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DEC 6 2007

APPENDIX X

GOVERNOR
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CLERK
Warren R. Emmer

North Dakota Pardon Advisory Board

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December 5, 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 PARDON ADVISORY 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 Pardon Advisory Board. To follow are the responses to your questions:

1. "Does the Pardon Advisory Board require exemption from the rulemaking provisions of NDCC Chapter 23-32, the adjudicative proceedings provisions of Chapter 28-32, or both?"

The Pardon Advisory Board requires exemption from both the rulemaking provisions and the adjudicative procedures of N.D.C.C. ch. 28-32.

According to Article V, Section 7 of the North Dakota State Constitution, only the governor may grant pardons, commutations and reprieves. Section 7, N.D.Const. authorizes the Governor to delegate that authority in the manner provided by law; however, under current law, there is no lawful authority to delegate pardon and the Board's only authority is to review requests in an advisory capacity and make recommendations to the Governor. See N.D.C.C. § 12-55.1-04. "The governor has the power to remit fines and grant commutations, reprieves, pardons, and conditional pardons after judgment of conviction."

The Pardon Advisory Board is an advisory board with no authority to grant a pardon, unconditional pardon, commutation of sentence, remission of fine or reprieve. The grant of a pardon exists solely by the discretion of the Governor, who is authorized, but not required to even appoint the board. See N.D.C.C. § 12-55.1-02.

N.D.C.C. § 12-55.1-02 specifies that the Governor may appoint a pardon advisory board. This statute specifies the board to consist of five members, including the

Attorney General, two members of the Parole Board, and two persons who are citizens and residents of the state of North Dakota. The advisory board is charged to "provide information and make recommendations to the governor concerning any matters before the governor under this chapter."

2. "Does the Pardon Advisory 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?"

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 Pardon Advisory Board are already exempted from the requirements of Chapter 28-32 to the extent the Pardon Advisory Board's policies and procedures concern internal management or concern only inmates. To the extent the Board's policies and procedures are applicable to convicted offenders who are no longer in custody, a copy of the Pardon Advisory Board is attached.

3. "Does the Pardon Advisory 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 Pardon Advisory Board does not hold hearings. Its records are subject to N.D.C.C. §§ 12-55.1-11 and 12-47-36. There is no statutory requirement or authority for the Pardon Advisory Board to hold a meeting on a pardon application. N.D.C.C. § 12.1-34-02(17) requires that victims must be afforded notice of application for Pardon and of a scheduled Pardon Advisory Board meeting and they may have the opportunity to respond in writing or appear in person. The sentencing judge and the prosecuting attorney are also entitled to notice of an application. See N.D.C.C. § 12-55.1-07. Meetings are subject to the open meeting requirements of state law. Information that may not be publicly disclosed is considered in executive session. A victim's statements must be kept confidential. See N.D.C.C. § 12.1-34-02(17).

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 current exemption for the Pardon Advisory Board should continue unchanged. There are the necessary laws and policies in effect in order for the Pardon Advisory Board to carry out its duties as an advisory board. There is no right to a pardon, commutation, remission of fine, or reprieve under current law and the provisions of the Administrative Agencies Practices Act would substantially alter the Pardon Advisory Board's, and the Governor's role, in the pardon application process and bring certain rights into the process.

The following definitions are relevant to the Pardon Board regarding the inclusion of the Pardon 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.

N.D.C.C. § 28-32-01(7)

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.

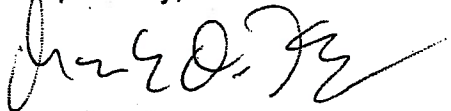
If the pardon application process becomes subject to N.D.C.C. ch. 28-32, there would be considerable adjudicative proceedings, and the final decisions would be administrative orders that would trigger the procedures of the Administrative Agencies Practices Act. The result is that applicants for pardons 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, applicants for pardons 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 pardon application process. This would be an untenable situation for the Pardon Advisory Board, the Governor, and for the Department of Corrections and Rehabilitation, the state agency responsible for the administrative support for the Pardon Advisory Board and the Governor.

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At the present time, the decision to grant a pardon lies exclusively with the Governor and is not subject to judicial review. Subjecting the Pardon Advisory Board, and the Governor, to the administrative rule-making and adjudicative proceedings requirements of N.D.C.C. ch. 28-32 would place undue burdens upon the process without any benefit to the Governor, the Judiciary, to victims, to applicants or to the general public.

Respectfully,

A handwritten signature in black ink, appearing to read "Duane DeKrey", with a long horizontal flourish extending to the right.

Duane DeKrey
Chairman,
North Dakota Pardon Advisory Board

NORTH DAKOTA
PARDON ADVISORY
BOARD POLICY

November 1, 2005

Pardon Advisory Board, Policy and Procedures

I. AUTHORITY:

Authority for this policy is found in Chapters 12-55.1 and 12.1-34 of the North Dakota Century Code (NDCC) and Article 5, Section 7 of the North Dakota Constitution.

II. DEFINITIONS (NDCC 12-55.1-01):

- A. Commutation: The change of the punishment to which a person is sentenced to a less severe punishment.
- B. Conditional pardon: A pardon, commutation, reprieve, or remission of fine subject to terms and conditions established by the governor upon the recommendation of the Pardon Advisory Board.
- C. Pardon: The removal of punishment or custody imposed upon a person for the commission of an offense. A pardon does not remove that person's conviction or plea or finding of guilt for an offense unless specifically stated in the certificate of pardon.
- D. Remission of fine: A release or partial release of a fine.
- E. Reprieve: A temporary relief from or postponement of the execution of a criminal sentence.

III. MISSION:

- A. The mission of the Pardon Advisory Board is to hear requests within its jurisdiction and base its recommendations in keeping with constitutional and statutory intent and the best interest of society. All germane information that is available to the Pardon Advisory Board, including any new mitigating information regarding the conviction as well as social development and achievement of the requester, will be considered.

IV. PARDON ADVISORY BOARD:

- A. The governor may appoint a Pardon Advisory Board to consist of five members including the attorney general and two members of the parole board. The governor shall appoint two persons who are residents and citizens of this state to the remaining two positions. The governor shall appoint a chairperson from within the membership of the Pardon Advisory Board.
- B. The governor may dissolve the Pardon Advisory Board at any time.

- C. The governor may call the meetings of the Pardon Advisory Board as the governor deems necessary.
- D. The Pardon Advisory Board is not an administrative agency as defined by NDCC 28-32-01(1)(n) and is not subject to the Administrative Agencies Practice Act NDCC 28-32-01(1)(p). Any rules the Board may adopt need not be published in the North Dakota Administrative Code.
- E. Pardon Advisory Board members may not engage in ex parte communications with applicants for pardons or with their representatives or advocates.

V. POLICIES AND PROCEDURES:

- A. Meetings and rules.
 - 1. The board will schedule at least two meetings per year to review sentences imposed on offenders. Unless otherwise indicated, all meetings will be held in Bismarck. Pardon Advisory Board meetings will follow meetings of the parole board by one day or more, when ever possible.
 - 2. A simple majority of the Board constitutes a quorum.
 - 3. The Board may call executive sessions as allowed by NDCC 44-04-19.
 - 4. The rules and procedures for reviewing requests for relief are contained within this policy.
- B. Duties and responsibilities of the board. The board shall provide information and make recommendations to the governor concerning any matters before the governor under this chapter. Recommendations may include remission of fine, commutation of sentence, grant of a pardon and grant of a reprieve. Recommendations for conditional pardons will include recommended terms and conditions of the pardon.
- C. Duties and responsibilities of the pardon clerk. The director of the field services division shall serve as the pardon clerk and will:
 - 1. Maintain a register of all applications filed with the board as well as a record of proceedings. Maintain a record of all actions of the board.
 - 2. Conduct investigations for and provide information to the board. The pardon clerk will receive all information to be considered by the board.
 - 3. Direct officers of the DOCR to provide testimony or written comments for the board to consider when the offender is on supervision or has recently been on supervision by the department.

4. Provide written notice of an application to the district court and the state's attorneys in the county or counties where the judgment of conviction was entered against the applicant. The notice must include the name of the applicant, the date of entry and docket number of the criminal judgment, the crime or crimes stated in the criminal judgment, and the date and place for the meeting on the application.
5. The pardon clerk will ensure that victims rights (NDCC 12.1-34 and 12.1-35) are protected and that victims have the opportunity to present information to the board in the manner that the board prescribes.

D. Cases eligible for Pardon Advisory Board review.

1. Offenders in DOCR custody or on supervision with the Field Services Division of the DOCR.
 - a. Inmates currently incarcerated.
Inmates who have no legal remedy through the Parole Board may be eligible for review by the Pardon Advisory Board providing that review does not conflict with any other provisions of this policy.
 - b. Offenders under the supervision of the Field Services Division of the DOCR.
The supervising officer of any offender on supervision may apply for relief on behalf of the offender with the pardon clerk.
2. Persons not in the custody of, or under the supervision and management of, the DOCR.

The applicant must have encountered a significant problem with the consequences of his or her conviction or sentence (e.g. difficulty entering a professional school or securing employment).
3. In very limited circumstances, the Board may consider applications from individuals who present a compelling need for relief as a result of unusual circumstances not otherwise specified by the above criteria.

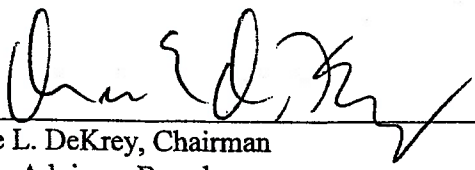
E. Application and review process.

1. Applications for board review must be made with the pardon clerk on a form prescribed by the pardon clerk. (12-55.1-06)
2. The written application must be submitted to the pardon clerk at least 90 days before the Pardon Advisory Board convenes. Field services staff will investigate the application and prepare a packet for each application.

- a. If applications are incomplete, the pardon clerk will notify the applicant of the items that need completion before the applicant will receive consideration.
 - b. Any incomplete application may be deferred until such time the application is complete. An incomplete application includes failure of the applicant to respond to the pardon clerk's or his designee's requests for information.
3. The pardon clerk shall conduct a pre-screening of all applications to determine the merit of the application. For inmate applications, the clerk will determine if the inmate is eligible for parole board consideration. In all cases, the clerk will also consider the reason for the pardon request.
4. The pardon clerk will staff each case on the proposed docket with a representative of the Governor and the Pardon Advisory Board Chairman.
5. The pardon clerk will prepare a final docket at least 45 days before the Pardon Advisory Board convenes.
6. The pardon clerk may formulate a recommendation concerning an applicants request for relief.
7. The pardon clerk will present a final packet for each application to members of the board at least 30 days before board convenes. This may include any sentencing report prepared by the division and statements of the sentencing judge, states attorney and victim.
8. The board may review the application with the applicant or may review the application without a personal appearance. Granting or not granting a personal appearance should not constitute a negative recommendation for relief. The pardon clerk will schedule all personal appearances.
9. Any request made by the Pardon Advisory Board Chairman for the personal appearance of an applicant will be honored.
10. After appropriate review, the board will make a recommendation to the Governor regarding each case on the final docket.
11. If the governor denies the applicant the requested relief, the applicant may not reapply for relief for a period of one year from the date the governor denied relief, or if the board has set a later date, the date the board has set. The board is not precluded by this section from considering an emergency application for relief at any time.

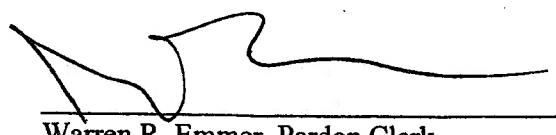
12. Any reapplication will be submitted on a summary form as provided by the pardon clerk and must demonstrate specific changes in circumstances since the prior application.
13. The governor may reconsider the decision to grant an applicant relief at any time before the applicant is released from the correctional facility. If an applicant is released from custody pursuant to a conditional pardon and the applicant has violated any of the terms or conditions of the conditional pardon, the governor may revoke the conditional pardon in the same manner provided for violation of any of the terms or conditions of parole. In all other cases, the governor may reconsider a decision on an application if the reconsideration is made within thirty days from the date of the initial decision.

This policy with subsequent changes becomes effective when signed by the Governor, the Chair of the Pardon Advisory Board, and the Clerk of the Pardon Advisory Board.



Duane L. DeKrey, Chairman
Pardon Advisory Board

1-04-06
Date



Warren R. Emmer, Pardon Clerk
Pardon Advisory Board

1-03-06
Date