

VOLUME NO. 37

OPINION NO. 23

BOARD OF PARDONS - Parole revocation hearings, use of less than full Board for hearings; STATE AGENCY - Board of Pardons; ADMINISTRATIVE PROCEDURE - Use of hearing examiners; REVISED CODES OF MONTANA, 1947 - Section 95-3308.

HELD: The State Board of Pardons may conduct parole revocation hearings using a single member designated by the board chairman if the full board makes that examiner's decision final and the single member's decision may be appealed by the offender at a new hearing before the full board.

12 May 1977

Henry E. Burgess, Chairman
Montana State Board of Pardons
1119 Main Street
Deer Lodge, MT 59722

Dear Mr. Burgess:

You have requested my opinion on the following question:

May the State Board of Pardons use a single member designated by the chairman to conduct parole revocation hearings with the full board to act on such member's decision at the next meeting if provision is retained that the offender may appeal that decision to the whole board?

In recent years because of growth of the work of various state and federal agencies recognition has come that something must be done to expedite the work of such agencies.

In recent years, many state Boards of Pardon, faced with the same problem now facing the Montana Board of Pardons, i.e., an excessive number of parole revocation hearings to consider, have gone to the single examiner system. New Mexico is a notable example. The New Mexico codes dealing with the Board of Pardons and return of parole violators are very similar to Montana's. New Mexico Statute 41-17-40 sets forth the powers and duties. New Mexico Statute 41-17-28 dealing with the return of parole violators in subparagraph (c) carries the exact wording of section 95-3308(3), R.C.M. 1947 regarding procedure. Authorities in the State of New Mexico use the single hearing examiner since the full board has adequate knowledge of the decision. There is no requirement that the full board hear the entire case. In such a situation the hearing examiner makes the recommendation and the full board makes the final decision based on sufficient information.

It is a well-settled rule of administrative law, articulated in Clairborne v. The Coffeyville Memorial Hospital, 510 P.2d 1200 (Kansas, 1973) that:

[d]ue process or a fair hearing is not denied by the mere fact that an administrative officer makes or participates in the making of a decision without having been present when evidence was taken.

Additionally, the Clairborne decision states at page 1203:

The decisions recognized the term "hearing" as relating not to physical presence at the taking of evidence, but to certain procedural minimums to

insure and inform judgment by one who has the responsibility of making the final decision and order.

While the examiner makes the decision this does not remove any power from the board since the ultimate decision lies there. The offender can appeal for a new hearing before the board of the full board can decide to hold a new hearing. Section 95-3308, R.C.M. 1947, says in pertinent part:

...the Board shall cause the prisoner to be promptly brought before it for a hearing on the violation charged under such rules and regulations as the Board may adopt.

The board may adopt a regulation calling for a single hearing examiner to report to the full board. It would be advisable that the board adopt a rule following the guidelines of the Montana Administrative Procedure Act covering this proposal.

In the procedures outlined the Board of Pardons is in actuality inserting an extra step, i.e., the revocation hearing by a single member of the board to be followed by approval or denial of the full board. One facing revocation has the option to request a new hearing by the board or the board may do so on its own. However, the procedure you propose to follow not only is more economical but is a speedier dispensation of justice.

THEREFORE, IT IS MY OPINION:

The State Board of Pardons may conduct parole revocation hearings using a single member designated by the board chairman if the full board makes that examiner's decision final and the single member's decision may be appealed at a new hearing before the full board.

Very truly yours,

MIKE GREELY
Attorney General