



OFFICE OF ATTORNEY GENERAL  
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION  
2019-2

The Honorable Kevin L. Matthews  
State Senator, District 11  
2300 N Lincoln Blvd., Room 522A  
Oklahoma City, OK 73105

January 29, 2019

Dear Senator Matthews,

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:<sup>1</sup>

- 1. If the Governor grants parole to an offender conditioned upon the offender completing a pre-parole program, must the Governor's action be authenticated by the Secretary of State before or after the offender completes the program?**
- 2. May the Secretary of State authenticate a Governor's grant of parole that is conditioned upon the offender completing a pre-parole program if the Governor is no longer in office?**
- 3. Does the Governor's grant of parole conditioned upon the offender completing a pre-parole program create a protected liberty interest in parole on the part of the offender?**
- 4. Does the Governor have the authority to rescind his or her decision to deny a parole that had been recommended by the Oklahoma Pardon and Parole Board?**
- 5. If the answer to Question #4 is yes, must the offender go back before the Pardon and Parole Board or does the Board's previous recommendation of parole remain effective?**

---

<sup>1</sup> Your original Questions 1, 2, and 3 refer to a specific pre-parole program set forth in Title 57, Section 115, which "authorized to be created within the Department of Corrections" a reentry program for "offenders who need structured release prior to completion of the sentence." 57 O.S.2011, § 115(A). However, the statute also provides that the program *shall not* receive state appropriations, but rather shall "be fully funded by federal or private funds." *Id.* While the Department was statutorily authorized to establish the program, it was not mandated to do so. *See Morgan v. Wilson*, 1969 OK 31, ¶ 6, 450 P.2d 902, 903 (finding statute that "hereby authorized" municipality to establish pension system was not a mandatory directive, but rather "empowered" municipality to do so "if it [was] so inclined"). Our understanding is that no federal or private monies have been received, and the program was therefore never established. As such, we are unable to answer your first three questions that are specific to that program. However, to the extent those questions touch more broadly on the procedures involved in grants of conditional parole, this opinion provides some general guidance.

## I. BACKGROUND

The Oklahoma Constitution gives the Governor, in conjunction with the Pardon and Parole Board (the “Board”), the authority to grant parole, subject to certain limitations:

*The Governor shall have the power to grant, after conviction and after favorable recommendation by a majority vote of the Pardon and Parole Board, commutations, pardons and paroles for all offenses, except cases of impeachment, upon such conditions and with such restrictions and limitations as the Governor may deem proper, subject to such regulations as may be prescribed by law. Provided, the Governor shall not have the power to grant paroles if a person has been sentenced to death or sentenced to life imprisonment without parole. The Legislature shall have the authority to prescribe a minimum mandatory period of confinement which must be served by a person prior to being eligible to be considered for parole. The Governor shall have power to grant after conviction, reprieves or leaves of absence not to exceed sixty (60) days, without the action of the Pardon and Parole Board.*

OKLA. CONST. art VI, § 10 (emphasis added). Similar language is used in statute to describe the power of the Governor to grant parole and other forms of clemency. *See* 57 O.S.2011, § 332. “The power to grant pardons and paroles carries with it the power to make a conditional pardon or parole. It is generally said that the Governor in the exercise of his power may impose conditions which are not illegal, immoral or impossible of performance.” *Wingfield v. Page*, 1966 OK CR 147, ¶ 9, 419 P.2d 564, 566 (citations omitted).

A precondition to the Governor’s grant of parole is a favorable recommendation from the Pardon and Parole Board. OKLA. CONST. art VI, § 10. Before making such a recommendation, the Board must “make an impartial investigation and study of applicants for . . . paroles, and by a majority vote make its recommendations to the Governor of all persons deemed worthy of clemency.” *Id.* For certain nonviolent offenders, the Board itself “by majority vote shall have the power and authority to grant parole . . . upon such conditions and with such restrictions and limitations as the majority of the . . . Board may deem proper or as may be required by law.” *Id.*

## II. DISCUSSION

**A. The Governor’s grant of parole conditioned upon the offender completing a pre-parole program must be authenticated (i) prior to the offender’s entry into the program, and (ii) while the Governor is still in office.**

Your first two questions involve the timing for authentication of a Governor’s grant of parole conditioned upon the offender completing a pre-parole program. As noted above, the Governor may attach to a grant of parole any condition precedent or subsequent, as long as the condition is not illegal, immoral, or impossible to perform. *Ex parte Barrett*, 1942 OK CR 174, 132 P.2d 657, 659. In this case, completion of the pre-parole program is a condition precedent to parole release.

To be legally valid, an official act of the Governor must be recorded and authenticated by the Secretary of State. *See* OKLA. CONST. art VI, § 18 (“The Secretary of State shall be the custodian of the Seal of the State, and authenticate therewith all official acts of the Governor except his approval of laws.”).<sup>2</sup> “The exercise of [the Governor’s power to grant pardons] is an official act, which must be authenticated with the seal of the state, and recorded in the office of the Secretary of State, and until these are done it is not the official act of the Governor.” *Shields v. Sneed*, 1926 OK 336, ¶ 4, 245 P. 647, 648. Indeed, “[i]t was clearly the intent of the framers of the Constitution to require the official acts of the Governor to be authenticated and recorded *before* they became effective[.]” *Id.* ¶ 5, 245 P. at 648. Thus, a Governor’s grant of parole that is conditioned upon the offender completing a pre-parole program must *first* be authenticated by the Secretary of State in order to make such grant an official act.<sup>3</sup> *Jones v. Sneed*, 1924 OK 440, ¶ 7, 225 P. 700, 701; *Shields*, 1926 OK 336, ¶ 4, 245 P. at 648.

You also ask whether the Secretary of State may authenticate a Governor’s grant of parole conditioned upon the offender completing a pre-parole program if the Governor having executed the grant is no longer in office. The Oklahoma Supreme Court held in *Shields v. Sneed* that the Secretary of State may only authenticate official acts of the current Governor. The Court reasoned that authenticating the act of a previous Governor would be akin to authenticating “the act of a mere private citizen.” 1926 OK 336, ¶ 4, 245 P. at 648.

As the official acts of the Governor are incomplete until duly authenticated, it follows that those acts, *to become effective, should be authenticated while the individual who is chief executive still occupies that position*. Hence the defendant in error should not now be compelled to authenticate an act of a former Governor.

*Id.* ¶ 5, 245 P. at 648-49 (emphasis added). Accordingly, to be effective as an official act a Governor’s grant of parole conditioned upon the offender completing a pre-parole program must be authenticated by the Secretary of State while that Governor is in office.

**B. A Governor’s grant of parole conditioned upon the offender completing a pre-parole program may create a protected liberty interest on the part of the offender.**

The Fourteenth Amendment’s Due Process Clause protects persons against deprivations of life, liberty, or property, and those who seek to invoke its protections must establish that such an interest is at stake. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005); *see also* OKLA. CONST. art. II, § 7 (“No person shall be deprived of life, liberty, or property without due process of law.”), *State ex rel. Bd. of Regents v. Lucas*, 2013 OK 14, ¶ 27 n.25, 297 P.3d 378, 391 n.25 (describing the Due Process Clause of the Oklahoma Constitution as “coextensive with its federal counterpart”).

---

<sup>2</sup> “The purpose of this regulation obviously is to authenticate [the Governor’s] acts and make [such acts] a matter of record, so that the authenticity and verity of his acts may not be called in question.” *Ex parte Guy*, 1928 OK CR 273, ¶ 6, 269 P. 782, 783.

<sup>3</sup> However, the effective date of parole would not be until the completion of the program. The parole certificate currently used by the Governor’s office has a blank to be filled in with the date that the Governor signed and caused the Great Seal of the State of Oklahoma to be affixed and a separate blank for the effective date of parole. Certificates of parole may be viewed at <https://www.sos.ok.gov/pardonParole.aspx> (last visited Dec. 14, 2018).

Parolees have two sources of liberty interests: those inherent in the Due Process Clause and those created by state law. *Boutwell v. Keating*, 399 F.3d 1203, 1212 (10<sup>th</sup> Cir. 2005) (citing *Harper v. Young*, 64 F.3d 563 (10<sup>th</sup> Cir. 1995), *aff'd*, 520 U.S. 143 (1997)). A liberty interest in parole that is inherent in the Due Process Clause arises only once an offender is released from incarceration. *Id.* Because an offender whose grant of parole is conditioned upon completion of a pre-parole program has not yet been released, this type of liberty interest is not implicated in such a scenario. Accordingly, we turn to whether Oklahoma law has otherwise created a liberty interest in parole.

In Oklahoma, prisoners generally do not have a constitutionally protected liberty interest in a grant of parole. *See, e.g., Shabazz v. Keating*, 1999 OK 26, ¶ 9, 977 P.2d 1089, 1093. This is so because the State's general parole release procedure "affords *no more* than an *expectation* (or hope) of parole[.]" *Id.* (emphasis in original). Nevertheless, in reviewing a specific early-release program in Oklahoma, the Tenth Circuit Court of Appeals acknowledged that "a state parole statute *can* create a liberty interest when the statute's language and structure sufficiently limits the discretion of a parole board." *Boutwell*, 399 F.3d at 1213 (citing *Greenholtz v. Inmates of the Nebraska Penal and Corr. Complex*, 442 U.S. 1, 11-12 (1979), and *Bd. of Pardons v. Allen*, 482 U.S. 369, 377-78 (1987)) (emphasis added). For example, the parole statute at issue in the *Greenholtz* case cited in *Boutwell* provided that an inmate "shall" be paroled unless one of four exceptions was met, while the statute in the *Allen* case provided that "subject to the following restrictions, the board shall release on parole" any eligible inmate. *Id.* "In each case, the board was limited to determining whether an exception applied, and if none applied, it was required to grant parole." *Id.* This lack of discretion under the relevant parole statute "was held to be sufficient to create a liberty interest in the expectancy of parole." *Id.* Thus, a grant of parole conditioned upon the offender completing a pre-parole program may create a liberty interest on the part of the offender if the grant leaves *no* further discretion as to whether the offender will be paroled once he or she has completed the program. However, whether a liberty interest is created in a particular set of circumstances will depend on the statutory basis for the parole and facts specific to the parolee.<sup>4</sup>

---

<sup>4</sup> In determining what process is due should a liberty interest attach, the Oklahoma Court of Criminal Appeals has stated as follows:

[B]efore a parole is revoked and the parolee recommitted for the remainder of his sentence, he should be advised of the ground upon which revocation is sought and afforded a reasonable opportunity for a hearing on whether the conditions of the parole were in fact violated. This does not mean that a parolee is entitled to a trial in court, with all the constitutional procedures and safeguards guaranteed by due process. It is sufficient if the parolee is extended the opportunity to explain away the accusation of a violation of the conditions of the parole at an administrative hearing before an impartial officer before issuance of an order of parole revocation. Nor is it mandatory that a hearing always be held before a parole is revoked, as the circumstances in certain cases may clearly indicate the breach of a parole condition, without the necessity of a hearing.

*Chase v. Page*, 1969 OK CR 196 ¶ 19, 456 P.2d 590, 595. *See also Hampton v. State*, 2009 OK CR 4, ¶ 22, 203 P.3d 179, 188, *Beck v. State*, 1970 OK CR 210, ¶¶ 3-4, 478 P.2d 1019, 1020-21.

**C. Once the Governor denies parole to an offender who received a favorable recommendation from the Pardon and Parole Board, any reconsideration of the denial must follow the procedures set forth in 57 O.S.Supp.2018, § 332.7.**

Finally, you ask whether a Governor can reverse his or her decision regarding a parole denial and/or honor a previous favorable recommendation for parole from the Pardon and Parole Board, so that the offender is not required to first have his or her parole reconsidered by the Board.

Under the Oklahoma Constitution, the authority of the Governor to grant clemency upon recommendation of the Board is “subject to such regulations as may be prescribed by law.” OKLA. CONST. art. VI, § 10; *see also* 57 O.S.2011, § 332. The Legislature has prescribed limitations on reconsideration for parole after a denial. Specifically, unless the Board directs otherwise, a person who was considered for and denied parole shall not be reconsidered for parole except according to certain timeframes as set forth in the statute:

E. Any inmate who has parole consideration dates calculated pursuant to subsection A, B or C of this section may be considered up to two (2) months prior to the parole eligibility date. ***Except as otherwise directed by the Pardon and Parole Board, any person who has been considered for parole and was denied parole or who has waived consideration shall not be reconsidered for parole:***

1. Within three (3) years of the denial or waiver, if the person was convicted of a violent crime, as set forth in Section 571 of this title, and was eligible for consideration pursuant to paragraph 1 of subsection A of this section, subsection B of this section or paragraph 2 of subsection C of this section, unless the person is within one (1) year of discharge; or
2. Until the person has served at least one-third (1/3) of the sentence imposed, if the person was eligible for consideration pursuant to paragraph 3 of subsection A of this section. Thereafter the person shall not be considered more frequently than once every three (3) years, unless the person is within one (1) year of discharge.

57 O.S.Supp.2018, § 332.7(E) (emphasis added). These are the minimum timeframes according to which an offender may be reconsidered for parole. Additionally, by rule the Board may “set off any offender’s reconsideration for up to five years.” OAC 515:3-9-1.

Moreover, in order for an offender to be reconsidered for parole after a denial, the Board must again give a favorable recommendation. The Governor does not have statutory or constitutional authority to make parole decisions unilaterally. Rather, the Governor may exercise parole authority only after a recommendation for clemency by the Board. *Shirley v. Chestnut*, 603 F.2d 805, 807 (10<sup>th</sup> Cir. 1979). The Oklahoma Constitution is clear that the Governor may only grant parole after a favorable recommendation by the Board, and within limitations set forth in law. OKLA. CONST. art. VI, § 10. Thus, an offender who is denied parole may not be reconsidered except pursuant to specific timeframes set forth in statute. 57 O.S.Supp.2018, § 332.7(D).

It is, therefore, the official Opinion of the Attorney General that:

1. A Governor's grant of parole conditioned upon the offender completing a pre-parole program is valid only if authenticated by the Secretary of State before the offender enters the program. *See* OKLA. CONST. art VI, § 18, *Shields v. Sneed*, 1926 OK 336, 245 P. 647.
2. A Governor's grant of parole conditioned upon the offender completing a pre-parole program is valid only if authenticated by the Secretary of State while that Governor is still in office. *Shields v. Sneed*, 1926 OK 336, 245 P. 647.
3. In Oklahoma, a prisoner generally does not have a constitutionally protected liberty interest in parole. *See, e.g., Shabazz v. Keating*, 1999 OK 26, 977 P.2d 1089. In some cases, however, "a state parole statute can create a liberty interest when the statute's language and structure sufficiently limits the discretion of a parole board." *Boutwell v. Keating*, 399 F.3d 1203, 1213 (10th Cir. 2005). Whether a liberty interest is created in a particular set of circumstances will depend on the statutory basis for the parole and facts specific to the parolee.
4. The Governor does not have the authority to rescind an authenticated denial of a parole that had been recommended by the Oklahoma Pardon and Parole Board. The Pardon and Parole Board first must reconsider a denial of parole pursuant to the procedures set forth in 57 O.S.Supp.2018, § 332.7.
5. If the Governor denies parole to an offender who received a favorable recommendation from the Oklahoma Pardon and Parole Board, the offender must go through the full reconsideration process set forth in 57 O.S.Supp.2018, § 332.7.



MIKE HUNTER  
ATTORNEY GENERAL OF OKLAHOMA



MARIE SCHUBLE  
ASSISTANT ATTORNEY GENERAL

