STATE OF MICHIGAN

COURT OF APPEALS

WAYNE COUNTY PROSECUTOR,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant-Appellee,

and

ROBERT JOSEPH OWENS, JR.,

Defendant.

UNPUBLISHED
October 29, 1999

No. 216270
Wayne Circuit Court
LC No. 98-813465 PC

Before: Gribbs, P.J., and Smolenski and Gage, JJ.

PER CURIAM.

This case arises from plaintiff's complaint for declaratory judgment that the parole guideline rule, 1996 AACS, R 791.7716 is unconstitutional. Plaintiff appeals as of right from an order granting summary disposition in favor of defendant pursuant to MCR 2.116(I)(2). We affirm.

Plaintiff contends on appeal that the Legislature would have adopted MCL 791.233e; MSA 28.2303(6) if it knew that the rule promulgation requirements of the Administrative Procedures Act (APA), MCL 24.201 *et seq*.; MSA 3.560(101) *et seq*., in particular MCL 24.245-246; MSA 3.560(145)-(146) (sometimes referred to as § § 45 and 46) as indicated in MCL 791.233e(5); MSA 28.2303(6)(5), would be severed from MCL 791.233e; MSA 28.2303(6). We disagree with this contention.[1]

We will perform a de novo review of this issue because it involves both a question of statutory interpretation and a grant of a motion for summary disposition. *Oakland Co Bd of Road Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998);

Spiek v Dep't of Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998). MCL 8.5; MSA 2.216 provides a statutory rule of construction regarding the severability of statutes:

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:
>
> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

Generally, portions of acts are severable as long as the remaining portions can operate without the severed portions. *Citizens for Logical Alternatives & Responsible Environment v Clare Co Bd of Comm'rs*, 211 Mich App 494, 498; 536 NW2d 286 (1995). In deciding whether particular language in a statute can be severed, courts may look to an act's legislative history to determine whether the severance of the provision results in an outcome consistent with the Legislature's intent. See *id.* at 499. Thus, severance is appropriate if "the valid portion of the statute can be read and enforced independently of the invalid portion and remains reasonable in view of the act as originally drafted." *Id.* at 498. One test applied to determine whether the remaining portion of the statute is capable of separate enforcement is whether the Legislature would have passed the statute had it been aware that portions therein would be declared to be invalid and excised from the act. *Pletz v Secretary of State*, 125 Mich App 335, 375; 336 NW2d 789 (1983).

MCL 791.233e; MSA 28.2303(6) provides as follows:

> (1) The department shall develop parole guidelines that are consistent with section 33(1)(a) and that shall govern the exercise of the parole board's discretion pursuant to sections 34 and 35 as to the release of prisoners on parole under this act. The purpose of the parole guidelines shall be to assist the parole board in making release decisions that enhance the public safety.
>
> (2) In developing the parole guidelines, the department shall consider factors including, but not limited to, the following:
>
> (a) The offense for which the prisoner is incarcerated at the time of parole consideration.
>
> (b) The prisoner's institutional program performance.
>
> (c) The prisoner's institutional conduct.
>
> (d) The prisoner's prior criminal record. As used in this subdivision, "prior criminal record" means the recorded criminal history of a prisoner, including all

misdemeanor and felony convictions, probation violations, juvenile adjudications for acts that would have been crimes if committed by an adult, parole failures, and delayed sentences.

(e) Other relevant factors as determined by the department, if not otherwise prohibited by law.

(3) In developing the parole guidelines, the department may consider both of the following factors:

(a) The prisoner's statistical risk screening.

(b) The prisoner's age.

(4) The department shall ensure that the parole guidelines do not create disparities in release decisions based on race, color, national origin, gender, religion, or disability.

(5) The department shall promulgate rules pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws, which shall prescribe the parole guidelines. The department shall submit the proposed rules to the joint committee on administrative rules not later than April 1, 1994. Until the rules take effect, the director shall require that the parole guidelines be considered by the parole board in making release decisions. After the rules take effect, the director shall require that the parole board follow the parole guidelines.

(6) The parole board may depart from the parole guideline by denying parole to a prisoner who has a high probability of parole as determined under the parole guidelines or by granting parole to a prisoner who has a low probability of parole as determined under the parole guidelines. A departure under this subsection shall be for substantial and compelling reasons stated in writing. The parole board shall not use a prisoner's gender, race, ethnicity, alienage, national origin, or religion to depart from the recommended parole guidelines.

(7) Not less than once every 2 years, the department shall review the correlation between the implementation of the parole guidelines and the recidivism rate of paroled prisoners, and shall submit to the joint committee on administrative rules any proposed revisions to the administrative rules that the department considers appropriate after conducting the review.

After reviewing the statute and associated pre-enactment legislative history, we find that the Legislature did not intend to actively participate, oversee, or contribute to the promulgation of parole guideline rules. Rather, the intent of the Legislature was to codify defendant's responsibility to develop parole guidelines so that the parole board's decisions would be based on objective and legally relevant factors. Because the Legislature did not intend to oversee the promulgation of the parole guidelines, we

conclude that the Legislature's inclusion of the rule promulgation requirement provisions of the APA as set forth in MCL 791.233e(5); MSA 28.2303(6)(5) was merely to conform the statute with the then-existing rule promulgation requirements as detailed in the APA. Therefore, we further conclude that § § 45 and 46 of the APA, as related to MCL 791.233e(5); MSA 28.2303(6)(5), are severable because the statute can be read and enforced independently of those invalid portions and remains reasonable in view of the statute as originally drafted.

Further, the Legislature is assumed to be aware of administrative interpretations of its acts and, thus, legislative silence following an agency's construction is construed as consent to that construction. *Parker v Byron Center Public Schools Bd of Ed*, 229 Mich App 565, 570; 582 NW2d 859 (1998). If the Legislature disapproved of the parole guideline rule because the rule was unauthorized, not within legislative intent, or inexpedient, pursuant to MCL 24.251; MSA 3.560(151), the Legislature could have: (1) enacted a bill, passed by a majority of both houses and presented to the Governor, that revoked the rule; or, (2) adopted a resolution expressing its disapproval of the rule in an effort to recommend to the promulgating agency to withdraw or amend the rule. *Michigan State Employees Ass'n v Liquor Control Comm*, 232 Mich App 456, 465-466; 591 NW2d 353 (1998); *Blank v Dep't of Corrections*, 222 Mich App 385, 398-399; 564 NW2d 130 (1997), lv gtd 459 Mich 878 (1998).

The next issue on appeal is whether defendant was required to submit its proposed parole guideline rules to the Joint Committee on Administrative Rules (JCAR), in conformity with § 45 of the APA, as provided in MCL 791.233e(5); MSA 28.2303(6)(5), even though this Court, in *Blank, supra* at 388-389, explicitly declared that the retention of the JCAR's veto power was unconstitutional. Plaintiff argues that the holding in *Blank* is not applicable to MCL 791.233e; MSA 28.2303(6) because *Blank* involved a different underlying issue, i.e., the promulgation of prisoner visitation rules, not parole guideline rules. We disagree. While the specific rule at issue in *Blank* involved prisoner visitation, this Court's decision involved the broader question of "the constitutionality of [the] statutory scheme that essentially requires that administrative rules established by the Michigan Department of Corrections (DOC) and other state administrative agencies be submitted to a joint committee of the Legislature for approval before becoming effective." *Blank, supra* at 388. Therefore, we conclude that defendant was not required to submit its proposed parole guideline rules to the JCAR, in conformity with § 45 of the APA, as provided in MCL 791.233e(5); MSA 28.2303(6)(5), because the legislative approval requirement has been declared unconstitutional.

Next, plaintiff contends that the parole guidelines rule, 1996 AACS, R 791.7716 (sometimes referred to as "the rule") does not conform with the requirements of 1992 PA 181.[2] We disagree.

The substantive validity of an agency's rules promulgated pursuant to its statutory authority is determined by a three-part test: (1) whether the rule is within the subject matter of the enabling statute; (2) whether it complies with the legislative intent underlying the enabling statute; and, (3) whether it is arbitrary or capricious. *Luttrell v Dep't of Corrections*, 421 Mich 93, 100; 365 NW2d 74 (1984); *Faircloth v Family Independence Agency*, 232 Mich App 391, 405 n 7; 591 NW2d 314 (1998). We find that the rule is explicitly within the subject matter covered by the enabling statute, in particular MCL 791.233e(5); MSA 28.2303(6)(5). Therefore, the rule meets the first test of validity. Further,

we find that the rule meets the second test of validity because it substantially mirrors MCL 791.233e; MSA 28.2303(6) and conforms with the legislative intent that defendant develop parole guidelines so that the parole board's decisions would be based on objective and legally relevant factors.

Finally, plaintiff contends that the rule is arbitrary and capricious because it does not designate the manner in which the factors considered by the parole board are to be weighted and that the scores or scoring ranges are disproportionate to the significance of the factors. We disagree. The arbitrary and capricious standard was explained recently in *Blank, supra* at 407 (citations omitted):

> A rule is arbitrary if it was fixed or arrived at through an exercise of will or by caprice, without giving consideration to principles, circumstances, or significance.. A rule is capricious if it is apt to change suddenly or is freakish or whimsical. If a rule is rationally related to the purpose of the statute, it is neither arbitrary nor capricious. Further, if there is any doubt about the invalidity of a rule in this regard, the rule must be upheld. -

MCL 791.233e(1); MSA 28.2303(6)(1) mandated that defendant develop parole guidelines that were consistent with MCL 791.233(1)(a); MSA 28.2303(1)(a), which requires the parole board to have reasonable assurances that the prisoner will not become a menace to society or to the public safety. MCL 791.233e(1); MSA 28.2303(6)(1) vested broad discretion in defendant to develop and implement the parole guidelines and did not contain a provision requiring that the parole guidelines be designed in any particular manner or that the various mandated factors of consideration be quantified or proportionately weighted. MCL 791.233e(5); MSA 28.2303(6)(5) also mandated that defendant promulgate rules which "prescribe" the parole guidelines. While plaintiff contends that the rule is simply a "re-hash" of 1992 PA 181, which "adds nothing," we note that the word "prescribe" does not mean "to quantify," but rather to "lay down authoritatively as a guide, direction, or rule." See Black's Law Dictionary (5^{th} ed), p 1064.

In the present case we conclude that defendant properly prescribed a rule which mandated quantification, through scoring, of the various factors to be considered in parole decisions. The parole guideline scores are based on a combination of the length of time the prisoner has been incarcerated for the offense for which parole is being considered and various aggravating and mitigating factors, with defendant publishing numeric scores for the aggravating and mitigating factors not less than once every two years. 1996 AACS, R 791.7716(2) and (3). Such quantification illustrates an effort to standardize and give some measure of comparison to parole decision making to ensure uniformity and consistency in parole decisions. Quantification also allows a means to track recidivism rates so that scores assigned to various factors can be tested for their predictive viability and adjusted accordingly. This Court gives great deference to an agency's interpretation of a statute or rule. *Tercheck v Dep't of Treasury*, 171 Mich App 508, 512; 431 NW2d 208 (1988). "[R]ules are valid so long as they are not unreasonable; and, if doubt exists as to their invalidity, they must be upheld." *Sterling Secret Service, Inc v Dep't of State Police*, 20 Mich App 502, 514; 174 NW2d 298 (1969).

Accordingly, we find that R 791.7716 is neither arbitrary or capricious, but rationally related to the Legislature's purpose to codify defendant's responsibility to develop and promulgate parole guidelines so that the parole board's decisions would be based on objective and legally relevant factors.

Affirmed.

/s/ Roman S. Gribbs
/s/ Michael R. Smolenski
/s/ Hilda R. Gage

[1] Plaintiff's contention arises from this Court's opinion in *Blank v Dep't of Corrections*, 222 Mich App 385, 392-402; 564 NW2d 130 (1997), lv gtd 459 Mich 878 (1998), which held that the legislative approval requirements for proposed agency rules as set forth in § 45 was unconstitutional, and that the requirement in § 46 that an agency may not file a rule with the Secretary of State without a certificate of legislative approval was a nullity.

[2] 1992 PA 181 states: "AN ACT to amend sections 32, 34, 35, and 44 of Act No. 232 of the Public Acts of 1953, entitled as amended 'An act to revise, consolidate, and codify the laws relating to probationers and probation officers, to pardons, reprieves, commutations, and paroles, to the administration of correctional institutions, correctional farms, and probation recovery camps, to prisoner labor and correctional industries, and the supervision and inspection of local jails and houses of correction; to provide for the siting of correctional facilities; to create a state department of corrections, and to prescribe its powers and duties; to provide for the transfer to and vesting in said department of powers and duties vested by law in certain other state boards, commissions, and officers, and to abolish certain boards, commissions, and offices the powers and duties of which are hereby transferred; to prescribe the powers and duties of certain other state departments and agencies; to provide for the creation of a local lockup advisory board; to prescribe penalties for the violation of the provisions of this act; to repeal certain parts of this act on specific dates; and to repeal all acts and parts of acts inconsistent with the provisions of this act,' sections 32 and 44 as amended by Act No. 314 of the Public Acts of 1982 and sections 34 and 35 as amended by Act No. 22 of the Public Acts of 1992, being sections 791.232, 791.234, 791.235, and 791.244 of the Michigan Compiled Laws; to add sections 31a and 33e; to repeal certain acts and parts of acts; and to repeal certain parts of the act on specific dates."