Opinion No. 72-66

November 27, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General Harvey B. Fruman, Assistant Attorney General

TO: Mr. Santos Quintana, Executive Secretary, Adult Parole Hearing Board, Post Office Box 2006, Santa Fe, New Mexico 87501

QUESTIONS

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1. What reasons should be given by the Adult Parole Hearing Board in granting or denying parole?

2. While the voluntary submission to urinalysis is not a requisite for eligibility for a parole hearing, the Board, as a matter of policy, has decided to consider this factor as a proof of a known drug user's rehabilitation motivation. May the Board deny parole solely because a prisoner has refused to submit to voluntary urinalysis?

3. What action may the Board take when there has been a violation of the conditions of parole after parole has been granted but prior to the release of the prisoner on parole?

4. Once parole is revoked because of a violation of conditions, how long must the ex-parolee wait before again being eligible for parole consideration?

CONCLUSIONS

1. See analysis.

2. Yes, see analysis.

3. See analysis.

4. See analysis.

OPINION

*{*107}* ANALYSIS

Section 41-17-24, N.M.S.A., 1953 Comp. (1972 Repl. Vol.), entitled "Parole Authority and Procedure" states that a prisoner may be paroled by the Board when given "evidence of having secured gainful employment or satisfactory evidence of self-support

. . ." and when it finds that ". . . the prisoner can be released without detriment to himself or to the community."

As the reasons for the granting of parole are given by this statute, when the evidence presented at the hearing does not support the grant of parole, the Board should use negative wording of the listed reasons to deny parole. Therefore, in denying parole, the Board should employ one or a combination of the following reasons:

1. There is no evidence of the prisoner having secured gainful employment;

*{*108}* 2. There is no satisfactory evidence of self-support; or,

3. It is the opinion of the Board that the prisoner cannot be released without detriment to himself or to the community.

Referring to the second question, in determining whether to grant or deny parole, "the Board shall consider all pertinent information . . . including the circumstances of his offense, the reports filed (as to presentence and prerelease investigations), his previous social history, and the reports of such physical and mental examinations as have been made . . ." Section 41-17-24, **supra.**

Thus the results of urinalysis may be considered as a part of the prisoner's physical examination. If the Board deems it necessary and proper pursuant to its authority under Section 41-17-24, **supra,** to implement such requirement, we suggest that the Board adopt a resolution to that effect. Then, based on other factors in the prisoner's history, should the Board decide that because there was no voluntary submission it cannot form the opinion that release would not be detrimental to the prisoner or to the community, it may deny parole.

It may further be argued that since 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 . . ." Section 41-17-24, **supra,** it may make eligibility depend upon submission to urinalysis in the following instance. In paragraph numbered 1 of this statute, prisoners having completed one-third of their minimum sentence are eligible for parole hearing if they have a six-month clear conduct record prior to appearing before the Board. If the Board deems it proper to rule that submission is a factor of clear conduct, as to these prisoners, submission may be a prerequisite of eligibility.

In response to the third question, once again Section 41-17-24, **supra,** is cited. "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 . . ." (Emphasis added.) There are numerous cases which state the proposition that parole does not begin until the prisoner accepts the conditions of parole given him. No case has been found rebutting this.

It is our understanding that a prisoner at the New Mexico State Penitentiary does not sign and accept his conditions of parole until his day of release. Thus the distinction must be made between the authority of the Board to deny parole after it has been granted and the prisoner has not been released, and the retaking of a prisoner after the parole has become effective and he has been released from prison. In **Ex Parte Allen,** Cal. App., 81 P.2d 168, 169 (1938) it is stated that:

"[I]f the conduct of the prisoner while in the prison does not justify his release on parole, no statutory or constitutional right demands a notice and hearing before the Board can set aside or rescind its action granting a parole. Such determinations . . . are disciplinary in nature. They hold out to the prisoner the chance of parole unless his conduct in the meantime is such as to require further confinement."

Our statutes are silent as to whether the Board has the authority to rescind the order made. This, too, was the case in **State ex rel. Newman v. Lowery,** Ohio App., 104 N.E.2d 590 (App. 1951), aff'd, 157 Ohio St. 463, 105 N.E.2d 643, cert. denied, 344 U.S. 881, 73 S. Ct. 176, 97 L. Ed. 682 (1952). There it was construed that:

"It is recognized that courts have the power during term, even on their own motion, to set aside and vacate an order theretofore made. By analogy, it would appear that when the Commission has made an order granting a parole effective at a future date, it would have in its broad discretionary power the right to enter an order of rescission **provided that it become effective prior to the acual release of the prisoner."** at 592. (Emphasis added.)

It is our opinion that the requirements of **Morrissey v. Brewer,** U.S. , 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), as outlined in our October 18, 1972 Advisory Letter to you, do not *{*109}* apply to rescinding the grant of parole before the prisoner's release because there the petitioners had been paroled and released.

As the Board has the statutory authority to enact rules with respect to the eligibility of prisoners for parole, Section 41-17-24, **supra,** we suggest that the Board adopt a rule requiring maintenance of a clear conduct record, to include the conduct requirements recited in the conditions of parole of the Certificate of Parole, until the date of release. Such requirement should then be made a condition in the order granting parole. The order granting parole may then be withdrawn, without a preliminary hearing on the issue, by appropriate action of the Board prior to the prisoner's acceptance and release when a condition of parole has been violated.

Although the statutes are silent as to the fourth question, the Board should follow the dictates of Section 41-17-24, **supra,** paragraph numbered 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."

Thus the prisoner who has had his parole revoked should be allowed to apply for review of his case and have it considered just as any other prisoner may so apply after one year from his last appearance before the Board.

Of course, in the event parole is revoked after one year following the parole hearing at which parole was granted, or revoked before one year has elapsed, or under any other circumstance giving it just cause, the Board may decide when the violator will again be eligible for parole. It should then enter its decision as "any other order as it sees fit" when "violation is established." Section 41-17-28 C, N.M.S.A., 1953 Comp. (1972 Repl. Vol.).