



WILLIAM J. SCOTT

ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD

March 22, 1974

File No. S-727

CRIMINAL LAW:
Parole and Pardon Board

Joseph J. Longo, Chairman
Parole and Pardon Board
160 North LaSalle Street
Room 420
Chicago, Illinois 60601

Dear Mr. Longo:

I have your letter in which you state:

"The State Legislature amended the Court of Claims Act by Public Act 77-2089 which became effective October 1, 1972. Prior to this amendment, Chapter 37, Illinois Revised Statutes, Sec. 439.8(c) provided that the Court of Claims shall have exclusive jurisdiction to hear and determine 'All claims against the State for time unjustly served in prisons of the State where the persons imprisoned prove their innocence of the crime for which they were imprisoned;'

The said amendment to the Act changed the language above quoted to the following: 'All claims against the State for time unjustly served in prisons of this State where the persons imprisoned shall receive a

pardon from the governor stating that such pardon is issued on the ground of innocence of the crime for which they were imprisoned:'

The Court of Claims has construed the amendment as procedural in nature only and, therefore, has advised some claimants who have cases pending as of October 1, 1972 and not yet decided by the Court, that they must initiate a petition before the Parole and Pardon Board to obtain a gubernatorial pardon on the ground of innocence before the Court could proceed to consider the amount of the award that might be granted.

The Parole and Pardon Board is requesting an opinion of the Attorney General as to whether this determination of the Illinois Court of Claims is correct and therefore that such pending cases should be processed under said amendatory Act.

Many years ago, the Court of Claims determined that under the prior Statute a claimant must prove his innocence of the crime for which he was imprisoned by a preponderance of the evidence. The Parole and Pardon Board requests an opinion of the Attorney General as to whether the same requirement of proof of innocence would prevail in hearings before the Parole and Pardon Board under said amendatory Act which became effective October 1, 1972.

The Parole and Pardon Board proposes that one Member of the Board, together with a Legal Consultant, will conduct a hearing and report to the Board on such hearing for the Board's determination and recommendation to the Governor. The Parole and Pardon Board is requesting an opinion of the Attorney General as to the legality of this procedure under Chapter 38 of the Illinois Revised Statutes,

Joseph J. Longo - 3.

Sec. 1003-3-13 which sets forth the procedure for executive clemency."

It would be improper for me to respond to your first question. The Court of Claims has determined that Public Act 77-2089 is procedural in nature only. That holding is not reviewable by the Attorney General. I would point out that said Act only changed the jurisdiction of the Court of Claims. Whereas prior to said Act, the jurisdiction of the court to hear and determine claims included cases "where the persons imprisoned prove their innocence of the crime for which they were imprisoned" (Ill. Rev. Stat. 1971, ch. 37, par. 439.8), upon the effective date of the Act, the court's jurisdiction was narrowed to include only those cases "where the persons imprisoned shall receive a pardon from the Governor stating that such pardon is issued on the grounds of innocence of the crime for which they were imprisoned." (Ill. Rev. Stat. 1973, ch. 37, par. 439.8.) The powers and duties of the Parole and Pardon Board regarding pardons were in no way changed by the Act.

As to your second question, since the standard of persuasion adhered to in the Court of Claims does not in any way

Joseph J. Longo - 4.

bind the Parole and Pardon Board, the question may be restated as follows: What burden of persuasion should be employed in a proceeding before the Parole and Pardon Board where the petitioner is seeking a pardon on the grounds of innocence?

Section 12 of article V of the Illinois Constitution of 1970, dealing with pardons, states in part:

"Governor - Pardons

* * * The manner of applying therefore may be regulated by law."

Under the authorization of said section, the legislature, in section 3-3-13 of the Unified Code of Corrections (Ill. Rev. Stat. 1973, ch. 38, par. 1003-3-13), has provided that:

"§3-3-13. Procedure for Executive Clemency.

(a) Petitions seeking pardon, commutation or reprieve shall be addressed to the Governor and filed with the Parole and Pardon Board. The petition shall be in writing and signed by the person under conviction or by a person on his behalf. It shall contain a brief history of the case and the reasons for executive clemency.

(b) Notice of the proposed application shall be given by the Board to the committing court and the state's attorney of the county where the conviction was had.

(c) The Board shall, if requested and upon due notice, give a hearing to each application, allowing representation by counsel, if desired, after which it shall, without publicity advise the Governor by a written report of its recommenda-

Joseph J. Longo - 5.

tions which shall be determined by majority vote. The Board shall meet to consider such petitions no less than 4 times each year.

(d) The Governor shall decide each application and communicate his decision to the petitioner and to the Board."

Section 1 of article IX of the Illinois Constitution of 1970, containing an identical requirement to that of section 1 of article IX of the Illinois Constitution of 1870, states in part:

"Legislature - Power and Structure.
The legislative power is vested in a General
Assembly * * * "

This disposition of power is not violated by a delegation of discretion to an administrative agency, for administrative discretion is not an unconstitutional delegation of the legislative function where adequate standards to guide the exercise of discretion are provided for by statute. Krause v. Peoria Housing Authority, 370 Ill. 356.

While it appears that there are no substantive standards provided by section 3-3-13 of the Unified Code of Corrections (Ill. Rev. Stat. 1973, ch. 38, par. 1003-3-13) to guide the Parole and Pardon Board in exercising its discretion in conducting hearings

Joseph J. Longo - 6.

and making recommendations, this absence, nevertheless, does not render said section unconstitutional. An analogy to the case of State v. Pigg, 244 S.W. 2d 75, 362 Mo. 798(1951), makes this clear. That case dealt with a state statute creating a State Board of Mediation for labor disputes and provided, in part, for the appointment of public hearing panels by said board. As to said panels, the statute provided for their composition, powers, hearings and notice, and required them to file with the Governor, in writing, reports setting forth statements of the controversies, resumes of the evidence submitted to them, and their recommendations based thereon. The panel's conclusions, having no legal effect, remained nothing more than recommendations, unless and until voluntarily accepted by the parties involved.

The court, in reference to one of plaintiff's contentions, stated:

"With reference to the alleged unlawful delegation of legislative power to members of the public hearing panels, respondent says that these sections are void by reason of conflict with Sec. 1, Art. II of the Constitution of Missouri 1945, which provides for three departments of government and for the separation of powers. Respondent's theory is that the public hearing panels exercise legislative authority which has been delegated to them; and that 'without limitation or direction, the statute gives to the members of such panels the very

broadest discretion to determine the wages, hours and working conditions which should be applied and permitted in a given utility.' (Italics ours), p. 85. Respondent further says that 'notwithstanding the clear requirements that a delegation of legislative power must be accompanied by standards and guidance, Secs. 295.120 to 295.180 do not set forth any standards, criterions, patterns or guides to be followed by the public hearing panels in carrying out their duties under the said sections.' However, if no legislative power has in fact been delegated to the public hearing panels and if no power to arbitrate, determine and settle labor disputes has in fact been granted to them, then the position of respondent is not well taken. Neither the board nor the panels have any authority under the act to put these panel recommendations concerning wages, hours and working conditions into effect without the voluntary acceptance and agreement of the parties. The authority delegated is not legislative, but administrative. The delegation of power to hear the parties, to review the facts and to make recommendations which bind no one does not amount to the delegation of legislative power." (244 S.W. 2d at 82.)

Since the recommendations of the Parole and Pardon Board are not binding on the Governor (People ex rel. Abner v. Kinney, 30 Ill. 2d 201), the above reasoning leads me to conclude that the fact that the legislature declined to specify substantive, as opposed to procedural, standards in section 3-3-13 of the Unified Code of Corrections (Ill. Rev. Stat. 1973, ch. 38, par. 1003-3-13), does not render it unconstitutional.

Joseph J. Longo - 8.

The reason that the legislature declined to formulate substantive standards, and the answer to the resulting question as to who may do so absent such formulation, can be ascertained by considering the nature and history of the pardoning power; the intent of the constitutional framers; and the construction given to the laws and constitution by the judiciary.

Regarding the nature and history of the pardoning power, a pardon represents an act of grace, proceeding from the power entrusted with the execution of the laws (United States v. Wilson, 32 U.S. (7 Pet.) 150), based on a determination of innocence or otherwise (People ex rel. Symonds v. Gualano, 124 Ill. App. 2d 208), which exempts the individual on whom it is bestowed from the punishment the law inflicts for the crime for which he has been convicted. (Ill. Rev. Stat. 1973, ch. 38, par. 1003-3-13.) In referring to the principles and practices of the laws of England in relation to pardons, Chief Justice Marshall observed:

"As this power had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is

Joseph J. Longo - 9.

to be used by the person who would avail himself of it." (United States v. Wilson, 32 U.S. (7 Pet.) 94 at 101-102.)

Consequently, the pardoning power, as exercised by State and Federal government, has its basis in the laws and practices of England where it was one of the prerogatives of the Crown.

Ex Parte Wells, 59 U.S. (18 How.) 307.

The 1870 Illinois Constitution vested the pardoning power in the Governor by providing in section 13 of article V that:

"The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as may be provided by law relative to the manner of applying therefor."

This provision was the subject of much debate in the 1870 Convention between those who felt that, notwithstanding the restrictions on the Governor's pardoning power found in the 1848 Illinois Constitution, the power had continued to be abused, and those who feared the proposed language, identical to that adopted except that it did not include the phrase "relative to the manner of applying therefor", would permit the legislature to destroy the Governor's traditional power. A compromise was

Joseph J. Longo - 10.

reached whereby said phrase was added to the proposed language,
the purpose being to:

"[L]eave the Legislature full power to prescribe that notice should be given, or that certain persons who have acted as officers to hear and pass upon the case should sign the petition; but it would not authorize the Legislature in any way to cut off the right of the executive to use his discretion." Debates and Proceedings of the 1870 Illinois Constitutional Convention, Vol. 1, p. 785.

The framers of the 1970 Illinois Constitution provided
in section 12 of article V:

"Governor - Pardons.

The Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper. The manner of applying therefore may be regulated by law."

That the power of the legislature vis-a-vis the Governor was not changed is made clear in the Debates of the 1970 Convention wherein it was stated in reference to the proposed language which was eventually adopted:

"MR. J. PARKER: This is the section that we presently have in section 13 of the executive article. It is identical except for one major substantive change, and that is * * * giving the governor, for the first time, what is better called a conditional pardon.

[T]he purpose of this is that parole, which is sending forth a person after conviction - what-have you - is controlled strictly by statute - the manner of applying for it, the conditions when they can get it, et cetera. However, the governor presently under our present constitution only has authority to grant reprieves, commute a sentence, or pardon; and pardon itself means absolute exoneration from the charge or crime for which he was convicted.

Now, there has been argument presented to the committee that there could be conditions or situations whereby it might not be best that we give a person a complete exoneration from all aspects of it, and therefore, in effect, to grant the governor a form - or power to grant a form of parole. * * *

[T]he legislature only has the authority to set up the procedure for applying for a pardon. The legislature does not have any authority to grant pardons or direct when a governor shall exercise his discretion or how he shall exercise it. So that basically the position of the committee - the majority - is that we would be granting the governor the power to grant conditional pardons or pardons upon such terms as he thinks proper.

VICE-PRESIDENT ALEXANDER: Thank you, Delegate Parker. Are there questions for the committee at this time? Delegate Sommerschild?

MR. SOMMERSCHILD: Am I correct in understanding that this provision would make it impossible for the legislature at some future date to pass an amendment to the Criminal Code which would allow for a lifetime sentence in place of say, capital punishment, without possibility of parole?

MR. J. PARKER: No, the General Assembly would have full authority to control and legislate as far as parole. Parole is entirely different from pardons, and this only would restrict the General Assembly from passing any legislation that would grant someone a pardon. Only the governor has this authority. But your example, if they want,

for capital punishment or what-have you, to grant - order a parole - for instance, the Criminal Code right now says that no matter how long a person - he could be sentenced for 1,000 years - after serving twenty years, he is eligible for parole. Now this is legislative, and this provision would not have anything to do with that.

MR. SOMMERSCHIED: You are saying, then, that they could say that certain offenses - if one committed certain offenses, he would not - could not - be eligible for parole; and in spite of this section in the constitution, the governor could not parole that individual?

MR. J. PARKER: He could not parole but he could still grant a pardon to that individual. He can do that today, no matter what the General Assembly says. He could grant a pardon to anybody, no matter what the offense or what the General Assembly would say.

MR. SOMMERSCHIED: So then the General Assembly does not have complete control of this area. I am fishing for words, I think. Even if they said that there is a sentence of now - a lifetime sentence, without the possibility of someone getting out of prison - the governor at any point in time can let him out by pardoning him, in essence?

MR. J. PARKER: Right.

MR. SOMMERSCHIED: In spite of what the General Assembly says?

MR. J. PARKER: The General Assembly has authority to act on the question of parole, but they would not have any effect on the governor's exercise of his power of granting pardons. You are correct.

Now, I will defer to Delegate Friedrich who served or was on the Parole and Pardon Board.

MR. FRIEDRICH: The governor could now and can pardon everyone in Stateville, including those in death row, and can continue to do it under this. He has complete authority in this area.

MR. SOMMERSCHIED: Under the present constitution?

MR. FRIEDRICH: He has it presently and will have under this. " (emphasis added.)
(Record of Proceedings, Sixth Illinois Constitutional Convention, Verbatim Transcripts, Vol. III, p.p. 1331-32.)

The courts have enforced the constitutional provision in accordance with its terms. In People ex rel. Symonds. v. Gualano, 124 Ill. App. 2d 208, 219, the court stated in construing section 13 of article V of the 1870 Illinois Constitution:

"In regard to the provision which became section 13 of Article V, we conclude that it was the intention of the drafters of the provision to give the governor unlimited power to grant reprieves, commutations and pardons. They defeated the proposal of the Committee on the Executive Department that this power be subject to legislative supervision. They recognized that imperfections can exist in the judicial machinery and occasions might arise when an innocent person would be convicted of a crime; they also foresaw that the pardoning power would be a means of encouraging guilty persons to become upstanding citizens of the community and to prove by exemplary conduct that they were worthy of public confidence. It was the manifest purpose of those who designed our constitutional framework to give the governor full and untrammelled discretion in remedying injustices, in lowering sentences and in restoring the rights of citizenship. * * * The only qualification attached to section 13 was procedural: 'subject to such regulations as may be provided by law relative to the manner of applying therefor.'

Section 13 in no way limits or modifies the full force and effect of the governor's power and discretion. Section 13 vests in the governor the exclusive power to grant, after conviction, reprieves,

commutations and pardons. People ex rel. Brundage v. LaBuy, 285 Ill. 141, 120 NE 537 (1918). Such power is subject only to the limitation that the legislature may establish the manner of applying therefor. People ex rel. Smith v. Jenkins, 325 Ill. 372, 156 NE 290 (1927)."

The clause "relative to the manner of applying therefor" has been narrowly construed by the courts. In People ex rel. Smith v. Jenkins, 325 Ill. 372, the court construed it in light of section 1 of "AN ACT to regulate the manner of applying for pardons, reprieves and commutations" (Ill. Rev. Stat. 1925, ch. 104a, par. 1) which required, inter alia, that petitions for pardons:

"[B]e accompanied by a statement in writing made by the judge and prosecuting attorney of the court in which the conviction was had; stating the opinion of said judge and prosecuting attorney in regard to the same, or satisfactory reasons shall be given to the Governor, why such statements of the judge and prosecuting attorney, or either of them, do not accompany such petition; * * * "

Despite this clear requirement, the court stated at page 375:

"The only restriction which the legislature may impose upon the Governor's power refers to the regulations relative to the manner of applying for reprieves, commutations and pardons, and the act on that subject does not purport to, and does not, restrict the Governor's authority except to that extent. The giving of statements or opinions by the judge and prosecuting attorney is not made a

Joseph J. Longo - 15.

condition precedent to the Governor's action and the requirement of them does not hamper his freedom of action in any way, for the Governor may act without such statements for any reason satisfactory to him."

The courts have also examined duties of the Parole and Pardon Board. In People ex rel. Abner v. Kinney, 30 Ill. 2d 201, the court said at page 205:

"The Parole and Pardon Board has two separate and distinct functions. One is to act as the Governor's agent in hearing applications for executive clemency, in which the Board has no power to grant a pardon, reprieve or commutation, but merely to submit a recommendation to the Governor, who is free to accept or reject the recommendation. The other is when it sits as an administrative body with the power to make final decisions in parole matters. The latter power has been granted it by the legislature."

Before drawing conclusions from the above material, it is first necessary to note some elemental rules of construction. With regard to legislative action, it is presumed that the General Assembly has and acts with full knowledge and information as to the subject matter of the statutes and the existing conditions and facts relating thereto (Krebs v. Board of Trustees of Teachers' Retirement System, 410 Ill. 435), as to prior and existing law and legislation on the subject of the statute and the existing conditions thereof (Gaither v. Lager, 2 Ill. 2d 293),

Joseph J. Longo - 16.

and as to the judicial decisions with respect to such prior and existing law and legislation. Heineman v. Hermann, 385 Ill. 191.

Presuming then that when the General Assembly enacted the Unified Code of Corrections (Ill. Rev. Stat. 1973, ch. 38, pars. 1001-1 et seq) it was aware of the traditional nature of the pardoning power at common law, of the construction placed by the constitutional framers and by the courts upon that power and of the relationship of the Governor and legislature thereto, I am of the opinion that the General Assembly intentionally declined to formulate substantive standards to guide the Parole and Pardon Board in the performance of its duties regarding pardons because:

(1) it recognized that since the Governor is free to accept or reject the recommendations of the Parole and Pardon Board, he should be the one to formulate substantive standards for its operations insofar as pardons are concerned, and (2) it decided that any attempt by the legislature to set substantive standards might be construed as an unconstitutional infringement upon the pardoning power granted to the Governor. Consequently, I am of the opinion that the standard of persuasion to be employed in hearings where petitioners are seeking pardons on the grounds of innocence

Joseph J. Longo - 17.

should be determined by the Governor.

As to your third question, concerning the proper structure of the hearings wherein the petitioner is seeking a pardon on the grounds of innocence, the General Assembly, pursuant to constitutional authorization (Ill. Const. art. V, sec. 12), has created the Parole and Pardon Board (Ill. Rev. Stat. 1973, ch. 38, par. 1003-3-1), and assigned to it the duty to hear all requests for pardons. Ill. Rev. Stat. 1973, ch. 38, par. 1003-3-2.

Section 3-3-13 of the Unified Code of Corrections (Ill. Rev. Stat. 1973, ch. 38, par. 1003-3-13) provides in part:

"§3-3-13. Procedure for Executive Clemency.

* * *

(c) The Board shall, if requested and upon due notice, give a hearing to each application, allowing representation by counsel, if desired, after which it shall, without publicity advise the Governor by a written report of its recommendations which shall be determined by majority vote. The Board shall meet to consider such petitions no less than 4 times each year."

While said section provides for a hearing by the Board, it does not specify whether the hearing should be before the full Board, part of the Board, or a hearing officer. Upon applying the rule of construction which states that in construing a statute to ascertain the intention of the General Assembly, the statute

Joseph J. Longo - 18.

should be construed in its entirety (Fliakos v. Illinois Liquor Control Commission, 11 Ill. 2d 456), and the legislative intent gathered from the entire statute rather than from any one part thereof (Illinois Bell Telephone Co. v. Ames, 364 Ill. 362), it becomes clear that a hearing on a pardon petition before only one board member and legal consultant would be contrary to legislative intent.

The basis for the above conclusion is that section 3-3-2 of said Act (Ill. Rev. Stat. 1973, ch. 38, par. 1003-3-2) provides in part:

"§3-3-2. Powers and Duties.

* * *

(g) Except under Section 3-3-5 and 3-3-9, a majority of the members then appointed to the Parole and Pardon Board shall constitute a quorum for the transaction of all business of the Board."

Section 3-3-13 of said Act, supra, which provides for a Board hearing on pardon petitions, is not similarly excepted. Sections 3-3-5 and 3-3-9 of said Act (Ill. Rev. Stat. 1973, ch. 38, pars. 1003-3-5 and 1003-3-9), which are excepted, both deal with parole, not pardon, and the latter of the two, dealing with parole violations, provides for a preliminary hearing before

Joseph J. Longo - 19.

a hearing officer, a revocation hearing before at least one board member, and Board action taken in panels of three or more members. If the legislature had intended Board hearings on pardon petitions to be conducted by less than a majority of the board members, it surely would have given the same or similar treatment to section 3-3-13 as it did to section 3-3-9.

In conclusion, I am of the opinion that the construction placed by the Court of Claims upon Public Act 77-2089 is not reviewable by the Attorney General; that the powers and duties of the Parole and Pardon Board were in no way changed by said Act; that the standard of persuasion adhered to in the Court of Claims does not in any way bind the Parole and Pardon Board; that the standard of persuasion to be employed in hearings where petitioners are seeking pardons on the grounds of innocence should be determined by the Governor; and that hearings on pardon petitions may not be held before only one board member and legal consultant, but rather must be held before a majority of the board members.

Finally, it should be noted that although the Parole and Pardon Board is not empowered to deal directly with any

Joseph J. Longo - 20.

person's claim for damages for unjust imprisonment, the occasion, nevertheless, may arise where the Board will be asked by a petitioner to recommend that a pardon be issued on the grounds of innocence. The Board will then have to consider whether to make such recommendations. Whether a pardon is granted on the grounds of innocence, and whether, even if granted on that ground, the pardon order will expressly so state, is solely a matter for determination by the Governor.

Very truly yours,

A T T O R N E Y G E N E R A L