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1/14/08

04
43
45
46
47
48
49

MEMORANDUM

TO: Director,
Department of Corrections

ATTN: Jose Q. Salas,
Chairman
Guam Parole Board

Michael Quinata,
Chief Parole Officer
Department of Corrections

FROM: Chief Deputy Attorney General

VIA: Attorney General

SUBJECT: Questions and Concerns of January 2, 2008 Meeting.

Buenas yan Håfa Adai! Reference is made to the January 2, 2008, meeting between members of the Territorial Board of Parole ("Board"), the Department of Corrections ("DOC"), and the Office of the Attorney General ("Office"). In that meeting, certain issues were brought up and discussed which resulted in a request by the Board to this Office for legal research relevant to those issues.

INTRODUCTION

The first issue had to deal with the situation of Alexander Kitano, an offender who is currently serving his term of incarceration in an off-island institution. The Superior Court had ordered the DOC to either bring Kitano back to Guam to appear physically, or to appear by live video conference. On December 3, 2007, this Office had sent a memorandum which informed the Board that the Court's order of a video-conference was a sufficient substitute for transporting Kitano from the States to be here personally for his parole hearings. The Office had also advised the Board that

the same issue was being litigated by Kitano before the District Court of Guam[1]. Furthermore, it was opined that our parole statute created a liberty interest in an inmate's obtaining parole, if certain requirements are met; and that that right must be given appropriate, meaningful, due process protection.

The second issue relates to the authority of the Board to toll a parolee's parole time when he or she has absconded and who has not duly fulfilled his or her parole conditions, such as reporting to his or her parole officer. This Office's December 3rd memorandum also briefly discussed this issue and it was suggested that a tolling statute was required and that a Board tolling regulation would not suffice.

Finally, subsequent to the January 2nd meeting, there was a media inquiry into one of the standard provisions for conditions of parole. That provision reads: "That I will refrain from any common-law relationships (cohabitation) unless legally married. I understand that if I do not comply with this condition I will be brought before the Guam Parole Board."

QUESTIONS PRESENTED

1. Whether due process requires that an offender personally appear before the Board in its determination of whether to grant or deny parole.

2. Whether the Board may, upon its own authority, toll the parole period for the time that a parolee absconds parole.

3. Whether the Board may properly impose the condition that a parolee not co-habit with any person unless he or she is legally married.

SHORT ANSWERS

1. The personal appearance of the offender before the Board at the parole hearing is not mandated statutorily nor does the failure of the inmate to personally appear before the Board represent a violation of due process.

2. The Board's Order of November 30, 2005, being consistent with the rule that specific statutory language is not required to toll the term of supervised release of an absconding parolee, is sufficient as a rule and procedure in such a case.

[1] *Kitano v. Guam Territorial Parole Board*, Civil Case No. 06-0036, 2007 WL 1795544 (Dist. Ct. Guam).

3. There appears to be support in other jurisdictions, including Missouri and Nebraska, for the Parole Board to refuse to allow its clients, parolees, to live in meretricious relationships or with a "boyfriend" or "girlfriend".

OVERVIEW

The provisions of Guam law governing the subject of parole are found in Article 5 of Title 9 of the Guam Code Annotated. *See* 9 GCA §§ 80.70 *et seq*. The administration of this Chapter is given to the Territorial Parole Board. 9 GCA § 85.26. The Board is authorized to adopt such rules and procedures not inconsistent with law as it may deem proper or necessary to carry out its duties. *Id.*

Generally, parole is the conditional release of an offender who has been sentenced to a term of imprisonment. An offender is eligible for parole upon completion of at least two-thirds (2/3) of his fixed sentence or, if convicted of a violent crime as defined in the statute, then upon completion of at least eighty-five percent (85%) of his fixed sentence. *See* 9 GCA § 80.70(a). The conditional release on parole of an offender is for a period, or term, of three (3) years unless the conviction was for a misdemeanor in which case the term of parole is one (1) year. *See* 9 GCA § 80.70(b). An offender can also be recommitted to the DOC upon the revocation of his parole, the term of which is determined by the Board subject to certain limitations to the length of imprisonment. *See* 9 GCA § 80.70(c). When the parole term has expired or the offender has been sooner discharged from parole then the offender is deemed to have served his sentence and must be released unconditionally. *See* 9 GCA § 80.70(d).

As it pertains to the granting or denial of parole, pursuant to statute, an offender confined in a Guam penal or correctional institution shall be eligible for release on parole (in accordance with the time provisions above). *See* 9 GCA § 80.72(a). The role of the Board is to consider the desirability of parole of each inmate at least sixty (60) days prior to his first eligibility. *See* 9 GCA § 80.72(b). Following such consideration, the Board issues a formal order granting or denying parole. *Id.* If parole is denied, then the Board has to state in its order the reasons for denial and the approximate date of next consideration, which cannot be more than one year from the date of the previous consideration. *Id.* However, the Board need not state its reasons for denial if "to do so would impair a course of rehabilitative treatment of the inmate." *Id.*

Before the Board makes any determination regarding a prisoner's release on parole, it must cause to be brought before it certain prescribed records and information. *See* 9 GCA § 80.78. Guam law also requires that in advance of his parole hearing, the prisoner must be requested to prepare a parole plan, setting forth the manner of life he intends to lead if released on parole and that the institutional parole staff must render reasonable aid to the prisoner in the preparation of his plan and in securing information for submission to the Board. *See* 9 GCA § 80.74(a). The prisoner is also permitted to advise with any person(s) whose assistance he reasonably desires, including his own legal counsel, in preparing for a hearing before the board. *See* 9 GCA § 80.74(b). A parole hearing, as such is applicable to the determination of whether to grant or deny parole, and the procedures for the

conduct of such hearings is not specifically provided for in Guam law. However, the standards upon which the Board shall order the release on parole of prisoners is laid out by statute. *See* 9 GCA § 80.76.

DISCUSSION

1. Whether due process requires that an offender personally appear before the Board in its determination of whether to grant or deny parole.

A. There is no statutory authority that an offender personally appear before the Board at the hearing to determine whether to grant or deny parole.

As an initial matter and outlined above, there is nothing in the parole statutory scheme of Guam that requires a prisoner under consideration for release on parole to personally appear before the Board. The statute only requires that the prisoner have a hearing before the parole board and does not require that the prisoner personally appear at the hearing. *Cf. Mahaney v. State of Maine*, 610 A.2d 738 (Maine 1992) (statutory construction of parole statute, no declaration that an inmate be required to appear at his parole hearing and concluding that the decision whether to permit an inmate to appear before the board is discretionary).

B. Due Process Analysis

The question then is whether the failure to personally appear before the Board is a violation of due process. "The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process we have inquired into the nature of the individual's claimed interest." *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 US 1, 7, 99 S.Ct. 2100, 2103-04 (1979). The United States Supreme Court has held that there is no inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. *Id.* Although a state may establish a parole system, it has no duty to do so. *Id.* Moreover, as the Court noted:

> to insure that the state-created parole system serves the public interest purpose of rehabilitation and deterrence, the state may be specific or general in defining the conditions for release and the factors that should be considered by the parole authority. It is thus not surprising that there is no prescribed or defined combination of facts which, if shown, would mandate release on parole. Indeed, the very institution of parole is still in an experimental stage. In parole releases, like its siblings probation release and institution rehabilitation, few certainties exist. In each case, the decision differs from the traditional mold of judicial decisionmaking in that the choice involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community. This latter

> conclusion requires the Board to assess whether, in light of the nature of the crime, the inmate's release will minimize the gravity of the offense, weaken the deterrent impact on others, and undermine respect for the administration of justice. The entire inquiry is, in a sense, an "equity" type judgment that cannot always be articulated in traditional findings.

Id. at 7-8, 99 S.Ct. at 2104. (footnotes omitted)(quotation in original)

In *Greeholtz*, the inmates in a section 1983 class action, had argued that they have a constitutionally protected interest in parole determination. They claimed that a reasonable entitlement is created whenever a state provides for the *possibility* of parole. *Id.* at 8-9, 99 S.Ct. at 2104. The Court held that since "the possibility of parole provides no more than a hope that the benefit will be obtained," an inmate's eligibility for parole, in and of itself, is not a liberty interest protected by due process. *Id.* at 11-12, 99 S.Ct. at 2105-06.

The Supreme Court did, however, recognize that state statutes governing parole may create a protectable interest entitling a prospective parolee to some constitutional protection. *Id.* For example, the inmates had argued that the statute at issue created a presumption that parole will be granted, and that this in turn created a legitimate expectation of release absent the requisite finding that one of the justifications for deferral existed. *Id.* In which case, an examination of the statutory procedures to determine whether they provide the process that is due in those circumstances must be undertaken. *Id.* The Court observed:

> It is axiomatic that due process "is flexible and calls for such procedural protections as the particluar situation demands." *Morrissey v. Brewer*, 408 U.S. at 481, 92 S.Ct. at 2600; *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162-163 71 S.Ct. 624, 643, 95 L.Ed. 817 (1951)(Frankfurter, J., concurring). The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions. Because of the broad spectrum of concerns to which the term must apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

Id. at 12-13, 99S.Ct. at 2106-07.

In this case, the Office had originally opined that Guam's parole statute had created a liberty interest in an inmate's obtaining parole if certain requirements are met. The Office sought to distinguish the Kitano situation from the situation in a case cited by the Board, *Fox v. Stotts*, 203 F.3d 834 (10th Cir. 2000), *cert.* denied in 531 U.S. 843, 121 S.Ct.110 (2000). In that case, the 10th Circuit Court of

Appeals found that the Kansas Supreme Court's interpretation that the Kansas parole statute did "not give rise to a liberty interest when the matter before the Board is the granting or denial of parole to one in custody." *Id.* "Parole, like probation, is a matter of grace in this state. It is granted as a privilege and not as a matter of fundamental right." *Id.* (citing *Gilmore v. Kansas Parole Board*, 756 P.2d 410 (Kan. 1988)). The Guam parole statute provides:

> (a) Whenever the board considers the release of a prisoner for parole, the board *shall* order his release, if it is of the opinion that:
>
> > (1) his release is compatible with public safety and security;
> > (2) there is substantial likelihood that he will abide by law and conform to the conditions of parole;
> > (3) his release at that time would not depreciate the seriousness of his crime nor promote disrespect for law;
> > (4) his release would not have a substantially adverse effect on institutional discipline; and
> > (5) his continued correctional treatment, medical care or vocational or other training in the institution will not substantially enhance his capacity to lead a law-abiding life when released at a later date.
>
> (b) In making its determination regarding a prisoner's release on parole, the board may consider, to the extent relevant, the following factors:
>
> > (1) the prisoner's personality, including his age and maturity, stability, sense of responsibility and any apparent development in his personality which may promote or hinder his conformity to law;
> > (2) the prisoner's parole plan;
> > (3) the prisoner's ability and readiness to assume obligations and undertake responsibilities;
> > (4) the prisoner's family status and whether he has relatives who display interest in him or whether he has other close and constructive associations in the community;
> > (5) the prisoner's employment history, his occupational skills and training, and the stability of his past employment;
> > (6) the type of home environment in which the prisoner plans to live;
> > (7) the prisoner's past use of narcotics or other harmful drugs, or past habitual and excessive use of alcohol;
> > (8) the prisoner's mental and physical make-up, including any disability or handicap which may affect his conformity to law;
> > (9) the prisoner's prior criminal record, including the nature and circumstances, recentness and frequency of previous offense;
> > (10) the prisoner's attitude toward law and authority;

> (11) the prisoner's conduct in the institution, including whether he has taken advantage of the opportunities for self-improvement afforded by the institutional program;
> (12) the prisoner's conduct and attitude during any previous experience of probation or parole and the recentness of such experience.

9 GCA § 80.76 (emphasis added).

First, unlike the situation in *Fox v. Stotts*, the Supreme Court of Guam has not decided whether this statute gives rise to a liberty interest in the determination of granting or denying parole.

Next, similar to *Greenholtz* and to the extent that the Guam parole statute creates an expectation of parole, the inmate's eligibility for parole, in and of itself, is not a liberty interest protected by due process. *Greenholtz*, 442 U.S. 11, 11-12, 99 S.Ct. 200, 2105-2106.

However, does the statute create some protectable interest such that there may be some constitutional protection? It was initially asserted that the use of the mandatory "shall order his release" in 9 GCA § 80.76(a) created a liberty interest. Assuming that 9 GCA § 80.76(a) created a liberty interest, the next inquiry is whether the procedures "provide the process that is due in these circumstances." 442 U.S. 1, 12, 99 S.Ct. 2100, 2106. *Cf. Sage v. Gamble*, 929 P.2d 822(Mont. 1996)(in an earlier case, the U.S. Supreme Court had found that the Montana statute's use of mandatory language ("shall") to create a presumption that parole release will be granted when the designated findings are made).

In the case of *Mahaney v. State of Maine*, the inmate argued that the liberty interest is the right to a meaningful hearing by the parole board, which includes a personal appearance. 60 A.2d 738, 742. *Compare Sage v. Gamble*, 929 P.2d 822 (Mont. 1996)(At the time prisoner was convicted, Montana statute commanded that before ordering the parole of any prisoner the board shall interview him. Furthermore, the board's own rules provided that an inmate will systematically come before the parole board for an interview at the time fixed by law.) The inmate contended that a personal appearance before the board is a critical part of the decisionmaking process and that the process afforded him was an inadequate substitute. *Id.* The Supreme Judicial Court of Maine held that since there was no statutory right to appear personally before the board and the parole decision is one that must be made largely on the basis of the inmate's files, the procedure used in the case provided adequate safeguards against serious risks of error and thus satisfies due process. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The inmate, who was incarcerated in Florida at the time of the parole hearing, made an equal protection argument that he was treated differently than prisoners housed within the state. *Id.* at 742-743. The Court rejected this argument and held that the decision whether to require an inmate to attend a parole hearing is left to the discretion of the board. *Id.* That neither the parole statute nor the parole board rules require that an inmate be present at his parole hearing. *Id.* Furthermore, it observed that a legitimate concern both

for cost and security justifies the board in exercising its discretion differently in the case of out-of-state prisoners. *Id.*

Similarly, there is no statutory right of the inmate to personally appear before the Guam Territorial Parole Board nor is there a Board rule which requires the same. The Board's decision on whether to grant or deny parole is largely based on the parole plan submitted by the prisoner, *see* 9 GCA § 80.74(a), and the following files and information pursuant to 9 GCA § 80.78(a) through (i), including a report prepared by the institutional parole staff, all official reports of the prisoner's prior criminal record, any pre-sentencing investigation report of the sentencing court, the reports of any physical or mental examinations of the prisoner, and the record of his conduct while imprisoned. Furthermore, concerns of cost and security are properly within the Board's consideration in exercising its discretion to treat an off-island inmate differently from those on-island.

Therefore, the Office concludes that the personal appearance of the offender before the Board at the parole hearing is not mandated statutorily nor does the failure of the inmate to personally appear before the Board represent a violation of due process.

2. Whether the Board may, upon its own authority, toll the parole period for the time that a parolee absconds parole.

Earlier in this memorandum, it was stated that the term of parole is three (3) years except if the underlying conviction of the offender was a misdemeanor, in which case the parole term is for one (1) year. *See* 9 GCA § 80.70(b). When a parolee has violated a condition of parole he is subject to sanctions which may include a reprimand and warning from the Board, an intensification of parole supervision and reporting, the inclusion of more conditions, and the arrest and/or recommitment of the parolee, after a hearing. *See* 9 GCA § 80.80. However, the question presented involves the situation wherein a parolee has absconded and fails to dutifully abide by the conditions of parole and whether the time within which to revoke his release on parole is tolled so that if he is eventually caught the Board will retain jurisdiction over the absconder and may mete out the appropriate sanction.

The parole statute, unlike the provisions governing probation, does not have a law providing for a tolling of the period of supervision. *See* 9 GCA § 80.66(a)(3)(4).There is authority for the proposition that tolling of a parole sentencing while he was in violation of parole may be authorized by statute. *See e.g., Watkins v. Class*, 566 N.W.2d 431 (S.D. 1997). In addition, there are rules of statutory construction which may justify a conclusion that the legislature intended not to provide a tolling provision in the context of parole, Specifically, that when the legislature has specifically included a term in some places within a statute and excluded it in other places, courts will not read that term into the sections from which it was excluded; and the rule of *expressio unius est exclusio alterius*, meaning the expression of one thing is the exclusion of another.

However, there is also authority that specific statutory language is not required to toll the term of supervised release while a defendant is in "fugitive status." *U.S. v. Murguia-Oliveros*, 421 F.3d 951 (9th Cir. 2005), cert. denied in 546 U.S. 1125, 126 S.Ct. 1108 (2006). A person is in "fugitive status" when he effectively absconds from serving the terms of his supervised release. *Id.* at 954. Tolling of the period of supervised release is necessary so as not to reward those who violate the terms of their supervised release and avoid arrest until after the original term expires. *Id.*

Although it would appear that the safest course would be to get legislation passed to answer the question; it does not mean that there is not an arguable position that the lack of a specific statutory provision prevents the tolling of the supervised period so long as the Board can demonstrate that steps were taken to deal with the absconder during the term of parole. Any action by the Board after the parole term has expired is problematic. The Board is empowered to adopt such rules and procedures not inconsistent with law as it may deem proper or necessary to carry out its duties. *See* 9 GCA § 85.26. Thus, the Board's Order of November 30, 2005, being consistent with the rule that specific statutory language is not required to toll the term of supervised release of an absconding parolee, is sufficient as a rule and procedure in such a case.

3. Whether the Board may properly impose the condition that a parolee not co-habit with any person unless he or she is legally married.

The conditions imposed by the Board upon a parolee may not be unlawful, immoral, or impossible of performance. *See Commonwealth v. Minor*, 241 S.W. 856 (Ky. Ct.App. 1922). While the Board may properly subject the parolee to restrictions which are not applicable to other citizens, the imposition of such conditions must be within constitutional limitations. *See e.g., People v. Hernandez*, 40 Cal.Rptr. 100 (Cal.Ct.App. 3d 1964); *Schwartz v. Woodahl*, 487 P.2s 300 (Mont. 1971).

An example of this concept is found in the case of a parolee who had sought injunctive relief against the enforcement of a condition of his parole to obtain permission from his parole officer before giving any public speech. *Hyland v. Procunier*, 311 F.Supp. 749-750 (D.Ct. N.D. Cal. 1970). The court granted injunctive relief and ordered that the paroling authority be permanently enjoined from conditioning the parolee's parole on his seeking advance permission to address public gatherings and prohibiting any California State parolee from addressing lawful public assemblies. *Id.* at 750-751. The court found that there existed a prior restraint of the parolee's first amendment right and that the restraint was invoked in view of the anticipated content of the parolee's speech. *Id.* at 750. But the court further held that "California as well as federal law has imposed the due process rule of reasonableness upon the State's discretion in granting or with 'privileges' from prisoners, parolees, and probationers." *Id.* (citations omitted). And that the defendants have made no showing that the condition imposed was in any way related to the valid ends of California's rehabilitation system. *Id.*

Further research into the existence of a fundamental right of a person, in this case a parolee, to engage in a common-law relationship outside of legal marriage might be necessary. However, for

purposes of discussion, it is assumed that there is some constitutional right involved. The issue then becomes whether the condition imposed on the parolee is in any way related to the valid ends of Guam's rehabilitation system.

DOC has indicated that the provision was put into place about 10 years ago. It was premised upon a concern that, in many instances, parolees were ill-equipped to handle such relationships until after they had received some counseling or other means of adequately dealing with interpersonal relationships. In addition, common law relationships or marriages are not accorded any legal status or rights under Guam law. Further, it does not appear that the condition has ever been challenged by a parolee in Guam. There appears, however, to be support in other jurisdictions, including Missouri and Nebraska, for the Parole Board to refuse to allow its clients, parolees, to live in meretricious relationships or with a "boyfriend" or "girlfriend". *See* Missouri Attorney General Opinion No. 80-74; Nebraska Attorney General Opinion No. 96035.

If you should have any questions, please do not hesitate to contact me. *Dångkolo na Agradesimiento*!

Sincerely,

ALBERTO E. TOLENTINO
Chief Deputy Attorney General