

**Pardons, Commutations, Etc., Granted by Governor. State Board of Pardons, No Power to Grant Commutation of Punishment or Pardons. Governor, Power of to Grant Pardons, Commutations, Etc.**

The state board of pardons has no authority to grant commutations of punishment, or pardons, but such power is vested in the governor, the board having only the authority to approve or disapprove of the action taken on such matters by the governor.

December 15th, 1913.

Hon. S. V. Stewart,  
Governor of the State of Montana,  
Helena, Montana.

Dear Sir:

I am in receipt of your favor of the 12th instant, submitting a question:

"As to the relative authority of the governor and the state board of pardons 'to grant commutation of punishment' of persons convicted of crime."

Sec. 9, Art. 7, of the State Constitution, provides:

"The governor shall have the power to grant \* \* \* a commutation of punishments \* \* \* after conviction and judgment for offenses committed against the criminal laws of this state."

The section further provides that the secretary of state, attorney general and state auditor shall constitute a board of pardons, and that the legislative assembly shall by law prescribe the sessions of said board and regulate the proceedings thereof. This section further provides:

"The governor shall communicate to the legislative assembly at each regular session each case of \* \* \* commutation granted \* \* \*."

By the provisions of Sec. 9556 et seq. the legislature has prescribed the methods of procedure to be observed by the board of pardons in the consideration of cases submitted to it, providing, among other things, for the publication or giving of notice of hearing, and for the filing with the secretary of state the decision of the board; and also providing that the governor must notify the board

that he has granted such commutation, and that such commutation is not effective until it is approved by a majority of the board of pardons. The legislature has not at any time attempted, even if it possessed that power, to confer any authority upon the board of pardons to grant of its own motion commutations, pardons or reprieves, but has left the power of the board, where it seems to be placed by the constitution, limited to approving or disapproving the action taken on such matters by the governor. This section of the constitution above quoted seems to confer exclusive authority upon the governor to take the initiative in all such matters, and the only question submitted to the board is that of approving or disapproving the action taken by the governor. This is the holding of the courts of last resort in states having similar constitutional provisions.

People v. Cook, 147 Mich. 127.

110 N. W. 514, and cases cited.

Ex parte McClure (Okla.) 118 Pac. 591.

Ware v. Sanders, 146 Iowa, 233.

124 N. W. 1081.

State v. Sloss, 25 Mo. 291.

69 Am. Decisions, 463.

29 Cyc. 1562.

In an opinion given by the Justice of the Supreme Court of Massachusetts, on inquiry submitted by the governor and the counsel concerning their authority in the granting of pardons, it is after some discussion as to the meaning of the phrase "by and with the advice of counsel," said:

"So, as to pardons, 'the power of pardoning offenses \* \* \* shall be in the governor.' But this power can be exercised only 'by and with the advice of counsel.' If the governor does not think it his duty he has no occasion to take the advice of the counsel. If he should consult them, and they should unanimously advise him to pardon, it would not be his duty to act unless he himself should think he ought to exercise his power. It is not intended that he should be obliged to bring before the counsel an application for pardon when he was plainly of opinion that no pardon should be granted."

As said in the syllabi of this opinion:

"The responsibility rests primarily upon the governor to determine whether any action is called for, and what action, if any, is desirable, and the approval and the concurrence of the counsel are required only to complete an affirmative act."

190 Mass. 616, 620.

If, therefore, the governor does commute punishment and serves the notice upon the board, as required by the provisions of the statute, the board is limited to the single question: "Shall the action of the governor be approved?" And if the board disapproves the action of the governor, there is nothing further before the board for it to act upon, unless the governor again commutes punishment,—for if the first commutation is not approved, its disapproval is not

any bar to another commutation. The board of pardons does not possess any common law powers with reference to such matters, and can only act upon that which is submitted to them by the chief executive.

The mere fact that the governor transmits, pursuant to the provisions of Sec. 9568, a commutation to the legislative assembly relative to a commutation granted by him is not of itself a commutation, but is only the information which the law requires him to give to the legislature.

Yours very truly,

D. M. KELLY,  
Attorney General.