

Opinion No. 70-12

February 2, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Honorable Tibo J. Chavez Senate Majority Floor Leader Legislative-Executive Building Santa Fe, N.M. 87501

QUESTIONS

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Is the ultimate power to grant and revoke parole under the "Corrections Act", Sections 42-9-1 through 42-9-11, N.M.S.A., 1953 Compilation (1969 P.S.), vested in the Secretary of Corrections or the Adult Parole Hearing Board?

CONCLUSION

The Adult Parole Hearing Board is vested with the sole and ultimate power to grant and revoke parole.

OPINION

{*18} ANALYSIS

The confusion in this area seems to arise from a latent contradiction between two separate sections of the "Corrections Act" which deal with where the power to grant or revoke parole is ultimately vested. Upon a mere reading of the "Corrections Act," no contradiction is apparent, but when the Act is read in conjunction with other statutes dealing with granting and revoking parole it appears that the authority to act in this capacity has been granted twice.

Section 42-9-8, N.M.S.A., 1953 Compilation (1969 P.S.), created the Adult Parole Hearing Board.

"There is created the 'adult parole hearing board' which shall consist of five [5] voting members. One [1] member shall be the secretary of corrections who may designate either the director of adult probation and parole or the director of adult institutions as his representative; four [4] members shall be appointed by the secretary with the approval of the governor for four [4] year terms. The terms shall be so staggered that one [1] seat on the board terminates each year on December 31. Not more than two [2] of the appointive members shall belong to the same political party.

"Three [3] members, providing one [1] of the three [3] is the secretary of corrections, or his representative, shall constitute a quorum. Majority vote of the board shall determine such questions as come before the board.

"The four [4] members appointed by the secretary shall receive compensation as provided by the Per Diem and Mileage Act [5-10-1 to 5-10-5]. Meetings of the board shall be set for regular, recurrent dates consistent with the work load. In the event of the need for a special meeting, the secretary of corrections shall summon the members. Meetings shall be held at the penitentiary of New Mexico at Santa Fe. All records shall be kept by the director of adult probation and parole whose office shall handle, for the board, all correspondence and communications.

"No appointment to the board shall be an official or employee of the federal, state or local government at the time of, or during, his appointment; his government service shall be exclusive to the board. Nor shall any appointee hold state or county position in any political party.

{*19} "Board members may be appointed to successive terms and shall continue in their appointment until their successor is appointed and qualified. Vacancies on the board shall be filled promptly by the secretary of corrections." (Emphasis added.)

It was obviously the intention of the Legislature that this board was to take the place of the State Board of Probation and Parole which had been created by Section 41-17-15, N.M.S.A., 1953 Compilation (repealed), and that the new board was to exercise the powers and use the procedures which had previously been set out in the "Probation and Parole Act," Sections 41-17-12 through 41-17-34, N.M.S.A., 1953 Compilation. This intention is made evident by the fact that the sections creating the State Board of Probation and Parole were repealed by the "Corrections Act" while all other sections in the "Probation and Parole Act" were unaffected. Furthermore, the Legislature made no attempt to set out the scope of authority or the administrative rules and procedures for the Adult Parole Hearing Board in the "Corrections Act", but depended on the remaining sections of the "Probation and Parole Act" to serve this function. The most pertinent of these remaining sections is Section 41-17-24, N.M.S.A., 1953 Compilation, set out below:

"The board may release on parole any person confined in any correctional institution administered by state authorities, except persons under sentence of death, when the prisoner gives evidence of having secured gainful employment or satisfactory evidence of self-support, and the board finds in its opinion the prisoner can be released without detriment to himself or to the community.

"The board shall consider all pertinent information regarding each inmate, including the circumstances of his offense, the reports filed under section 14 [41-17-23] above, his previous social history and criminal record, his conduct, employment and attitude in prison, and the reports of such physical and mental examinations as have been made.

"At least thirty [30] days before ordering any parole, the board shall notify the district judge of the judicial districts [sic] from which the inmate was committed to the correctional institution. Such judge may express his views on the inmate's prospective parole either in writing or personally, to the board, **but the final decision on parole shall be of the board.**

"Before ordering the parole of any prisoner, the board shall have the inmate appear before it and shall interview him at the institution to which he is committed. A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered a reduction of sentence or a pardon. An inmate shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. **Every prisoner while on parole shall remain in the legal custody of the institution from which he was released but shall be subject to the orders of the board.** The board shall furnish to each person released under their supervision a written statement of the conditions of parole which shall be accepted and agreed to by him as evidenced by his signature affixed to a duplicate copy to be retained in the files of the board and shall instruct him regarding the same. Provided that the following rules shall apply to the eligibility of prisoners for paroles:

"1. Prisoners may become eligible for parole hearing after they have completed one-third of their minimum sentence; however, they must have a clear conduct record for at least six [6] months prior to their appearance before the parole board.

"2. Prisoners having minimum sentences of ten [10] years or more shall be required to serve one-third of ten [10] years plus one [1] month additional for every year beyond a ten-year sentence before becoming eligible to appear before the parole board.

"3. Prisoners sentenced for thirty [30] years or more shall become eligible to appear before the parole {*20} board after they have served seven [7] years of their minimum sentence.

"4. Prisoners sentenced to life imprisonment shall become eligible to appear before the parole board after they have served ten [10] years.

"5. An inmate may, at any time, after one [1] year has elapsed from the time he has appeared before the parole board, make application for a review of his case; however, the board may decide if he should appear before them or a review of his record may be made without having him appear in person.

"6. The board may on its own motion re-open any case in which a hearing has already been granted and parole denied.

"The board may adopt such other rules not inconsistent with law as it may deem proper or necessary, with respect to the eligibility of prisoners for parole, the conduct of parole hearings **or conditions to be imposed on parolees.** Whenever an order for parole is issued it shall recite the conditions thereof." (Emphasis added.)

The powers and procedures set out in the above section were exercised by the State Board of Probation and Parole before that board was abolished and the new Adult Parole Hearing Board was created. Unless these powers and procedures are now to be exercised by the Adult Parole Hearing Board, that board is powerless to perform its intended functions, and the obvious intention of the Legislature in creating this board will have been completely frustrated.

The contradiction now arises from a careful reading of Section 42-9-9, N.M.S.A., 1953 Compilation (1969 P.S.), set out below:

"Wherever, under any statute, which was administered or enforced, prior to the effective date of the Corrections Act [42-9-1 to 42-9-11], by the penitentiary of New Mexico board, **the state board of probation and parole**, the combined board of the juvenile institutions known as the New Mexico Boys' School and the Girls' Welfare Home, the juvenile probation services division of the administrative office of the courts, its officers or employees, reference is made to any such previously named officers, employees, councils, commissions, **boards** or agencies, **the reference shall be construed to mean the secretary of corrections.**" (Emphasis added.)

If this section is to be construed strictly and literally, all references to the now defunct State Board of Probation and Parole in the "Probation and Parole Act" would now be construed to refer to the Secretary of Corrections; thus stripping the Adult Parole Hearing Board of all of its powers and functions. We feel that, if this had been the intention of the Legislature, it would never have created an Adult Parole Hearing Board in the first place, let alone make the Secretary of Corrections the head of the Board.

Section 42-9-11, N.M.S.A., 1953 Compilation (1969 P.S.) states: "The Corrections Act [42-9-1 to 42-9-11] shall be liberally construed to carry out its purposes."

The obvious purpose of the Legislature in creating the Adult Parole Hearing Board was that this board was to be substituted for the old State Board of Probation and Parole and that the new board was to assume and exercise all the powers, duties and functions exercised by the old board under the "Probation and Parole Act." Section 42-9-11, supra, demands that Section 42-9-9, supra, be liberally construed to carry out this purpose.

On November 1, 1969, the Secretary of Corrections, as required by Section 42-9-10 (A), N.M.S.A., 1953 Compilation (1969 P.S.), published his Administrative Procedures, Rules and Regulations. These guidelines are supplementary to the "Corrections Act" and the "Probation and Parole Act," not superior to them, and they are valid only insofar as they are in accord with the statutory provisions of those acts, but they are especially important here in that they show that the Secretary of Correction's interpretation of the "Corrections Act" and the {21} "Probation and Parole Act" is exactly the same as the interpretation expressed in this opinion. Especially pertinent are Section V (E) (8) and Section V (E) (9) of the Administrative Procedures, Rules and Regulations, set out below:

"V (E) (8) **Parole Application.** -- As prescribed by law (NMSA 1953, Sec. 41-17-24), every prison resident shall be given a personal hearing **by the Board** when he is initially eligible for parole. If denied parole at that time, he will be automatically reviewed administratively by the Board annually as allowed by statute. However, the Secretary may order special review to be held administratively or in a personal hearing as he directs.

"For parole to be granted, a majority vote of the members present is necessary.

"No proxy votes will be recognized." (Emphasis added.)

"V (E) (9) **Parole Revocation.** -- As prescribed by statute (NMSA 1953, Sec. 41-17-28), every parole violator returned is to be given a personal hearing. **Board action** shall have one of the following designations:

- a. Parole revoked
- b. 1) Parole revoked
2) Another parole granted
- c. Parole reinstated
- d. Under advisement

"A majority vote of the Board members present is necessary to revoke parole. When parole is revoked, crediting of parole time on sentence shall be indicated on the action notice." (Emphasis added.)

It is, therefore, the opinion of this office that the purpose of the Legislature in creating the Adult Parole Hearing Board was that the ultimate power to grant or revoke parole be vested in that Board, that such powers shall be exercised by the Board in accordance with the pertinent provisions of the "Probation and Parole Act" and the "Corrections Act," and that the provisions of these acts be liberally construed so as to best carry out their purposes.

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