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Pardon and Parole - Application and Proceedings Thereon - Due Process Requirements Apply to the Parole-Release Hearing

Mark M. Suby

RECENT CASE

PARDON AND PAROLE—APPLICATION AND PROCEEDINGS THEREON—DUE PROCESS REQUIREMENTS APPLY TO THE PAROLE-RELEASE HEARING—Petitioner, an inmate of the Colorado State Penitentiary, had served his minimum sentence and was eligible for release on parole. He appeared before the Colorado State Board of Parole (hereinafter the Board) for parole consideration; his parole was denied and no reason was given. On September 7, 1971, petitioner and several other inmates whose parole had been similarly denied sent a written request to the Board asking for written reasons for denial of parole, but the Board refused to give the inmates reasons for the denials. Subsequently, petitioner and the others filed a civil rights class action suit against the Board alleging violation of their civil rights. This was based on the inconsistency of notification to inmates regarding refusal to grant parole and the failure of the Board to grant written reasons why parole was denied.[1] Shortly before the final hearing on the matter, the Board adopted and approved rules and regulations which provided for prompt transmission of reasons in the event of denial of parole, which satisfied the inmates' complaint. Although this reform by the Board rendered the complaint moot, the Court stated that an inmate does have a right to know why his parole was denied[2] and *held* that due process in some form does attach in the parole-release hearing.[3] *Johnson v. Heggie*, 362 F. Supp. 851 (D.C. Colo. 1973).

Courts have traditionally taken a hands-off attitude toward the discretion used by administrators in the management and supervision of correctional institutions.[4] As a result, the number of pris-

1. The action was commenced on November 26, 1971. On December 27, 1971, the defendants moved to dismiss with prejudice on the grounds that, *inter alia*, the complaint failed to state a claim upon which relief could be granted. On June 2, 1972, the action was dismissed without prejudice. Plaintiff appealed when the motion to reconsider was denied, but the matter was remanded by the United States Court of Appeals for the Tenth Circuit on February 5, 1973.

2. Johnson v. Heggie, 362 F. Supp. 851, 857 (D.C. Colo. 1973).

3. *Id.*

4. "The supervision of the internal affairs of correctional institutions, including the discipline and care of inmates, rests with prison administrators and is not ordinarily subject to judicial review." Perez v. Turner, 462 F.2d 1056, 1057 (10th Cir. 1972), *cert. denied*, 410 U.S. 665.

oners' suits filed in district courts have been relatively low.[5] But prisoners have increasingly been allowed to file suits under federal civil rights legislation.[6] Recent decisions in the United States Supreme Court have allowed the federal courts to play an increasing role in prisoners' rights litigation. Previously, petitioners were required to exhaust all state remedies before being allowed into federal courts, but this requirement has been modified.[7] And the prisoners' claims have been held to "less stringent pleading standards."[8]

One area where courts have been particularly active is that of parole revocation proceedings. Some jurisdictions still retain the traditional rule that parole is a form of custody,[9] and release on parole is an act of grace and not a constitutional right.[10] Further, courts have generally taken the position that parole is only "a correctional device authorizing service of sentence outside a penitentiary"[11] and that the "prisoner has no constitutional right to a hearing upon revocation of his parole. . . ."[12]

In *Morrissey v. Brewer*,[13] however, the Supreme Court of the United States rejected this latter view and held that an informal hearing was required before parole could be revoked. Petitioner Morrissey was paroled from the Iowa State Penitentiary and seven months later was arrested as a parole violator.[14] After reviewing the parole officer's written report, the Iowa Board of Parole revoked Morrissey's parole and he was returned to the penitentiary without a hearing.[15] In Morrissey's subsequent suit, the Supreme Court ruled that minimum due process required "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole."[16] And in *Gagnon v. Scarpelli*[17] the parole revoca-

5. Note, *The United States Courts of Appeals*: 1971-1972 *Term*, 61 GEO. L.J. 275, 528 (1972-73).

6. *Id.*

7. Wilwording v. Swenson, 404 U.S. 249 (1971). The Supreme Court held that claims for relief under federal civil rights legislation are not subject to exhaustion requirements.

8. Haines v. Kerner, 404 U.S. 519, 520-21 (1972).

9. Note, *The Federal Parole System: A Constitutional Analysis*, 17 HOW. L.J. 894, 898 (1973).

10. *Id.* at 898.

> About half the States grant hearings as a matter of 'grace', rather than regarding them as a normal function of the parole board. . . . [S]ome States have no hearings at all on revocation questions. . . .
> Typically, parole decisions have been communicated in writing or it has been left to others, usually institution staff, to tell inmates if parole was granted or denied. [Inmates] have had little opportunity to discover the reasons for the decisions and discuss them with parole board members.
> PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 64-65 (1967).

11. Morrissey v. Brewer, 443 F.2d 942, 947 (8th Cir. 1971), *rev'd*, 408 U.S. 471 (1972).

12. *Id.* at 950.

13. 408 U.S. 471 (1972).

14. *Id.* at 472.

15. *Id.* at 472-73.

16. *Id.* at 489. At the informal hearing, the Supreme Court stated that:

> due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are

tion requirements established by *Morrissey* were extended to probationers.[18]

Since parole revocation is not considered a part of a criminal prosecution, the Supreme Court has not extended the full "panoply of rights"[19] guaranteed a defendant under most other aspects of the criminal prosecution.[20] This has been rationalized on the ground that revocation deprives an individual not of the absolute liberty to which every citizen is entitled, but only of a conditional liberty, "properly dependent on observance of special parole restrictions."[21] Even though the parolee enjoys only conditional freedom, he is now guaranteed far more rights in the parole revocation stage than he was in the past.

Prisoners traditionally have been given few, if any, of the rights normally guaranteed by the due process clause while incarcerated.[22] Because of the wide discretion accorded the various parole boards as administrative governmental agencies, internal policies and rules that they might institute were, and still are to a substantial degree, generally non-reviewable.[23]

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available.

The Supreme Court stated that the requirements of due process at the revocation hearing include:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers. . . .

Id. at 485.

17. Gagnon v. Scarpelli, —— U.S. ——, 93 S. Ct. 1756 (1973). *Gagnon* addressed itself specifically to the question of whether an indigent parolee has a due process right to be represented by appointed counsel at revocation hearings. The Court concluded that neither indigent probationer nor parolee is entitled to appointed counsel as a matter of right except where counsel is deemed necessary by state probation or parole authorities as a matter of fundamental fairness. *Id.* at 1762.

18. A probationer is a convicted offender who has been granted freedom under conditions of probation, oftentimes upon suspension of a sentence. Parole is a conditional and revocable release of a prisoner serving an indeterminate or unexpired sentence in a penal or correctional institution.

19. Morrissey v. Brewer, 408 U.S. 471, 480 (1972).

20. *Id.*

21. *Id.*

22. D. RUDOVSKY, THE RIGHTS OF PRISONERS 19-27 (1973). However, in Landman v. Royster, 333 F. Supp. 621, 653 (D. Va. 1971), the Court said that in order to discipline prisoners confined to state penal institutions, certain due process rights are necessary.

> First, the decision to punish must be made by an impartial tribunal. . . . Second, there shall be a hearing . . . encompass[ing] the right to present evidence in defense, including testimony of voluntary witnesses. A hearing must be preceded by notice in writing of the substance of a factual charge of misconduct. . . . Cross-examination of adverse witnesses likewise is necessary. . . . [T]he ultimate decision [must] be based [on] evidence presented at the hearing . . . [and] . . . 'the decision maker should state the reasons for his determination and indicate the evidence he relied on'. . . .

23. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 85 (1967).

> Claims that parole was wrongfully denied have been uniformly rejected by the courts. Even those courts that have insisted on procedural safeguards on parole revocation are reluctant to extend them to the parole granting decision. Courts are even more reluctant to review the merits of such decisions.

Id.

The hearing conducted by the parole board to determine whether the prisoner will be granted or denied parole is still substantially conducted under its original cloak of secrecy.[24] The following comment, describing hearings conducted in the federal system, depicts a rather grim picture:

> There is no opportunity for the potential parolee to examine his file or record. Some of the prisoners' records are so scant and meager that when the individual comes before the Board there is not adequate or sufficient data upon which decisions are made. Not only are the interviews with the inmates very short and the decisions made with much celerity, but many of the questions are not germane to determining if a man has been rehabilitated. . . . There are no appeal rights and no legal standards against which to check possible unjust determinations.[25]

Further, the prisoner "has no right to counsel, to compulsory process, to present evidence, or to confront or cross-examine the faceless accusers responsible for 'silent beefs' or for adverse commentary contained in the probation reports" which the examiner uses to make his determination.[26] As the Second Circuit Court of Appeals in *Menechino v. Oswald* said, "[l]ike an alien seeking entry into the United States . . . [the prisoner] does not qualify for procedural due process in seeking parole."[27]

Furthermore, this parole-release hearing has almost without exception been considered beyond the purview of the courts.[28] This immunity, however, has given way recently and the door of the parole-release hearing has been partially opened. What appears to have been the first judicial break-through in this area was the case of *Monks v. New Jersey State Board of Parole*.[29] There the Supreme Court of New Jersey declared the New Jersey Parole Board's rule of not revealing the bases for denial of parole invalid.[30] What is most interesting about the *Monks* decision, however, is that the court did not base its decision on a formal due process requirement.[31] Rather, it based its decision on the concept of "fairness and rightness."[32] If it had based the decision formally on due process grounds, the door might have been opened for procedural

24. In Menechino v. Oswald, 430 F.2d 403, 409, *cert. denied*, 400 U.S. 1023 (1971), noting the "unanimous rejection of constitutional due process in parole revocation proceedings, . . ." the Court said that the claim that a prisoner being considered for parole before termination of sentence imposed by the court is entitled to procedural due process "must fail."
25. Note, *supra* note 10, at 897-98.
26. Parsons-Lewis, *Due Process in Parole-Release Decisions*, 60 CALIF. L. REV. 1518, 1525 (1972).
27. Menechino v. Oswald, 430 F.2d 403, 408-09 (1970), *cert. denied*, 400 U.S. 1023 (1971).
28. *See* Parsons-Lewis, *supra* note 26, at 1520.
29. 58 N.J. 238, 277 A.2d 193 (1971).
30. *Id.* at 249-50, 277 A.2d at 199.
31. *Id.* at 241, 277 A.2d at 194.
32. *Id.* at 249, 277 A.2d at 199.

due process guarantees within the parole-release hearing. While the Supreme Court of the United States has said that "fundamental fairness" is the "touchstone of due process,"[33] the *Monks* court apparently noted a difference and was unwilling to go so far.

More recently, as in the instant case, the courts have gone beyond the rule in *Monks*[34] and have formally declared that due process does attach in the parole-release hearing. In May, 1973, in *U.S. ex. rel. Harrison v. Pace* the United States District Court for the Eastern District of Pennsylvania stated that, "[t]he rudiments of procedural due process are not observed unless the administrative body details the reasons for its findings."[35] Moreover, the Pennsylvania court *held*, "[t]hat a prisoner's interest in the grant or denial of parole is entitled to constitutionally protected due process considerations. . . ."[36]

The grounds given by the Pennsylvania court and relied on by the Colorado court in the instant case to justify the requirement of giving reasons for parole board decisions are:

1. The statement of reasons ensures a responsible and just determination by the agency.
2. It affords a proper basis for judicial review.
3. It will have a positive effect on the goal of rehabilitation.
4. It is consistent with the recent expansion by the United States Supreme Court with respect to parole revocation proceedings.
5. The requirement does not cast an undue burden upon the administrative body.[37]

Considering the above criteria, the Colorado court concluded that the petitioner did have a substantial interest in knowing the reasons for the denial of his parole,[38] and adopted the conclusion of the Pennsylvania court that due process did attach in the parole-release hearing, limited to a statement of reasons by the parole board upon denial of such parole.[39]

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33. Gagnon v. Scarpelli, ——U.S.——, 93 S. Ct. 1756, 1763 (1973).
34. The ground upon which New Jersey based its decision to require the giving of reasons upon denial of parole was fairness and rightness. Monks v. New Jersey State Bd. of Parole, 58 N.J. 238, 249, 277 A.2d 193, 199 (1971).
35. U.S. ex rel. Harrison v. Pace, Civil No. 72-1294 at 3 (E.D. Pa. 1973).
36. *Id.* at 4.
37. *Id.*
An increasing number of parole boards have adopted the practice of calling inmates back after a hearing to discuss the decision in their cases. Institution staff and board members in these States—for example Minnesota and Iowa—reported it to be an improvement over prior methods.
PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 65 (1967).
38. Johnson v. Heggie, 362 F. Supp. 851, 857 (D. Colo. 1973). The court here recognized that "the inmate's interest is not created in a vacuum but rather is interrelated to the interest of the State in giving such reasons." *Id.*
39. *Id.* at 854.

In North Dakota the parole board is required by law to keep a record of every parole granted or refused and the reasons for the action.[40] While there is no statutory requirement for disclosure to the inmate of the reasons for denial, the board has indicated that it does inform the prisoners as a self-initiated policy, and makes recommendations to him as to what he should be doing between that time and the next Board meeting.[41] Absent a statutory requirement, however, the prisoner's right to have reasons given upon denial remains unclear.[42]

Incarceration is essential in only some instances, but, as it is currently administered, it is denigrating in almost every instance. While no accurate data is available,[43] the success rate in the "rehabilitation" of convicts is generally said to be about two out of three.[44]

The Colorado court noted the high rate of recidivism in the correctional process and called for an enlightened view of rehabilitation.[45] The recent decisions by courts announcing that due process does enter into the parole-release hearing may be the beginning of the fresh and enlightened view implored by the Colorado court. These decisions granting prisoners due process rights during the parole-release hearing are by no means the final solution to the myriad of problems faced by correctional facilities. But they may supplant the previous experience of being at the mercy of an apparently arbitrary and impersonal "Establishment" with an experience which will bring the prisoner part of the long way back into that society which has for so long alienated him.

MARK M. SUBY

40. N.D. CENT. CODE § 12-55-06 (Supp. 1973). The clerk of the board must ". . . keep a record of every . . . parole . . . granted or refused and of the reasons assigned for . . . such action. . . ."

41. Letter from Irvin Riedman, Chief Parole Officer, State of North Dakota Department of Parole and Probation, to the Author, Sept. 18, 1973.

42. This goes a long way in promoting a system being discussed whereby the prisoner "contracts" with the institution as to his release. He agrees to accomplish a specific, observable, attainable, but measurable amount of activities and the institution agrees to give him certain benefits in return. The final benefit to which the institution agrees is release. It is considered that this will provide the inmate with a significant input into determining the length of his stay in prison and eliminate thereby much of the feelng of helplessness experienced by many inmates. But this can only happen when the Parole Board will agree to follow the same procedure. It may have been the unwillingness of the various parole boards to so "contract" which has been a primary obstacle in the progress of the "contract" system.

43. The various state departments of corrections and the Federal Bureau of Prisons currently do not exchange data about inmates they receive, and therefore if one person is released from one system and reincarcerated in another, this recidivism may go unrecorded. For a discussion of the problem, see: Mobedg & Ericson, *A New Recidivism Outcome Index*, 36 FED. PROB. 50 (June 1972).

44. *Id.*

45. Johnson v. Heggie, 362 F. Supp. 851, 857 (D. Colo. 1973). *But see* Barradale v. U.S. Bd. of Parole and Pardons, 362 F. Supp. 338 (D. Pa. 1973).