors. Postconviction factors are those circumstances relating to prison conduct which do not factually relate to the commitment offense hu which shall be considered in determining the total period of confinement. . . .

". . . . . ."

Former 15 C.A.C. section 2291 provided:

"Adjustments for Postconviction Factors. (a) Prison Crimes. The hearing panel may increase the total period of confinement for crimes which occurred in prison.

"(1) Court Convictions—New Prison Commitment. The parole date for these offenses shall be established as provided in § 2295.

"(2) Court Conviction—No New Prison Commitment. The total period of confinement may be increased for court convictions which did not result in a new prison commitment and

15 CAC. §§ 2265, 2272, 2280, 2281(a)-(c), 2286(d), 2290(d), 2451.) Such construction is entitled to great weight and generally will not be departed from unless shown to be clearly erroneous or unauthorized. (*International Business Machines* v. *State Bd. of Equalization* (1980) 26 Cal. 3d 923, 930–931; *City of Walnut Creek* v. *County of Contra Costa* (1980) 101 Cal. App. 3d 1012, 1021.) Moreover, when the Legislature amends a statute without a modification which would require an interpretation contrary to that placed upon the statute by the administrative agency, such legislative action is persuasive that the intent was to continue the same construction as previously recognized and applied. (*Industrial Welf. Com*. v. *Superior Court* (1980) 27 Cal. 3d 690, 708, 709; *Wotton* v. *Bush* (1953) 41 Cal. 2d 460, 468.)

Section 3041(b) was amended in 1978 and 1979 (Stats. 1978, ch. 329, § 3; Stats. 1979, ch. 255, § 19) without making any modification which would require an interpretation contrary to that placed on the section by the board or its predecessor. We would also note that the board's interpretation of section 304 1(b) comports with the decisions of the California Supreme Court. For example, in the case of I (1974) 11 Cal. 3d 258, 268 the court stated:

> ". . . This court . . . has seldom had occasion to review parole release hearings. Although it has long been recognized that the Authority must exercise its discretion in good faith, neither arbitrarily nor capriciously (see *Roberts* v. *Duffy* (1914) 167 Cal. 629, 640 . . . [noting that the board's discretion must be exercised to reach a 'fair and Just conclusion']), it is only recently that we have attempted to identify with specificity what the general requirement entails. Beginning with *In re Schoengarth* (1967) 66 Cal. 2d 295. . . , we recognized that a prisoner not only has a right to apply for parole,

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which occurred since arrival in prison but before a parole date is granted.

"Court convictions which occur after a parole date is granted may increase the total period of confinement only after rescission proceedings. See Chapter 4

"(3) Disciplinary Offenses. The total period of confinement may be increased for serious disciplinary offenses which occurred arrival In prlson but before a parole date is granted. Only disciplinary offenses which might have resulted in rescission proceedings after a parole date has been granted shall affect the total period of confinement. These offenses are specified in § 2451.

"Serious disciplinary offenses which occur after a parole date is granted may increase the total period of confinement only after rescission proceedings. See Chapter 4

"(b) Other Postconviction factors. The total period of confinement may be decreased for other postconviction factors. Examples of these factors are enumerated in 2284(b)(2). In each case, the hearing panel shall consider all relevant postconviction factors known at the time of the hearing."

> but is entitled to have his application duly considered.' We further held in that case that *due consideration means an examination of the inmate's institutional conduct*, the nature of his offense, his age, his prior associations, his habits, inclinations and traits of character, the probability of his reformation, and the interest of public security. In the case of *In re Minnis* . . . [1972] 7 Cal. 3d 619 we held that 'due consideration' also necessarily entailed a periodic reconsideration of parole potential. . . ." (Emphasis added

Based on the foregoing, we are of the view that the board properly construed section 3041 (b). Note that if we construed the subject phrase to mean current convicted offense or offenses, it would be repetitious of the section's preceding phrase which refers to "the gravity of the current convicted offense or offenses. . . ." Since we are to give effect, whenever possible, to every word and clause of the statute and we are to assume that the Legislature did not indulge in an idle act in enacting the statute, it follows that the Legislature must have intended a different meaning from "current convicted offense or offenses" when it used the phrase "current or past convicted offense or offenses." (See *Gay Law Students Assn.* v. *Pacific Tel. & Tel. Co.* (1979) 24 Cal. 3d 458, 478; *Stafford* v. *Realty Bond Service Corp.* (1952) 39 Cal. 2d 797, 805; *Charles* s. v. *Board of Education* (1971) 20 Cal. App. 3d 83, 95.) And the interpretation by the board gives the subject phrase the different meaning which we believe the Legislature intended.

In order to determine whether the board may postpone the initial or subsequent parole hearing without convening such hearing when a life prisoner has new criminal or serious disciplinary charges pending, we look to the pertinent statutes, giving effect thereto according to the usual, ordinary import of the language employed and keeping in mind that the intent of the Legislature should be ascertained so as to effectuate the purpose of the law (See *California Teachers Assn.* v. *San Diego Community College Dist.* (1981) 28 Cal. 3d 692, 698)

The second sentence of section 304 1(a) states that "a panel consisting of at least two members of the Board of Prison Terms shall again meet with the inmate" and normally set a parole release date Section 304 1(b) provides in part that the panel or board "shall set a release date unless it determines that . . . the timing and gravity of current . . . offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration . . . and that a parole date . . . cannot be fixed at this meeting " Section 304 l.5(b)(2) states that within 20 days following any meeting where a parole date has not been set for the reasons given in section 3041(b), "the board shall send the prisoner a written statement setting forth the reason or reasons for refusal to set a parole date . . ." and "[t]he board shall hear each such case annually thereafter."

The language of sections 3041 and 3041 5(b)(2) requires the panel or board to fix a parole release date at an initial or subsequent parole hearing except as provided. (§ 3041(b).) As previously discussed, the gravity of current offenses is a basis for not fixing a parole release date at either the initial or subsequent parole hearing. Section 30415(b)(2) requires a statement of the reason or reasons for refusal to set a parole date ". . . following *any* meeting where a parole date has not been set." (Emphasis added.) this indicates the Legislature's intention that the meetings be mandatory The use of the word "shall" in the second sentence of section 3041(a) and the last sentence of section 3041 5(b)(2) is indicative of such intention The word "shall" is ordinarily a word of mandatory meaning. (See Ed. Code, § 75; Elec. Code, § 15; Evid. Code, § 11; Gov. Code, § 14; Health & Saf. Code, ,§ 16; Pub. Resources Code, § 15; Sts. & Hy. Code, § 16; Veh. Code, § 15; Wat. Code, § 15; Welf. & Inst. Code, § 15; *cf*. Pen. Code, § 7(16).) Note also that subsequent to the board's promulgation of section 2272 (a) of title 15 of the California Administrative Code (initially adopted as § 2273 (a) on July 9, 1977 (Cal. Admin. Register 77, No. 28),[5] renumbered from 2273 (a) to 2272 (a) effective July 21, 1978 (Register 78, No. 29)), the Legislature amended both section 3041 (Stats. 1978, ch. 329, § 3; Stats. 1979, ch. 255, § 19) and section 3041.3 (Stats. 1979, ch. 255, § 20; Stats. 1980, ch. 1117, § 12) without materially changing the provisions for the initial and subsequent parole hearings. As previously stated, when the Legislature amends a statute without a modification which would require an interpretation contrary to that placed upon the statue by the administrative agency, such legislative action is persuasive that the intent was to continue the same construction as previously recognized and applied. (*Industrial Welfare Com.* v. *Superior Court*, *supra*. 27 Cal. 3d at pp. 708, 709.)

We conclude that the board is without authority to provide for the postponement of a parole consideration hearing beyond the time specified in Penal Code sections 3041 and 3041.5(b) (2) in the case of a life prisoner who is facing new criminal or serious disciplinary charges. The parole consideration hearing is to take place whether or not a parole release date is fixed.

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[5]Section 2273(a) as adoted on July 9, 1977, provided:

"A prisoner with new criminal or disciplinary charges pending prior to his initial parole hearing, subsequent parole hearing, or rehearing shah be scheduled for the hearing as provided in § 2268, 2270, 2271, or 2272 as appropriate. If it is determined during the course of the hearing that a decision regarding parole cannot be made because of the pending charges, the hearing panel shall continue the hearing. Department staff shall place the case on the miscellaneous proceedings calendar every 90 days from the date of the originally scheduled hearing including a report of the status of the case Following conclusion of the criminal or disciplinary charges, the case shall be scheduled for the next regular calendar."