

Opinion No. 16

PARDON, Effect Of — EFFECT OF CONVICTION — RECORD OF CONVICTION — JUDGMENT OF CONVICTION

Held: That the acts done by the applicant were, by the full and unconditional pardon, purged of their criminality and the applicant is entitled to prove to the commission that he is now a man of good moral character.

March 11, 1947

Mr. E. J. Callaghan
State Service Officer
Veterans' Welfare Commission
State of Montana
Helena, Montana

Dear Mr. Callaghan:

You have addressed our attention to the following set of facts and have asked for an opinion as to the effect of the unconditional pardon by the Governor, namely:

(A veteran) "was convicted of a felony, sentenced to the state prison, served his sentence with good time allowed, was subsequently granted a full and unconditional pardon by the Governor with the approval of the State Board of Pardons, and was then restored to citizenship by the Governor in accordance with the provisions of Section 12263, Revised Codes of Montana, 1935."

You further state that this veteran is having a difficult time securing a job and therefore you wish to know the effect of such a pardon.

The definition of pardon is wide and diversified, but the pitfall of being too exclusive in defining is provided for in the case of *Biddle v. Petrovich*, 274 U. S. 480, 71 L. Ed. 116 (1), 47 S. Ct. 664, where the court said:

" . . . a pardon is a declaration on record by the chief magistrate of a state or country that a person named is relieved from the legal consequences of a specific crime." (Emphasis mine.)

However, the legal difficulties begin when the question is raised as to:

What are the legal consequences? Does this relief remove the record of the trial and conviction? Are these to be removed and all fines paid back to the former felon? Do they extend to acts prior to the pardon or only subsequent thereto?

Much of the trouble has been caused by the case of *Ex parte Garland*, 4 Wall. 333, 380 (1866) wherein the court used the following expression:

"A pardon reaches both the punishment prescribed for the offense and the guilt of the offender . . . 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 though he had never committed the offense . . . It removes the penalties and disabilities, 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." (Emphasis mine.)

But though the language reads well, the actual decisions do not bear out this to be the effect of a pardon. In the case of *People v. Biggs*, 9 Cal. (2d) 508, 71 Pac. (2d) 214, 216 (1937) the court points out:

"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 an 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 he may be deserving of punishment, though left unpunished; and the law may regard him as more dangerous to society than one never found guilty of crime, though it places no restraints upon him following his conviction." (Emphasis mine.)

And the language in a New York case of more recent date gives added emphasis to this idea:

"The pardon of this defendant did not 'make a new man' out of him. It did not 'blot out' the fact or the record of his conviction . . . The pardon in this case merely restored the defendant to his civil rights. If it had been granted before his term of imprisonment had been served, it would also have relieved the defendant of that. But it would not obliterate the record of his conviction or blot out the fact that he had been convicted."

People v. Caresi, 154 App. Div. 481, 139 N.Y.S. 309.

A recent case has also held, in a like case to our problem, when an applicant for a civil service position had previously been granted full pardon after conviction of larceny, that the above noted statement of the court in Ex parte Garland was too broad, saying:

"We do not approve of the statement in the case of Ex parte Garland, supra, . . . that the effect of a full pardon is to make the offender 'a new man' that 'in the eye of the law the offender is as innocent as if he never committed the offense' because of the broad implications that may be attributed to them."

Slater v. Olsen, 230 Ia. 995, 299 N.W. 879, 880 (1941).

It is well to note that the court went on to say at page 881:

"While the pardon did not, of itself, conclusively restore the character of the plaintiff, and although the acts done by him were not obliterated by the pardon, they were purged of their criminality, and plaintiff was entitled to an opportunity of proving to the commission that, although he committed the acts resulting in his conviction, he is now a man of good moral character."

The same theory has been supported in State v. Hazzard, 139 Wash. 487, 247 Pac. 957, 47 ALR 538 (in relation to the effect on a physician's right to reacquire her license to practice); United States v. Swift, D.C. 86 F 1002, 1016; In re Levine 2 Cal. (2d) 324, 41 Pac. (2d) 161, 162 (disbarment case);

In re Spencer 22 Fed. Case 921, 922, No 13234, 5 Sawy. 195 (where an alien, though fully pardoned, was prevented from becoming a U. S. citizen because of such prior conviction).

While it is true that a number of jurisdictions have followed Ex parte Garland and cited it as such, the weight of authority is contra and the case has been greatly criticized. In an excellent research on the subject, Professor Williston of Harvard Law School points out in 28 Harvard Law Review, at page 647, that the reason is based on an improper interpretation of the common law predicated by a misunderstanding of "pardon" at the common law, particularly since the pardon was used then to remedy a situation alleviated today by a new trial. Likewise he points out that recovery has been allowed in slander suits not because the conviction has been removed but rather because the infamy has been removed. Sup. 652. The author points out a well based line of distinction as follows:

"The pardon removes all legal punishment for the offense. Therefore if the mere conviction involves certain disqualifications which would not follow without conviction, the pardon removes such qualifications. 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 had been convicted and pardoned does not make him any more eligible."

Such appears to be the normal basis for such qualification in getting the civil service jobs of which you inquire. The conviction is merely evidence of connection with such crime and thus a character disqualification.

It has been pointed out, quite aptly, that if a pardon made the defendant a "new man" or an entirely "innocent" man, the fines paid should be returned, and a leading New York case has held that "a person convicted of a crime, imprisoned and subsequently pardoned and restored to citizenship by the Governor, has no claim against the State for damages for such imprisonment." (Roberts v. State. 30

App. Div. 106, 160 N.Y. 217, 54 N.E. 678-1899). And we find the following language in *Knote v. United States* (95 U.S. 153), (as to pardon):

"It gives to him a new credit and capacity, and rehabilitates him to the extent in his former position. **But it does not make amends for the past.** It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it. The offense being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered and no satisfaction can be required."

From this and other opinions the judicial determination of guilt is never removed since nothing short of acquittal removes it. See 78 U. of Pa. L. R. 562.

It has been necessary to go into detail in the above cases because Montana appears not to have any law upon the subject. There are, however, some rather confusing statements to be found in *In re Sutton*, 50 Mont. 88, 145 Pac. 6 (1941) which was an action brought by an attorney who had been convicted of a crime, to be reinstated on the basis of a conditional pardon. The court held that the **conditional pardon** does not wipe out the judgment of the conviction. The attorney cites a Texas case in his brief which holds that an unconditional pardon has this effect. (*Scott v. State* 6 Cir. App. 343, 25 S.W. 377), but it does appear that this is the Texas law even today. The court in speaking of this and several other cases, especially of the *Scott* case, said:

"We have no fault to find with anything said in any of these cases."

But it is hard for the writer to believe that this dicta is to be interpreted as holding Montana to be with the minority as a result of a case in which the particular question called for in this opinion did not confront the court. Being dicta it remains as such and is not to be considered the

law of the case, especially in view of the superficial treatment given to that particular point.

Thought should be given to the case of *Slater v. Olsen*, supra, wherein, though the court held the conviction was not wiped out, the court went on to hold, the statute providing that one of the qualifications of civil service employment is good moral character, and disqualifying a person from employment in civil service solely because he has been convicted of a felony, in effect establishes a conclusive presumption that a person who has been convicted of a felony is not of good moral character, and imposes legal consequences and disabilities because of conviction, and when applied to one who has received a full pardon is unconstitutional as a clear encroachment by the legislature upon the pardoning power of the Governor. The court held that the applicant should have a chance to be heard in order to show that he is now of good moral character.

I therefore adopt the reasoning of the Iowa Court in *Slater v. Olsen*, supra, and it is my opinion, that the acts done by the applicant were, by the full and unconditional pardon, purged of their criminality and the applicant is entitled to prove to the commission that he is now a man of good moral character.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General.