1919.

PAROLE AND CONDITIONAL RELEASE DISCUSSED—RECOMMENDATION OF WARDEN AND CHAPLAIN—PUBLICATION.

SYLLABUS:

1. *The terms "conditional release" and "parole," in so far as the Ohio Board of Clemency is concerned, are synonymous.*

2. *The provisions of Section 92-2, General Code, apply equally to paroles and conditional releases.*

3. *The Ohio Board of Clemency is without jurisdiction to grant a conditional release unless and until the provisions of Section 2171, General Code, have been complied with.*

4. *When cases are brought before the Ohio Board of Clemency in their regular order and in accordance with the provisions of Section 2171, General Code, and the Ohio Board of Clemency continues the hearing of such cases to a definite date, it is unnecessary that such prisoners again be recommended by the warden and chaplain of the Ohio Penitentiary as worthy of consideration for parole and to give notice thereof by publication as provided in said section.*

5. *When cases are brought before the Ohio Board of Clemency in their regular order and in accordance with the provisions of Section 2171, General Code, and the Ohio Board of Clemency continues the hearing of such cases for an indefinite period it is necessary that such prisoners again be recommended as eligible for parole by the warden and chaplain of the Ohio Penitentiary and that notice thereof be given as provided by Section 2171, General Code.*

COLUMBUS, OHIO, March 30, 1928.

HON. JOHN E. HARPER, *Director, Department of Public Welfare, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your letter which reads:

> "Section 2160, G. C., refers to the 'conditional or absolute release' of prisoners. Section 2169, G. C., provides that 'The Ohio Board of Administration (Ohio Board of Clemency) shall establish rules and regulations by which a prisoner * * * may be allowed to go upon parole.' Section 92, G. C., states that the Board of Clemency 'shall be vested with and assume and exercise all powers and duties in all matters connected with the release, parole or probation of persons confined in or under sentence to the penal institutions of Ohio.'
>
> 1. Is there any difference between a 'conditional release' and a 'parole'?
>
> 2. If a difference exists, does a conditional or unconditional release of a prisoner of the Ohio Penitentiary require the previous recommendation of the warden and chaplain and the advertisement as specified by Section 2171, G. C.?
>
> 3. Does the fifteen days elapsing between the granting of a parole and its becoming effective as provided by Section 92-2, G. C., apply to conditional releases and unconditional releases?
>
> 4. Has the Ohio Board of Clemency the right to grant a conditional release to a prisoner if the said prisoner has not been recommended by the warden and chaplain and a notice of such recommendation has not been

advertised as provided by Section 2171, G. C. Under any circumstances does the Ohio Board of Clemency have the right to release a prisoner if such prisoner has not been recommended as provided by Section 2171, G. C.?

5. When cases have been brought before the Ohio Board of Clemency in the regular order and in accordance with the provisions of Section 2171, G. C., and such cases are continued by the board for a definite or indefinite period, must such prisoners be again recommended by the warden and chaplain? Must such cases prior to a second hearing be advertised as provided by Section 2171, G. C.?"

1. In answer to your first question it is my opinion that, in so far as the Ohio Board of Clemency is concerned, the terms "conditional release" and "parole" are synonymous. I know of no reported Ohio case in which these terms are defined and distinguished. The following language was used in a former opinion of this department, which appears in Vol. I, Annual Report of the Attorney General for 1914, at page 157:

"If the words 'conditional release' used in Section 2160 do not mean 'parole,' the question you ask would be easily answered in the affirmative. But a careful reading of the statutes has convinced me that these words mean one and the same thing, and even without such investigation it would be hard to imagine a conditional release that would not be a parole, or a parole that would not be a conditional release. So in the discussion of this question I shall consider the two words as synonymous."

2. The answer to your first question renders it unnecessary to answer your second question.

3. In your third question you refer to Section 92-2, General Code, which, in so far as pertinent, provides:

"No parole granted by the board shall go into effect until the expiration of fifteen days from the making thereof and shall be subject to revocation at the discretion of the board; this requirement may be disregarded only on a physician's certificate of imminent danger of death or severe illness, or upon the order of the governor."

In view of the answer to your first question it is my opinion that the provisions of Section 92-2, supra, apply equally to paroles and conditional releases.

4. Your fourth question involves consideration of Section 2171, General Code, which provides:

"A prisoner confined in the penitentiary shall not be eligible to parole, and an application for parole shall not be considered by the board of managers, until such prisoner is recommended as worthy of such consideration by the warden and chaplain of the penitentiary. Before consideration by such board, notice of such recommendation shall be published for three consecutive weeks in two newspapers of opposite politics in the county from which such prisoner was sentenced. The expense of such publication shall not exceed one dollar for each paper."

This section was construed in Opinion No. 1622, dated January 25, 1928, addressed to you, the syllabus of which reads:

"1. The words 'worthy of such consideration' as the same are used in Section 2171, General Code, are to be construed in their natural, plain and ordinary signification. In other words, no prisoner of the Ohio Penitentiary having served within the penitentiary, the minimum term of imprisonment fixed by the trial court for the felony of which such prisoner was convicted, is eligible to parole until such prisoner is recommended as worthy of such consideration by the warden and chaplain of the penitentiary.

2. The Ohio Board of Clemency is without jurisdiction to consider an application for the parole of a prisoner confined in the Ohio Penitentiary until such prisoner has (1) served within the penitentiary, the minimum term of imprisonment fixed by the trial court for the felony of which such prisoner was convicted, and (2) is recommended as worthy of such consideration by the warden and chaplain of the penitentiary, notice of which recommendation shall have been published for three consecutive weeks in two newspapers of opposite politics in the county from which such prisoner was sentenced.

3. Section 2171, General Code, is silent with regard to whether the recommendation of the warden and chaplain that a prisoner is worthy of consideration for parole should be oral or in writing. To promote administrative efficiency and to insure accuracy and permanency of records, such recommendations should be made in writing."

Specifically answering your fourth question, it is my opinion that the Ohio Board of Clemency is without authority to grant a conditional release unless and until the provisions of Section 2171, General Code, have been complied with.

5. In considering your fifth question your attention is again directed to Section 2171, supra.

While Section 2171, supra, does not expressly state the reasons for requiring the recommendations of the warden and chaplain, the purpose of requiring such recommendations and the publication of the notice therein provided for is obvious.

The recommendations are required because the warden, having control of the prisoners, and the chaplain, being in constant contact with those confined in the penitentiary, are in a position best able to determine the fitness of any person to be paroled. The notice is to advise those in the community in which the crime was committed of the fact that the Board is about to consider the prisoner's application for parole and to give such persons as may be opposed to such parole or in favor thereof, an opportunity to be heard and present such facts bearing on the question of the parole as may be desired. That this is the purpose of the notice is manifest from the requirement that the notice be published in the county *from which the prisoner was sentenced.* And it is significant that the Legislature has, with considerable particularity, fixed the period of time for which such notice shall be published and prescribed that it be published in two newspapers of opposite politics.

It is fundamental that when the law requires notice to be given of a hearing and the contemplated action of a statutory board, such hearing may be had only on the date named and in accordance with the notice. It is true, of course, that such board may continue or adjourn the hearing to a date certain and further hear the matter on such date. The hearing at an adjourned meeting is upheld upon the theory and for the reason that persons properly notified of the date of the original meeting have had the opportunity to be there if interested, and at the meeting such persons, of course, have notice of the adjournment *and of the date to which such meeting is adjourned.* Such a board may also, after a full hearing on the date fixed in the notice and the dates to which the hearing was continued, reserve its decision for such rea-

sonable time as it deems advisable. But such a board may not, by continuing a matter indefinitely, or continuing generally, or continuing "subject to call," defeat the requirements of the law as to notice. If the hearing could be so continued it is readily apparent that the legal requirements as to notice may be defeated and the persons interested deprived of an opportunity to be heard.

For example let us assume that a prisoner had been recommended by the warden and chaplain of the penitentiary, as eligible for parole and notice has been given by publication as required by law, the hearing being set for a definite date. On the date specified the prosecuting attorney and the party injured and other persons opposed to the prisoner's release appear at the office of the Board of Clemency, as do the prisoner's family and those interested in securing his parole. Upon appearance of the parties the board announces that a hearing will not be had on the date specified and that the case will be continued "subject to call," upon which announcement all those appearing for the hearing leave. Would it be seriously contended by anyone that several months later, or a week later, or the next day, or even on the afternoon of the same day, the Board of Clemency could call up such prisoner's case and take action thereon, thus utterly destroying the rights of those interested to be heard on the question of such prisoner's parole?

Moreover, the vice of permitting general or indefinite continuance of any hearing without again obtaining the recommendation of the warden and chaplain and giving the notice required by Section 2171, supra, is clearly apparent in a case where the board would attempt to take action a year or more after the first publication of the notice. In such a period of time conditions may have changed entirely. The prisoner's conduct during such period may have been such that the warden and chaplain would under no circumstances recommend his parole at the time the board wanted to act. Conditions may have changed in the county from which he was sentenced. New facts with reference to the same or other crimes may have been discovered. The status of the injured party or of the prisoner's dependents may have changed in such a manner as to make most urgent an opportunity for such persons to be heard. Certainly if the recommendation of the warden and chaplain and notice thereof be necessary in the first instance, and the Legislature has determined that they are, it would seem logically to follow that action could not be taken at a later date when an extended period of time has elapsed, without again giving the notice prescribed by law.

It ought not be doubted by any one that, if the board, on the day specified in the notice, utterly rejects the application for parole and decides against the parole, such board would not again have jurisdiction until a new recommendation from the warden and chaplain is made and notice is published in accordance with the statute. If this be true, and it is my opinion that it is, then when a case is "continued generally," or "subject to call," a new recommendation and new notice are equally necessary. That is to say, a "general continuance" or a "continuance subject to call" is tantamount to a *rejection,* just as a motion "to postpone indefinitely" in American legislative practice, has the effect, when adopted, of preventing further action on the subject during the session.

In view of the foregoing and answering your fifth question specifically, it is my opinion that when cases are brought before the Ohio Board of Clemency in their regular order and in accordance with the provisions of Section 2171, General Code, and the Ohio Board of Clemency continues the hearing of such cases to a definite date it is unnecessary that such prisoners again be recommended by the warden and chaplain of the Ohio Penitentiary as worthy of consideration for parole and in such cases it is unnecessary again to advertise. When cases are brought before the Ohio

Board of Clemency in their regular order and in accordance with the provisions of Section 2171, General Code, and the Ohio Board of Clemency continues the hearing of such cases for an indefinite period, it is my opinion that such prisoners must again be recommended as eligible for parole by the warden and chaplain of the Ohio Penitentiary and notice thereof must be given as provided by Section 2171, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1920.

REAL ESTATE LICENSE—GRANTING OF TWO LICENSES TO ONE PERSON—MUST PAY TWO FEES.

SYLLABUS:

Where a real estate salesman makes application for two salesman's licenses, one to act for one company and one to act for another company, a fee of $2.00 *must be paid for the issuance of each license.*

COLUMBUS, OHIO, March 30, 1928.

HON. CYRUS LOCHER, *Director of Commerce, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your recent communication, as follows:

> "A salesman makes application for two salesman's licenses, one to act for one company and one to act for another company. Both companies recommend him and request that he be licensed for both companies.
>
> Is the board right when it requires that $2.00 be paid for each license?"

The answer to your question necessitates an examination of the purpose and end sought by the Legislature in requiring licenses from real estate salesmen. The term "real estate salesman" is defined in Section 6373-25 of the General Code, as follows:

> " 'Real estate salesman' means a person, who for a commission, compensation or valuable consideration, is employed by a licensed broker, to sell, or offer for sale, or to buy, or to offer to buy, or to lease, or to offer to lease, rent, or offer for rent, any real estate, interest therein or improvement thereon."

From this definition it is obvious that a non-technical definition would be that a real estate salesman is one who works for a licensed real estate broker in the real estate business. The essential feature is that of his employment by a licensed broker. The license, accordingly, is for the purpose of permitting the salesman to be so employed.

This conclusion is substantiated by other provisions of the license law. For example, Section 6373-34 of the Code requires that the license of a real estate salesman shall show the name of the real estate broker by whom he is or is to be employed. Section 6373-36 of the Code contains the following language: