

## Opinion No. 37-1653

June 1, 1937

**BY:** FRANK H. PATTON, Attorney General

**TO:** Mr. John B. McManus, Supt. New Mexico State Penitentiary Santa Fe, New Mexico

{\*105} This is to acknowledge receipt of your letter of May 26th in which you inquire as to the status of paroled prisoners. You make the following inquiries:

{\*106} "1. A receives a sentence from one to ten years. At the expiration of his minimum sentence he is placed upon parole and is ordered by the Parole Agreement to report for a period of twelve months. After the expiration of that period, that is, twelve months, he commits a violation of the law. You wish to know if he is a parole violator and whether you are obliged to declare him such under the provisions of Section 130-167, New Mexico Statutes Annotated, 1929 Compilation.

"2. You wish to know whether or not a prisoner released upon parole is entitled to allowance for good time to apply in the reduction of a maximum sentence."

Your inquiries will be discussed in the order presented.

It is our opinion that the first inquiry must be answered in the affirmative. Section 130-167 provides the conditions upon which parole may be granted and authorizes the Prison Board to establish rules and regulations relative to paroles.

Section 130-168 provides for final discharge under the conditions therein specified. It is our opinion that until finally discharged by the expiration of his sentence or otherwise, the prisoner is upon parole. We do not think that the mere fact he is not required to report pending final discharge or the termination of the final sentence would necessarily revoke the parole. Also, we think that the provision in the Parole Agreement to which you call our attention reading "or until he has been discharged in pursuance of law" has the effect of keeping the parole in force until such discharge.

Under the doctrine announced by our Supreme Court in the case of Vigil vs. Hughes, 24 N.M. 640, 175 Pac. 713, it is our belief you would have the power to revoke the parole, take custody of the prisoner and confine him in the penitentiary.

Your second proposition presents a question which is fairly difficult to answer. Section 130-158, New Mexico Statutes Annotated, 1929 Compilation, providing for good time makes no mention from which sentence it shall be deducted. I assume from your letter it has been your custom to deduct it from the minimum sentence. The question then presents itself whether or not such a deduction from the maximum sentence would be warranted if the prisoner has served the minimum and is out of the confines of the penitentiary on parole.

Where a statute of this kind is capable of two constructions, that requiring the prisoner to serve the least time should be followed. 50 C. J. 349, Sec. 50; In re Blocker, 69 Colo. 259, 193 Pac. 546. One out on parole is constructively a prisoner. His status is that of a prisoner. Such being the case we think you are entitled to allow deductions for good time while the prisoner is on parole. This question was directly presented in Henratty vs. Zerbst, 9 Fed. Sup. 230. The Court, speaking through the late Justice McDermott, said:

"(a) Is a prisoner on parole, who has observed its conditions, entitled to credit for time on parole? If he is not, it will be observed that a paroled prisoner can never serve out his sentence without recommitment. A paroled prisoner is not a free man; in this case he was not within prison walls, but he was confined to the state of Missouri; other restrictions, wholesome it is true, but nevertheless restrictions, were placed upon his liberties; he could be imprisoned again, under the statute, without indictment or jury trial. So it must be true that a paroled prisoner, living up to the conditions of his parole, is serving his {\*107} sentence. While time spent on parole is a lower grade of punishment, the prisoner is none the less in the legal custody of the warden and confined within specified bounds. As long as the parole conditions are not breached he is absent from the prison with the permission of the authorities. He is not a free man but rather a prisoner with many privileges which have been accorded him because he is deemed trustworthy. He is a 'trusty' with enlarged bounds. Not to permit his sentence to run while he is on parole would be to penalize a man for good behavior."

While under our statutes this would be a matter of some dispute, we think that the above case is sufficient authority for allowing deductions for good time while a prisoner is out on parole.

Trusting this answers your questions, I am

By: RICHARD E. MANSON,

Asst. Atty. Gen.