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ATTORNEY GENERAL OPINION NO. 78- 340

Mr. Devon F. Knoll
Director
Kansas Adult Authority
Fourth Floor - 535 Kansas Avenue
Topeka, Kansas 66603

Re: Criminal Code--Sentencing--Inmate's Entitlement To Parole Hearing If Convicted Of A Class B Or C Felony

Synopsis: L. Ch. 120 § 13(2) grant an inmate convicted of Class B or C felony a statutory right to a parole hearing upon completion of minimum term of sentence, less earned good time credits.

Re: Criminal Code--Sentencing--Retroactive Application Of New Amendments To Parole Eligibility

Synopsis: As a matter of statutory construction the 1978 amendments as to parole eligibility may only operate prospectively as to inmates convicted of crimes committed after the effective date of the act, and the old administrative rules and statutes govern inmates convicted of crimes committed prior to this date.

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Dear Mr. Knoll:

Your letters dated July 31, 1978, and September 18, 1978, pose two questions regarding certain amendatory and new legislation concerning the parole authority of the Kansas Adult Authority.

Specifically you inquire whether under L. 1978, Ch. 120 § 12(2)(b) the Authority is required to give an inmate sentenced to a Class B or C felony a hearing at a specific time, or whether it may be deferred if the inmate incurs a disciplinary infraction and forfeits "good time", even beyond the minimum term of sentence.

Once granted, release on parole becomes a vested liberty interest to which due process protections apply. However, prior to release, any prospective interest in early release enjoyed by an inmate is not a vested right, but strictly a matter of legislative grace. State v. DeCoursey, 224 K. 278, ___ P.2d ____ (1978). The authority to release incarcerated inmates on parole prior to actual service of the sentence imposed in Kansas, as in most jurisdictions, is now a matter of express statutory law.

Section 13(1), Ch. 120, L. 1978, like its predecessor, K.S.A. 22-3717(1), 1977 Supp., indicates that release on parole is a discretionary act of the authority based on its judgment that the inmate may be released without detriment to the community or to the inmate. An inmate has no right to parole at any stage of his incarceration, and could conceivably serve the maximum term specified in his sentence.

You ask, however, whether the inmate has a vested right to a parole hearing at any particular time. The answer is found in the express terms of the statute.

L. 1978, Ch. 120, § 13 provides in pertinent part as follows:

> "(2) The Kansas Adult Authority shall hold a parole hearing for any inmate who achieves eligibility for a parole hearing in accordance with this subsection (2) . . . .
> (B) Any inmate sentenced to imprisonment for a class B or C felony shall be eligible for a parole hearing after serving the entire minimum term imposed by the court, less good time credits established by rule and regulation of the Kansas adult authority and awarded by the secretary of corrections on an earned basis pursuant to rules and regulations adopted by the secretary of corrections. Except when the defendant has been sentenced for a second or more felony pursuant to K.S.A. 21-4504, as amended, the Kansas adult authority may grant a parole hearing for a defendant convicted of a class B or C felony at any time after the court no longer has jurisdiction to modify the sentence on its own initiative if the parole hearing is requested by the secretary of corrections for good cause." [Emphasis supplied.]

Under subsection (2) the authority is directed to hold a hearing when the inmate achieves eligibility for a hearing under the guidelines defined in the remainder of the subsection (2). Subpart (b) of that subsection indicates an inmate convicted of class B or C felony achieves

such eligibility when he or she serves the minimum term of sentence less good time credits awarded by the Secretary of Corrections.

Under the language of this subsection, the inmate is given a statutory right to a hearing on the date he becomes eligible under subpart (B). This date may be earlier than actual service of the entire minimum, depending on the amount of good time credit earned and subtracted from his sentence. This date may be adjusted because disciplinary infractions may result in forfeiture of good time. Such forfeitures would change the amount of good time the inmate has earned and therefore the eligibility date under this section. However, in no event may it be later than service of the minimum term. If no good time is subtracted, the inmate is eligible under the definition of subpart (B) after service of the minimum term.

Next you ask whether the Authority, in adopting its new rules and regulations as required under the new act, may specify that the old regulations and laws will continue to govern inmates convicted of crimes committed prior to January 1, 1979 (the effective date of the new statute). The cause for your inquiry is L. 1978, Ch. 120, § 23(b), which provides:

> "(b) Until January 1, 1979, and notwithstanding any provisions of K.S.A. 77-415 to 77-436, inclusive, and amendments thereto, all rules and regulations of the secretary of corrections and the Kansas adult authority which are in force and effect prior to July 1, 1978, shall continue in full force and effect and may be amended, revived or revoked in the manner provided by the law in effect prior to July 1, 1978. On January 1, 1979, all rules and regulations of the secretary of corrections and the Kansas adult authority in force and effect prior to January 1, 1979, shall be null and void." [Emphasis supplied.]

In answering this question, I would refer you to a previous opinion issued by our office to former Secretary Raines, No. 75-232. In that opinion we concluded that 1974 legislative amendments modifying parole eligibility requirement if applied retroactively to the detriment of inmates sentenced for crimes committed before the effective date of the act, would raise a grave constitutional questions under Article I, § 10, Ch. 1 of the U.S. Constitution, which prohibits ex post facto legislation.

Under the sound reasonsing of this previous opinion (pp. 10-11) it is clear that, as here, when the statute is silent on the question

of retroactivity, it can be inferred that it only operates prospectively in a manner consonant with the constitution. As indicated in the previous opinion, the determinative date for the purposes of the ex post facto prohibition is the time the offense was committed, not the date of sentencing. Kring v. State of Missouri, 107 U.S. 221 (1883).

Thus, I am of the opinion that not only may you adopt regulations in the manner suggested by your question, but by implication you are required to do so in order that the statute may operate in accordance with the Constitution.

Yours truly,

CURT T. SCHNEIDER
Attorney General

CTS:RNW:jj