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## State of Louisiana

DEPARTMENT OF JUSTICE  
CIVIL DIVISION  
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BATON ROUGE  
70804-9005

July 18, 2023  
OPINION 23-0083

Francis M. Abbott  
Executive Director  
Louisiana Board of Pardons &  
Committee on Parole  
P.O. Box 94304  
Baton Rouge, LA 70804

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La. R.S. 15:572.4  
La. R.S. 49:951

La. R.S. 49:961  
La. R.S. 49:962

LAC 22:V.213(M) does not permit the Board to waive the one-year eligibility period contained in LAC 22:V.203.

Dear Mr. Abbott:

You requested the opinion of this office regarding the administrative rules for the Louisiana Board of Pardons and Parole (the "Board"). Specifically, you asked whether the waiver provision contained in LAC 22:V.213 ("Rule 213") may be used to waive the provisions contained in LAC 22:V.203(E) ("Rule 203").

Rule 203 establishes the eligibility requirements for clemency consideration. Rule 203(E) provides, "Any offender sentenced to death may submit an application within one year from the date of the direct appeal denial. See also §213, Capital Cases."

Rule 213 sets forth the procedural requirements for an offender to submit an application to the Board for the Board's consideration of a recommendation to the governor for a stay of execution of a death sentence. Rule 213 also sets forth the hearing procedures pursuant to which the Board considers the applications. Rule 213(M) purportedly permits the Board to waive any procedural requirements regarding the application or hearing procedures contained in Rule 213:

Each of the provisions of this policy are subject to waiver by the board when it finds that there exists good and adequate cause to suspend said provisions and adopt a different procedure which it finds to be better suited to the exigencies of the individual case before it.

The Rule 213(M) waiver applies to "the provisions of this policy," i.e., the procedures for consideration of clemency applications in capital cases, as set forth in Rule 213. Rule 203 provides eligibility requirements for clemency applications and touches upon an array of application types not limited to capital cases. Although Rule 203(E) cross-references Rule 213 to direct the reader to that rule's procedural requirements, this does not subject Rule 203(E)'s one-year eligibility requirement to waiver by virtue of Rule 213(M). However, even assuming *arguendo* that the eligibility period provided in Rule 203(E) falls

within the reach of Rule 213(M)'s waiver authority, such a waiver would be contrary to law for the reasons set forth below. See La. R.S. 49:955, La. R.S. 49:961, and La. R.S. 15:572.4.

The Authority Note for Rule 213, states that the Board promulgated Rule 213 pursuant to La. R.S. 15:572.4, La. R.S. 15:574.12, and La. R.S. 44:1 *et seq.* None of these statutes support the waiver provision in Rule 213(M). The legislature may confer upon administrative agencies the power to “fill up the details” of a law by prescribing administrative rules and regulations. *Adams v. State Dep't of Health*, 458 So.2d 1295, 1298 (La. 1984). However, administrative agencies are limited to ascertaining the facts upon which the laws are to be applied and enforced. *State v. Taylor*, 479 So.2d 339, 341 (La. 1985). An administrative board or agency may not exceed the statutory authority set forth by the legislature. It may be permissible for the Board to waive certain requirements set forth in rule by the Board; however, the procedures for waiving the rule must be themselves adopted and adequately set forth in rule. The broad and ill-defined waiver in Rule 213(M) ostensibly empowers the Board to repeal portions of its own rules and enact new ones at will, on an ad-hoc basis, and without any notice to the public. Such a result is impermissible under Louisiana law.

The Administrative Procedure Act (the “APA”), La. R.S. 49:950, *et seq.*, expressly provides for public access and notice to agency decision-making in the promulgation and repeal of rules. The APA defines a “rule” as follows:

“Rule” means each agency statement, guide, or requirement for conduct or action, exclusive of those regulating only the internal management of the agency and those purporting to adopt, increase, or decrease any fees imposed on the affairs, actions, or persons regulated by the agency, which has general applicability and the effect of implementing or interpreting substantive law or policy, or which prescribes the procedure or practice requirements of the agency. “Rule” includes, but is not limited to, any provision for fines, prices or penalties, the attainment or loss of preferential status, and the criteria or qualifications for licensure or certification by an agency. A rule may be of general applicability even though it may not apply to the entire state, provided its form is general and it is capable of being applied to every member of an identifiable class. The term includes the amendment or repeal of an existing rule but does not include declaratory rulings or orders or any fees.

La. R.S. 49:951(8) (emphasis added).

Explicitly included in the APA definition of a rule is the repeal of an existing rule. Thus, in enacting *or repealing* a rule, agencies must adhere to the procedures set forth in the APA. The APA not only provides the public with notice and access to agency decision-making, the APA also provides for legislative oversight and gubernatorial veto of proposed rules prior to enactment or repeal. The waiver provision contained in Rule 213(M) circumvents the requirements of the APA. Rule 213(M) permits the Board to waive—essentially

repeal—any requirement set forth in Rule 213 and adopt new procedures or rules without public notice or legislative or gubernatorial oversight. A waiver in rule may be permissible in some circumstances, provided that the requirements and procedures for the waiver are properly set forth in the rule. The waiver in Rule 213(M) does not set forth the policies the Board must follow to waive the provisions in Rule 213, nor does the rule provide any means of notice to the public of the waivers granted by the Board.

In extraordinary circumstances, the APA permits the adoption of an emergency rule as an alternative to the ordinary rulemaking provisions contained in La. R.S. 49:961. However, an emergency rule may only be adopted for the following reasons:

- (a) To prevent imminent peril to the public health, safety, or welfare.
- (b) To avoid sanctions or penalties from the United States.
- (c) To avoid a budget deficit in the case of the medical assistance program.
- (d) To secure new or enhanced federal funding.
- (e) To effectively administer provisions of law related to the imposition, collection, or administration of taxes when required due to time constraints related to congressional, legislative, or judicial action.

La. R.S. 49:962(A)(1).

In the matter at hand, however, there exists no factual basis for the Board to engage in emergency rulemaking. Even to the extent that the nature of the Board rules at issue here demonstrate that your request concerns death row inmates, the carrying out of the death penalty upon lawfully convicted and sentenced individuals does not satisfy any of the five reasons set forth by the legislature in La. R.S. 49:962(A)(1). No exigency exists where there are currently no warrants issued for execution and where it has been officially reported that the drugs needed to carry out a lethal injection are not available.<sup>1</sup>

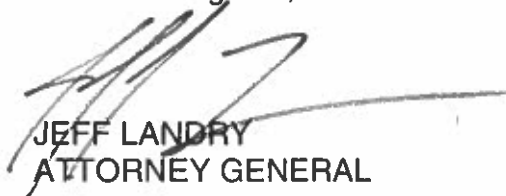
Considering the foregoing, it is the opinion of this office that Rule 213(M) does not permit the Board to waive the one-year eligibility period contained in Rule 203.

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<sup>1</sup> See *Hoffman, et al. v. Jindal, et al.*, 2022 WL 16571312 (M.D. La. 2022).

We trust this adequately responds to your request. However, if our office can be of further assistance, please do not hesitate to contact us.

With best regards,



JEFF LANDRY  
ATTORNEY GENERAL