

Opinion No. 92-09

November 6, 1992

OPINION OF: TOM UDALL, Attorney General

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TO: Richard G. Maestas Administrator, Pardons and Paroles Office of the Governor
State Capitol Santa Fe, NM, 87503

QUESTIONS

1. Does an unconditional gubernatorial pardon allow a person convicted of a felony to be eligible for: a) certification by the Law Enforcement Academy for permanent appointment as a police officer, b) permanent appointment as a police officer by a law enforcement agency or c) licensure as a private investigator?
2. Does the governor have the power to grant a partial pardon conferring the right to vote and hold public office while denying the right to possess a firearm?
3. Under NMSA 1978, § 30-7-16 (Cum. Supp. 1991), is a person who has been convicted of a felony eligible to transport or possess a firearm once ten years have elapsed since the conviction?

CONCLUSIONS

1. Yes; but, if authorized by statute or regulation, a pardoned felon's character and the acts underlying the conviction may be considered in certification or licensing.
2. Yes. The governor may grant a partial pardon which reinstates the right to vote and hold public office, but which denies the right to possess a firearm.
3. Yes. Under state law, a person convicted of a felony may possess or transport firearms if ten years have elapsed since the conviction.

FACTS

A person convicted a number of years ago of a felony for possession of drugs was subsequently pardoned by a governor. The Law Enforcement Training Act prohibits the Law Enforcement Academy from certifying convicted felons as eligible for permanent employment as police officers and also prohibits law enforcement agencies from employing convicted felons as permanent law enforcement officers. The pardoned felon now seeks confirmation from the Office of the Governor that these prohibitions against convicted felons do not apply to persons who have received an unconditional gubernatorial pardon.

Another person was convicted of felony tax evasion several years ago for activities which occurred in the course of his employment as a private investigator. This person's license was revoked in 1988 pursuant to the Private Investigators Act. NMSA 1978, § 61-27-43(D) (Repl. Pamp. 1990) (revocation authorized when an individual has been convicted of a felony). He has now requested a gubernatorial pardon so he may apply for reinstatement of his private investigator's license.

These requests raise several questions concerning the effect and extent of the governor's pardoning power.

ANALYSIS

1. Effect of a Gubernatorial Pardon on License Qualifications.

Under the Law Enforcement Training Act, a person convicted of a felony can neither be certified by the Law Enforcement Academy for permanent appointment as a police officer, NMSA 1978, § 29-7-6(D) (Repl. Pamp. 1990), nor obtain permanent employment as a police officer by any law enforcement agency. **Id.** § 29-7-8(A)(5).¹

To qualify for a license under the Private Investigators Act, applicant must "be of good moral character and temperate habits, " NMSA 1978, §61-27-14(C) (Repl. Pamp. 1990), and may be denied a license if, among other things, they have been convicted of a felony, have "committed any act constituting dishonesty or fraud," or "have a bad moral character, intemperate habits or a bad reputation for truth, honesty and integrity." **Id.** § 61-27-17(B)-(D).

Neither statute provides an exception for or makes any reference to convicted felons who have received a pardon from the governor **Cf.** NMSA 1978, § 31-13-1 (Repl. Pamp. 1984) (describing the procedure for obtaining a pardon restoring the right to vote and hold public office after completion of sentence); NMSA 1978, § 30-7-16 (Cum. Supp. 1992) (person pardoned of a felony convictions is not a "felon" for purposes of law prohibiting felons from possessing firearms). Thus, it is necessary to determine whether an unconditional pardon by the governor allows the recipients of such a pardon to be treated as though they had no felony conviction for purposes of the Law Enforcement Training Act and the Private Investigators Act.

The governor's authority to issue pardons is conferred by the New Mexico Constitution:

Subject to such regulations as may be prescribed by law, the governor shall have power to grant reprieves and pardons, after conviction for all offenses except treason and in cases of impeachment.

N.M. Const. art. V, § 6. According to the New Mexico Supreme Court, the power granted is self-executing and requires no legislation to make it effective. **Ex parte Bustillos**, 26 N.M. 449, 466, 194 P. 886 (1920). Moreover, the court held that the legislature may not use the regulatory authority granted by this provision to restrict the

governor's pardoning power: "There may be regulation by law of the manner of its exercise, but the ultimate power and right to pardon is granted, unrestrained by any consideration other than the conscience and wisdom and the sense of public duty of the Governor." **Id.** at 459.

The effect of a pardon on a convicted felon's eligibility for a professional or business license has not been considered by New Mexico courts. However, the New Mexico Supreme Court has concluded that a gubernatorial pardon generally removes "disqualifications or disabilities" that the law imposes as a result of a conviction, but does not preclude an enhanced sentence as an habitual offender because the punishment imposed is for commission of the later, not the pardoned, offense. **Shankle v. Woodruff**, 64 N.M. 88, 324 P.2d 1017 (1958). In reaching this conclusion, the court stated, in relevant part:

It is universally established that a pardon exempts the individual from the punishment which the law inflicts for the crime which he has committed; and generally speaking, it also removes any disqualifications or disabilities which would ordinarily have followed from the conviction. To say, however, that the offender is "a new man," and "as innocent as if he had never committed the offense," is to ignore the difference between the crime and the criminal. A person adjudged guilty of an offense is a convicted criminal, though pardoned....

Id. at 98 (quoting **People v. Biggs**, 71 P.2d 214, 216 (Cal. 1937)).²

The reasoning in **Shankle** indicates that, although a pardon does not erase the fact of conviction,³ it does relieve a convicted felon from any punishment for the pardoned offense, and any disqualifications or disabilities following from the conviction. Other states' courts following this view generally have found that ineligibility for various occupations and professions is such a disability, **see, e.g., Bjerkan v. United States**, 529 F.2d 125 (7th Cir. 1975); **Commissioner of Metropolitan Dist. Comm'n**, 203 N.E.2d 95 (Mass. 1964), and have determined that a pardoned felon cannot be disqualified from seeking a particular profession based solely on the fact of the prior conviction. Thus, for example, the Florida Supreme Court held that a pardoned person was not absolutely disqualified, based on the underlying conviction, from certification as a law enforcement officer. **Sandlin v. Criminal Justice Standards & Training Comm'n**, 531 So.2d 1344 (Fla. 1988). Otherwise, according to the court, the "legislative disqualification ... diminishes the effect of a pardon and imposes a legal disability." **Id.** at 1346. Other cases similarly have held that, as applied to persons pardoned of their felony convictions, statutes precluding convicted felons from pursuing certain professions and offices impermissibly encroached on the governor's constitutional pardoning power. **Slater v. Olson**, 299 N.W. 879 (Iowa 1941); **Brezizecki v. Gregorio**, 588 A.2d 453 (N.J. Super. Ct. 1990).

Consistent with the position expressed by the New Mexico Supreme Court in **Shankle v. Woodruff**, however, the pardon power does not preclude the legislature from allowing state licensing boards to consider the acts underlying the pardoned conviction,

e.g., through statutes requiring good moral character or similar qualifications. Many state courts, including those cited above, agree with an early commentator's interpretation of United States Supreme Court cases addressing the effect of a pardon:

The true line of distinction seems to be this: The pardon removes all legal punishment for the offense. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.

Williston, **Does a Pardon Blot Out Guilt?**, 28 Harv. L. Rev. 647, 653 (1915), **quoting in, Guastello v. Department of Liquor Control**, 536 S.W.2d 21, 24 (Mo. 1976). Accordingly, even when they have precluded **per se** disqualification for certain licenses, professions or public offices based solely on a pardoned conviction, courts have been permitted consideration of the acts underlying a pardoned conviction in cases where character was a necessary qualification. **See, e.g., Sandlin v. Criminal Justice & Training Comm'n**, 531 So.2d at 1347 (law enforcement officer); **Slater v. Olson**, 299 N.W. at 881 (civil service employees); **Commissioner of the Metropolitan Dist. Comm'n**, 203 N.E.2d at 103 (police officer); **Brezizecki v. Gregorio**, 588 A.2d at 456 (public office); **Stone v. Oklahoma Real Estate Comm'n**, 369 P.2d 642 (Okla. 1962) (real estate broker's license).

Based on the above authority, a pardoned felon cannot be denied certification under the Law Enforcement Training Act or denied a license under the Private Investigators Act solely on account of the pardoned conviction.⁴ However, the acts underlying the conviction can be considered under language in the Private Investigators Act to determine whether the applicant has a bad moral character or has committed an act constituting dishonesty or fraud. This option--to include character as a qualification for certification--is also available to officials of the Law Enforcement Academy and to law enforcement agencies (the ultimate employers) if the Law Enforcement Academy Board adopts regulations under its authority to prescribe additional requirements for certification and permanent employment. **See NMSA 1978, §§ 29-7-6(G); 29-7-8(A)(6)**. To date, the Board has not adopted such regulations. The legislature also has the option, without impermissibly interfering with the governor's constitutional pardon power, of making character a qualification and of allowing rehabilitation to be considered.⁵

2. Partial Pardons.

It appears generally accepted that unless restricted by constitutional grant, the executive pardoning power includes authority to grant conditional and partial pardons.⁶ In an early case, the United States Supreme Court upheld the right of the president to issue a "conditional pardon" commuting a death sentence to life imprisonment. **Ex parte Wells**, 59 U.S. (18 How.) 307 (1855). In answer to the argument that the Constitution conferred only the right to grant absolute pardons,⁷ the Court stated that the extent of

the president's pardon power was the same as that exercised by the king under English law in effect at the time of Constitution was adopted, and included general, special, particular, conditional and absolute pardons. **Id.** at 310-11 (1855). **See generally** 59 Am.Jur.2d **Pardon & Parole** § 22 (1987). The gubernatorial pardoning power has been construed in a similar manner by state courts. **See, e.g., Whittington v. Stevens**, 73 So.2d 137 (Miss. 1954) ("if the whole offense may be pardoned, a fortiori a part of the punishment may be remitted or the sentence commuted"); **State v. Hildebrand**, 95 A.2d 488, 489 (N.J. Super. Ct. 1953) (though not specifically mentioned, constitutional grant of pardoning power carried with it the lesser powers of granting a limited or partial pardon); **In re Conditional Discharge of Convicts**, 51 A. 10 (Vt. 1901) (pardon granted may be full, partial, absolute or conditional, provided the condition is not illegal, immoral, or impossible to perform).

Except for regulations governing the manner of its exercise, the New Mexico governor's constitutional pardon power is unrestricted. Based on the above authorities, therefore, we conclude that the governor may issue conditional and partial pardons.⁸ This conclusion is bolstered by case law in New Mexico which holds that the pardon power permits the governor to commute sentences. **State v. Mondragon**, 107 N.M. at 422-23. Commutation essentially is a partial pardon. **Way v. Superior Court**, 141 Ca. Rpter. 383, 390 (Cal. Ct. App. 1977); **In re New Jersey Court of Pardons**, 129 A. 624, 627 (N.J. Ct. Pardons 1925). It appears, therefore, that New Mexico courts at least presume that the governor's pardon power includes partial as well as full pardons.

This authority to issue partial pardons may be used to limit pardoned felons' rights to possess firearms. In New Mexico, one of the legal consequences of a felony conviction is that a convicted felon may not receive, transport or possess any firearm. NMSA 1978, § 30-7-16(A) (Cum. Supp. 1992). Generally, a person who is pardoned will no longer be considered a "felon" for purposes of this firearm statute. **Id.** § 30-7-16(C)(2). This provision would not, however, prevent the governor from exercising his pardon power to issue a partial pardon under which the statutory firearm prohibition remained in effect.⁹ **See France v. State**, 436 So.2d 428 (Fla. Dist. Ct. App. 1983) (analyzing a similar statute prohibition felons from owning firearms and squarely upholding the governor's authority to issue a partial pardon restoring civil rights except the right to possess or own a firearm).

3. The Effect of the Passage of Ten Years on the Firearm Statute.

The language of the firearm statute, however, limits the effect of the firearm prohibition for all felons, including those granted a partial pardon not restoring the pardoned person's right to use firearms. As mentioned above, New Mexico law prohibits felons from possessing or transporting firearms. For purposes of the statute, a "felon" is defined as

a person who has been convicted **in the preceding ten years** by a court of the United States or of any state or political subdivision thereof to a sentence of death or one or

more years imprisonment and has not been pardoned of the conviction by the appropriate authority.

NMSA 1978, § 30-7-19(C)(2) (Cum. Supp. 1992) (emphasis added). Read literally, the statute subjects a convicted felon to the statute's firearm prohibition only for ten years following conviction. Once ten years have elapsed, or if the person is granted an unlimited pardon, the prohibition no longer applies.

The statute is not ambiguous, nor does a literal reading have unreasonable or unjust consequences. **Cf. Wells v. Valencia County**, 98 N.M. 3, 6, 644 P.2d 517 (1982) (literal reading statute is not required if it would lead to injustice, absurdity or contradiction). Accordingly, we must give the statute its plain meaning. **See State ex rel. Stratton v. Roswell Indep. Schools**, 111 N.M. 495, 500, 806 P.2d 1085 (Ct. App. 1991) (when statutory language is free from ambiguity and doubt, resort should not be undertaken to any other means of interpretation). The plain meaning is that it permits a convicted felon to possess or transport firearms if more than ten years have passed since the conviction.¹⁰ **See also** AG Op. No. 88-03 (1988) (the phrase "in the preceding ten years" was added by an amendment to the bill eventually enacted as NMSA 1978, § 30-7-16 and effectively **narrowed** the statute's limitations on felons' rights).

ATTORNEY GENERAL

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GENERAL FOOTNOTES

[n1](#) Under Section 29-7-8(B), temporary employment as a police officer is allowed for no longer than one year before both Law Enforcement Academy certification and compliance with Section 29-7-8(A) are required.

[n2](#) Thus, **Shankle** held that a pardon does not obliterate the underlying conviction. **State v. Mondragon**, 107 N.M. 421, 423, 759 P.2d 1003 (Ct. App.), **cert. denied**, 107 N.M. 267, 755 P.2d 605 (1988). In interpreting the New Mexico Constitution's pardon provision in the context of the habitual offender statute, the New Mexico Supreme Court has not followed the view expressed by the United States Supreme Court in a somewhat different context that:

A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense.... [I]f granted after conviction, it removes the penalties and disabilities [consequent upon conviction], and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

Ex parte Garland, 71 U.S. (4 Wall.) 333, 380 (1866).

[n3](#) In this opinion, we assume that the pardons granted do not question the validity of the underlying conviction and, therefore, we do not address the effect of a pardon based on a determination of innocence.

[n4](#) In dictum a previous Attorney General expressed the view that statutes disqualifying convicted felons from obtaining professional licenses barred pardoned felons unless the legislature provided otherwise. Ag Op. No. 73-44, pp. 87-88 (1973). As is clear from this opinion, we disagree with this conclusion and believe that separation of powers problems arise if legislative action were required to give effect to a gubernatorial pardon.

[n5](#) The result reached in this opinion is also consistent with the policy expressed by the legislature in the Criminal Offender Employment Act, NMSA 1978, §§ 28-2-1 to -6 (Repl. Pamp. 1991), which provides that licensing boards subject to the Act by law or regulation "may take into consideration the conviction, but such conviction shall not operate as an automatic bar to obtaining public employment or license...." **Id.** § 28-2-3(A). In place of an "automatic bar," Section 28-2-4 requires consideration of rehabilitation--a kind of judgment about the current moral character of a convicted felon. **Weiss v. New Mexico Board of Dentistry**, 110 N.M. 574, 580, 798 P.2d 175 (1990).

Because the Criminal Offender Employment Act ("COEA") applies exclusively to **convicted felons**, it does not apply to **pardoned felons**, who, for the reasons discussed at length in the text, are not convicted felons. As to convicted felons, the COEA applies to the Law Enforcement Academy because the Academy provides law enforcement training and determines eligibility for employment with the state or its political subdivisions, but does not itself engage in law enforcement, and thus does not qualify for the "law enforcement agency" exclusion from the Act provided in Section 28-2-5. **Compare** AG Op. No. 89-32 (1989) **with** AG Op. No. 87-25 (1987) (discussion of what is and is not a law enforcement agency). **See also Bertrand v. New Mexico State Bd. of Educ.**, 88 N.M. 611, 544 P.2d 1176 (Ct. App. 1975) (the State Board of Education was subject to the COEA because it is an agency which determines eligibility for state employment), **cert. denied**, 89 N.M. 5, 546 P.2d 70 (1976).

[n6](#) A partial pardon "remits only a portion of the punishment or absolves from only a part of the legal consequences of the crime." **State ex rel. Smith v. Blackwell**, 500 S.W.2d 97, 104 (Tex. Crim. App. 1973). **See also Randall v. State**, 36 S.E.2d 450, 463 (Ga. 1945), **cert. denied**, 329 U.S. 749 (1946).

[n7](#) Significantly, the grant of pardoning power to the president under the United States Constitution and the gubernatorial pardoning power under the New Mexico constitution use similar language. **Compare** N.M. Const. art. V, § 6 **with** U.S. Const. art. II, § 2 (conferring the "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment"). Neither provision grants express power to issue partial or conditional pardons.

[n8](#) This power is somewhat limited by the state constitution. Under Section 1 of Article VII, a convicted felon is not a "qualified elector" unless pardoned. Section 2 of the same article provides that "a qualified elector ... shall be qualified to hold any elective office." Because the right to vote and eligibility to hold public office are tied together, the governor would effectively be precluded from granting a partial pardon reinstating the right to vote but not the right to hold public office, or vice versa. **Cf. Brezizecki v. Gregorio**, 588 A.2d at 457-58 (under the New Jersey constitution, the right to hold public office is "inexorably intertwined with the right of suffrage" so that a pardon restoring the right to vote also restored eligibility to hold office).

[n9](#) In fact, case law from other states suggests that if the governor were not permitted to issue a partial pardon with such an effect, it would raise separation of powers questions. **See Whittington v. Stevens**, 73 So.2d at 140 (statute purporting to allow county boards to commute sentences unconstitutionally infringed upon the governor's pardoning power); **In re Court of Pardons**, 129 A. at 629 (legislative cannot appropriate any of the prerogatives of the executive pardoning power to itself); **In re Conditional Discharge of Convicts**, 51 A. at 11 (pardoning power can neither be restricted nor taken away by legislative action).

[n10](#) Federal law, however, may prevent a convicted felon from possessing or transporting firearms, even if ten years have elapsed since the conviction, if the firearms were transported or shipped in interstate commerce. **See** 18 U.S.C. § 922(g). The federal statute does not generally apply to firearms imported for, sold or shipped to, or issued for the use of federal or state agencies, or to convicted felons who have received a pardon, unless the pardon provides that the person may not ship, transport, possess or receive firearms. **Id.** §§ 921 (a)(20), 925(a).