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December 4, 2007

Senator Tom Fischer
Chairman, Administrative Rules Committee
North Dakota Legislative Counsel
Attn: John Walstad
State Capitol
600 East Boulevard
Bismarck, ND 58505-0360

RE: RESPONSE TO ADMINISTRATIVE RULE STUDY RELATING TO THE PAROLE BOARD

Dear Senator Fischer and Members of the Administrative Rules Committee,

Thank you for the opportunity to respond to the administrative rules study as it relates to the North Dakota Parole Board. To follow are the responses to your questions:

1. "Does the Parole Board require exemption from the rulemaking provisions of NDCC Chapter 28-32, the adjudicative proceedings provisions of Chapter 28-32, or both?"

The Parole Board needs to be exempt from the rulemaking and the adjudicative proceedings of N.D.C.C. Ch 28-32.

The Parole Board consists of six members, who must be qualified electors of the state of North Dakota, and appointed by the Governor for three year terms, arranged so the terms of two members must expire on December thirty-first of each year. See N.D.C.C. § 12-59-01. The chairman of the Parole Board is appointed by the Governor and the chairman must designate three members of the Parole Board for each meeting. See N.D.C.C. § 12-59-01. At the present time three member committees of the Parole Board meet once each month. The Parole Board receives its administrative support from the North Dakota Department of Corrections and Rehabilitation. Parole is supervised by probation and parole officers who are licensed peace officers in the state of North Dakota.

Parole is very similar to probation, which may be imposed by a district court in lieu of a prison sentence or in lieu of part of a prison sentence, and which allows a convicted offender to serve all or part of the sentence in the community, subject to conditions of probation. Parole, like probation, is a major part of the criminal justice system; it also enables a convicted offender to serve part of a sentence in a community setting instead of in prison. Parole also requires the offender to comply with conditions

of parole. A parolee remains in the legal custody of the North Dakota Department of Corrections and Rehabilitation until expiration of the maximum term of imprisonment to be served, less good time.

Probationers and parolees will both be obligated to comply with requirements that affect their everyday lives, including restrictions on who they may associate with, where they may live or work, their use of automobiles, and on their freedom from searches. They may also be required to participate in programs of treatment and rehabilitation, including education, sex offender treatment, anger management, domestic violence programs, and drug and alcohol treatment and rehabilitation.

Parole serves a number of purposes in the criminal justice system, including: 1) it provides a structured and supervised return to freedom for inmate and is an important part of the transition from prisoner to free citizen; 2) it will assist in keeping the parolee from situations that promote criminal activity; 3) it encourages prisoners to obey institutional rules and participate in activities that will contribute to early release; and 4) it helps prison facilities regulate and manage the size and composition of prison inmate populations through the process of granting or denying parole.

The Parole Board must consider a myriad of factors, some objective and factual, some subjective, in determining whether to grant a prisoner parole. Ultimately, the Parole Board will exercise its discretion in granting or denying parole, based on its experience in the difficult job of evaluating the appropriateness of early release from sentence for a convicted offender and based on consideration of the many factors involved. A hardly exhaustive summary of the factors the Parole Board will consider includes: 1) the prisoner's criminal record; 2) the severity or violence of the prisoner's current offense or offenses; 3) the prisoner's conduct in the institution, including work, education, treatment and rehabilitation, and institutional behavior and disciplinary history; 4) the prisoner's past usage of drugs and alcohol; 5) the prisoner's parole release plan, including the type of residence, neighborhood, employment, and family support proposed by the prisoner; 6) the concerns of any victims; and 7) the prisoner's attitude towards law enforcement and lawful authorities.

If the probationer violates any of the conditions of probation, the probationer may be brought back before the district court for judicial revocation proceedings and sentenced to prison for all or part of the maximum sentence available to the district court. Just as in the case of probation, if the parolee violates any of the conditions of parole, the parolee may also be returned to prison to serve the balance of the parolee's sentence.

If the violation of conditions by a probationer or a parolee also constitutes a new crime, the probationer or parolee will face new criminal charges and a new prison sentence.

N.D.C.C. § 28-32-01(11) defines a rule to mean, "the whole or a part of an agency statement of general applicability which implements or prescribes law or policy or the organization, procedure, or practice requirements of the agency. The term includes the adoption of new rules and the amendment, repeal, or suspension of an existing rule. The term does not include:

- a. A rule concerning only the internal management of an agency which does not directly or substantially affect the substantive or procedural rights or duties of any segment of the public.

- f. A rule concerning only inmates of a correctional or detention facility,"

The policies and procedures of the Parole Board are already exempted from the requirements of Chapter 28-32, as the Board's policies and procedures concern internal management or concern only inmates. To the extent the Board's policies and procedures are applicable to prisoners who have received parole, a great deal of discretion and judgment is necessary, and those processes are governed elsewhere by statute and United States Supreme Court opinions.

The terms and conditions of parole are enforced by probation and parole officers who are licensed peace officers in the state of North Dakota. The circumstances of supervision of a probationer or parolee may quickly change, the terms of supervision may no longer be appropriate or sufficient, and the officer may be required to act in accordance with the circumstances, including potentially using force, restraints, and arrest authority. Just as a district court may need to change or modify the conditions of supervision for probation appropriately, the Parole Board may need to fairly immediately change or modify the conditions of parole supervision, including imposition of intermediate conditions of supervision and possibly incarceration.

The North Dakota parole process at the present time does not create any constitutionally protected interest in release on parole. See Patten v. North Dakota Parole Board, 783 F.2d 140 (8th Cir. 1986). The United States Supreme Court has recognized that formal procedures for parole, such as requirements for hearings and personal appearances, would provide "at best a negligible decrease in the risk of error." Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 14 (1979). Formal rule-making, in addition to increasing the level of bureaucracy and the risk of creating constitutionally protected interests, will in no way accomplish a more efficient and safer paroling system.

In addition to the problems that will be created by subjecting the Parole Board to formal rule-making, the Parole Board reasonably anticipates that the adjudicative proceedings provisions of N.D.C.C. ch. 28-32 will even be more problematic in a criminal justice system.

At the present time, the decision to grant parole lies with the Parole Board and is not subject to judicial review. Similarly, the decision to revoke parole is not reviewable. The revocation process is governed by statute, N.D.C.C. § 12-59-15, and by the requirements of Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnon v. Scarpelli, 411 U.S. 778 (1973), which require procedural due process, including a two stage proceeding involving first, a prompt preliminary hearing and second, a final revocation hearing, which under North Dakota law must be conducted by the Office of Administrative Hearings. There is no constitutional right to judicial review of either process.

The provisions of the Administrative Agencies Practices Act would substantially alter the Parole Board's role, both in granting parole and in revocation.

The following definitions are relevant to the Parole Board regarding the inclusion of the Parole Board in the Administrative Agencies Practice Act.

N.D.C.C. § 28-32-01(1)

1. "Adjudicative proceeding" means an administrative matter resulting in an agency issuing an order after an opportunity for hearing is provided or required. An adjudicative proceeding includes administrative matters involving a hearing on a complaint against a specific-named respondent; a hearing on an application seeking a right, privilege, or an authorization from an agency, such as a ratemaking or licensing hearing; or a hearing on an appeal to an agency. An adjudicative proceeding includes reconsideration, rehearing, or reopening.

7. "Order" means any agency action of particular applicability which determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons. The term does not include an executive order issued by the governor.

If parole proceedings, including granting, denying, or revoking parole, were subject to N.D.C.C. ch. 28-32, they would be considered adjudicative proceedings, and the decisions of the Parole Board would be administrative orders that would trigger the procedures of the Administrative Agencies Practices Act. The result is that inmates and parolees would have the specific rights provided under the act following issue of administrative orders and as provided for in the adjudicative proceedings process. Adjudicative proceedings are governed by N.D.C.C. §§ 28-32-21 through 28-32-51. Under these fairly extensive provisions, inmates and parolees would have some very specific rights, including the right to discovery, formal administrative hearings, and judicial review, including appeals to the district courts and the North Dakota Supreme Court, that are not presently available in the parole process. This would be an untenable situation for the Parole Board, as well as for the DOCR, which is responsible for the administrative support for the Parole Board, in managing and supervising parolees and the parole process.

2. **"Does the Parole Board make any rules, for purposes other than internal management, which are of general statewide application and might affect rights or duties of person's outside your agency?"**

The Parole Board's application policies and procedures only concern inmates in the legal and physical custody of the North Dakota Department of Corrections and Rehabilitation. As such, these policies and procedures fall under N.D.C.C. § 28-32-01(11)(f). The Board's policies and procedures for the revocation of parole are governed by N.D.C.C. § 12-59-15 and the requirements of Morrissey v. Brewer and Gagnon v. Scarpelli. Otherwise, all Parole Board policies and procedures are for internal management and DOCR purposes and fall under N.D.C.C. § 28-32-01(11)(a).

3. **"Does the Parole Board hold hearings to act on complaints, applications, or appeals? If so, what rules govern the conduct of the hearing and rights of those parties.**

The Parole Board is not required to hold a hearing to act on an application for parole, but it may allow an applicant for parole a personal appearance. An application for a parole is an open record. A decision of the Parole Board is also an open record. See N.D.C.C. § 12-59-04. Otherwise, Parole Board records are confidential and may not be disclosed, except as provided in N.D.C.C. § 12-47-36. See N.D.C.C. § 12-59-04.

The Parole Board is required to provide notice of an application for parole to the State's Attorney and the District Court in the county or counties where judgment of conviction was entered against the applicant. See N.D.C.C. § 12-59-10. The Parole Board is also required to notify a victim of pending review and provide opportunity for the victim to submit a written statement or personally appear before the Board. See N.D.C.C. § 12-1-34-02(17). The victim's statements must be kept confidential. The victim is also entitled to notice of the Parole Board's Decision. Id.

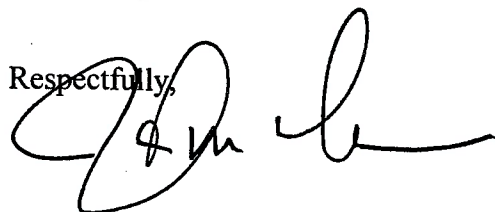
Parole revocation proceedings are commenced by taking a parole violator into custody pursuant to an arrest warrant, which must be supported by probable cause. As noted, two United States Supreme Court decisions, Morrissey v. Brewer and Gagnon v. Scarpelli, mandate that certain procedural due

process requirements are followed. These requirements are presently incorporated into statute at N.D.C.C. § 12-59-15. There must be a preliminary hearing to determine if there is probable cause the parolee violated any terms and conditions of parole. The hearing must be conducted by a disinterested hearing officer not directly involved in the supervision of the parolee or in bringing the alleged parole violation. If there is a finding of probable cause, the parolee will remain in custody pending a final revocation hearing. The parolee is entitled to written notice of the hearing, the opportunity to be heard and present witnesses and evidence, the opportunity to confront and cross-examine adverse witnesses, and a written decision. In accordance with N.D.C.C. § 54-57-03(1), final hearings for the Parole Board must be conducted by the Office of Administrative hearings. There is no judicial review.

4. "Do you believe the exemption for your agency under subsection 2 of NDCC Section 28-32-01 should be continued unchanged, modified, or eliminated?"

The exemption for the Parole Board should be continued for the reasons already explained above.

Respectfully,

A handwritten signature in black ink, appearing to read 'John Olson', written over the word 'Respectfully,'.

John Olson
Chairman, ND Parole Board