

FILED: September 21, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

ARLEN PORTER SMITH
and DWAYNE EDWARD ABRAHAM,
Petitioners,

v.

DEPARTMENT OF CORRECTIONS
and BOARD OF PAROLE & POST-PRISON SUPERVISION,
Respondents.

A132629

On respondent Board of Parole & Post-Prison Supervision's petition for reconsideration filed July 12, 2011, and petitioner Arlen Porter Smith's response to petition for reconsideration filed June 28, 2011. Opinion filed May 25, 2011. 243 Or App 45, ___ P3d ___ (2011).

John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Erin C. Lagesen, Assistant Attorney General, for petition.

Arlen Porter Smith *pro se* for response.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Rosenblum, Senior Judge.

PER CURIAM

Reconsideration allowed; former disposition withdrawn; former opinion modified and adhered to as modified; OAR 255-060-0011 and OAR 255-060-0016 held valid; OAR 291-062-0110, OAR 291-062-0140, OAR 291-082-0105(15), and OAR 291-082-0110 held invalid.

1 PER CURIAM

2 The Board of Parole and Post-Prison Supervision (board) seeks
3 reconsideration of our decision in [Smith v. Dept. of Corrections](#), 243 Or App 45, ___ P3d
4 ___ (2011). In that decision, petitioners challenged six administrative rules that
5 referenced an actuarial risk assessment instrument called the STATIC-99. Two of those
6 rules--OAR 255-060-0011 and OAR 255-060-0016--were promulgated by the board,
7 while four of the rules--OAR 291-062-0110, OAR 291-062-0140, OAR 291-082-
8 0105(15), and OAR 291-082-0110--were promulgated by the Department of Corrections
9 (DOC). We invalidated all six rules because we believed that the board and DOC did not
10 promulgate the rules properly by filing the necessary exhibits that describe the STATIC-
11 99 with the Secretary of State as required by OAR 166-500-0040. In its petition, the
12 board informs us that we were mistaken in our belief regarding the board's two rules and
13 that the board did in fact file the correct exhibits with the Secretary of State. We
14 acknowledge our mistake and, therefore, find the board's rules properly promulgated and
15 valid.¹

16 The DOC does not join the board's petition for reconsideration and,
17 therefore, the DOC's rules remain invalid as stated in our prior opinion.

18 Reconsideration allowed; former disposition withdrawn; former opinion
19 modified and adhered to as modified; OAR 255-060-0011 and OAR 255-060-0016 held

¹ In their original petition, petitioners argued that the board's rules were unconstitutionally vague. We did not address that argument in the previous opinion; we now reject that argument without discussion.

- 1 valid; OAR 291-062-0110, OAR 291-062-0140, OAR 291-082-0105(15), and OAR 291-
- 2 082-0110 held invalid.