provision was made for the transfer of territory from a city or exempted village school district, they being no part of a county school district.

Section 4692, General Code, was later amended to read as it now does (106 v. 397). As amended, authority is given to county boards of education to transfer territory between school districts of the county school district, subject to remonstrances by the electors residing in the territory affected by such transfer. Section 4696, General Code, was also later amended (109 v. 65), providing the manner by which school territory of a county school district may be transferred to a city, exempted village or another county school district, upon petition of the electors residing in the territory to be transferred, but there has not been any legislation since the repeal of Section 4693, General Code, and the last amendment of Section 4692, General Code, authorizing boards of education by mutual consent or otherwise to transfer territory embraced within a city from such city for school purposes.

It sometimes happens in the incorporation of a new city or village, or upon the extension of the city or village limits, that territory may be included within the corporate limits of a city or village which had previously been attached for school purposes to a school district of an adjacent city or exempted village school district. In such cases provision is made by Section 4696-1, General Code, whereby such territory may be transferred to the school district of the municipality in which said territory is located. But the provisions of said Section 4696-1, are not pertinent to your present inquiry.

Boards of education being creatures of statute and therefore vested with only such authority as is given them by statute, it follows that inasmuch as there is no authority given or means provided by statute for the transfer of territory from a city school district to another school district other than that contained in Section 4696-1, General Code, it cannot be done.

In specific answer to your question, therefore, it is my opinion that the territory now embraced within the Zanesville City School District cannot under the present state of the law be transferred to the South Zanesville Village School District for school purposes.

Respectfully,
EDWARD C. TURNER,
*Attorney General.*

---

2094.

## OHIO BOARD OF CLEMENCY—NO AUTHORITY TO TERMINATE SENTENCE OF PRISONER VIOLATING PAROLE—SECOND SENTENCE NOT BEGUN UNTIL TERMINATION OR ANNULMENT OF FIRST.

*SYLLABUS:*

1. *The Ohio Board of Clemency is without authority to terminate the sentence of a prisoner confined in the Ohio Penitentiary, who had been paroled and while on parole had been convicted of another felony and sentenced to the Ohio Penitentiary in order that such prisoner might begin serving the second sentence before the maximum term of the first sentence has been served.*

2. *By the terms of Section 2175, General Code, a second sentence to the Ohio Penitentiary, imposed upon a prisoner for a new crime committed while such prisoner was on parole, does not begin to run until the termination of such prisoner's service under the first sentence or the annulment thereof by a court of competent jurisdiction*

*or by a pardon or commutation properly granted. (Opinion No. 727, dated July 11, 1927, addressed to the Ohio Board of Clemency approved and followed).*

*3. The notice provided for in Section 2171, General Code, should state that the prisoner in question has been recommended by the warden and chaplain of the Ohio Penitentiary as worthy of consideration by the Ohio Board of Clemency for parole.*

COLUMBUS, OHIO, May 14, 1928.

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

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

"On July 11, 1927, you rendered your Opinion No. 727 construing Sections 2174 and 2175.

It is deemed advisable to ask for a ruling on the following specific case:

*Harry L. White, No. 49588 and No. 55221—Ohio Penitentiary.*

While serving a suspended sentence to the Ohio State Reformatory this man was sentenced to the Ohio Penitentiary on May 11, 1921, following conviction for stealing an automobile, with a sentence of one to fifteen years.

On December 15, 1922, he was paroled from the Ohio Penitentiary.

On October 21, 1923, while still on parole, he stole a Studebaker car valued at $2,000.00 and was returned to the Ohio Penitentiary on January 19, 1924, on a sentence of two to seven years. The entry on this prisoner's card at the Penitentiary is: 'Declared a parole violator by the warden and brought in by the sheriff of Allen County with a new sentence to follow.'

He had a hearing on February 5, 1924, and his parole under No. 49588 was revoked two years.

On February 2, 1926, he had a second hearing under No. 49588 and was given a final release to begin serving his new sentence as No. 55221.

On December 12, 1927, the warden and chaplain through D. J. Bonzo, parole and record clerk, advertised this man as legally eligible for a hearing after February 7, 1928. A copy of the advertisement is enclosed herewith.

This prisoner appeared before the Board of Clemency on February 2, 1928, pursuant to this advertisement. No personal recommendation had been filed with the board but the prisoner was presented on a work sheet containing a large number of prisoners' names and one blanket recommendation. *QUERY:*

1. Your Opinion No. 727, July 11, 1927, reads in part as follows:

'Nowhere in the powers expressly or impliedly granted to the Ohio Board of Clemency is authority given to "annul" a sentence.'

Does this mean that the Board of Clemency has no authority to grant a final release or termination of sentence to a parole violator who is returned to the Penitentiary on a new sentence? Section 2175 reads: 'Shall serve a second sentence to begin *at the termination* of his service under the first or former sentence, *or* the annulment thereof.' Evidently the Legislature had in mind not the *expiration* of the first sentence but its termination. Does not this section imply that the agency having authority to grant paroles and prescribe conditions under which prisoners must serve under parole, namely, The Ohio Board of Clemency, has the right to terminate a service on a sen-

tence? There appears to be no question that the Board of Clemency has jurisdiction to terminate the sentence of a prisoner while that prisoner is on parole. Does not the board have jurisdiction to terminate the first sentence of a man who is returned to prison on a new sentence and by reason thereof is a parole violator on the first sentence?

2. Assuming that the action of the Board of Clemency in granting a final release on the old sentence was legal, does the advertisement as inclosed comply with the provisions of Section 2171, G. C., considering that no recommendation of the warden and chaplain was filed with the Board before advertising?

3. If the Board of Clemency had no jurisdiction to grant a final release to a parole violator was that Board's action on February 2, 1926, releasing the prisoner by termination of the old sentence under No. 49588 to begin a new sentence as No. 55221 null and void and should the Board of Clemency restore the prisoner to his old number?"

On March 24, 1884 (81 v. 72), the Legislature passed an act entitled:

"An Act—Relating to the imprisonment of convicts in the Ohio Penitentiary, and the employment, government and release of such convicts by the board of managers."

Section 10 thereof read in part as follows:

"And it is hereby provided that any prisoner violating the conditions of his parole or conditional release (by whatever name), as affixed by the managers, when by a formal order, entered in the manager's proceedings, he is declared a delinquent, shall thereafter be treated as an escaped prisoner owing service to the state, and shall be liable, when arrested, to serve out the unexpired period of the maximum possible imprisonment, and the time from the date of his declared delinquency to the date of his arrest shall not be counted as any part or portion of time served. And any prisoner at large upon parole or conditional release committing a fresh crime, and upon conviction thereof, being sentenced anew to the penitentiary, shall be subject to serve the second sentence, after the first sentence is served or annulled, to commence from the date of termination of his liabilities upon the first or former sentence."

This act became Section 7388-13, Revised Statutes, and although slight changes in phraseology were made by the codifying commission of 1910, the act has not since been amended and now appears as Sections 2174 and 2175 of the General Code. These sections read as follows:

Sec. 2174. "A prisoner violating the conditions of his parole or conditional release, having been entered in the proceedings of the board of managers and declared to be delinquent, shall thereafter be treated as an escaped prisoner owing service to the state, and when arrested, shall serve the unexpired period of the maximum term of his imprisonment. The time from the date of his declared delinquency to the date of his arrest shall not be counted as a part of time served."

Sec. 2175. "A prisoner at large upon parole or conditional release committing a new crime, and re-sentenced to the penitentiary, shall serve a

second sentence, to begin at the termination of his service under the first or former sentence, or the annulment thereof."

Opinion No. 727, dated July 11, 1927, to which you refer, was addressed to the Ohio Board of Clemency. The syllabus thereof reads:

"1. Under the provisions of Section 2174, General Code, where a prisoner has violated the conditions of his parole or conditional release, and the Ohio Board of Clemency has declared such prisoner to be delinquent and entered such facts in the proceedings of the board, such prisoner shall thereafter be treated as an escaped prisoner owing service to the state and, when arrested, shall serve the unexpired period of the maximum term of his imprisonment and the Ohio Board of Clemency is without authority again to restore such prisoner to parole.

2. The Ohio Board of Clemency is without authority to 'annul' a sentence as that word is used in Section 2175, General Code."

The following language appears therein:

"It is fundamental that boards, such as the Ohio Board of Clemency, being creatures of statute, can exercise only such powers as are expressly granted by statute and such as are necessarily implied to carry the powers expressly granted into effect."

'Annul' as defined by Bouvier means: 'To abrogate, nullify or abolish; to make void.'

Nowhere in the powers expressly or impliedly granted to the Ohio Board of Clemency is authority given to 'annul' a sentence. Such action may only be taken in a proper proceeding by a court of competent jurisdiction, or by a pardon duly granted by the proper authority.

* * * it is my opinion that Section 2175, supra, in no wise grants authority to the Board of Clemency to release a prisoner, who has been paroled and has been convicted and sentenced to the penitentiary for a new crime, from serving any part of his first sentence in order to allow him to begin serving the second sentence before the maximum term of the first sentence has been served. * * * as provided in Section 2175, the second sentence imposed for the new crime committed while on parole does not begin to run until the termination of his service under the first sentence or the annulment thereof by a court of competent jurisdiction or by a pardon properly granted. In other words, the sentence contemplated in Section 2175, supra, and therein referred to as a 'second sentence' is in reality a sentence *in future* which does not begin until either the termination of the service under the first or former sentence, or the annulment thereof."

In Opinion No. 849, dated August 10, 1927, addressed to the Ohio Board of Clemency, the following language appears:

"In other words, Sections 2174 and 2175, General Code, relate to that class of prisoners under sentence to the Ohio Penitentiary, who having served a minimum term provided by law for the crime for which convicted, or, prisoners for murder in the second degree, having served under such sentence ten full years, have been allowed to go upon parole or conditional release outside the building and inclosure of the penitentiary and thereafter violate the conditions of such parole or conditional release."

This office, in several recent opinions, has had occasion to construe the powers and duties of the Ohio Board of Clemency with regard to the release and parole of prisoners of the Ohio Penitentiary. I refer to Opinion No. 149, dated March 5, 1927, addressed to the Prosecuting Attorney of Clinton County, Opinion No. 221, dated March 22, 1927, addressed to the warden of the Ohio Penitentiary, Opinion No. 849, dated August 10, 1927, addressed to the Ohio Board of Clemency, Opinion No. 1126, dated October 10, 1927, addressed to the Ohio Board of Clemency, Opinion No. 1381, dated December 16, 1927, addressed to the Ohio Board of Clemency, Opinion No. 1622, dated January 25, 1928, and Opinion No. 1919, dated March 30, 1928, both addressed to you.

A question similar to the one about which you inquire was presented to this office and answered by Opinion No. 1381, supra. The question presented read as follows:

> "Prisoner Harry Davis, No. 53,083, was committed to the Ohio Penitentiary, April 29, 1924, and was paroled August 26, 1925. While out on parole he committed another crime, was convicted and was brought to the Ohio Penitentiary, May 4, 1926.
>
> This case was one of those which led to a difference of opinion between the Board and the keepers of the two prisons, the Ohio Penitentiary and the London Prison Farm, for the reason that he was given his parole from the London Prison Farm, but when resentenced was brought back to the Ohio Penitentiary. The Ohio Board of Clemency in an effort to clear the record marked him for a "Final Release from the London Prison Farm on May 4, 1927.
>
> *Question*—Was that action null and void, or is he entitled to continue on the new number, 55,606, in the Ohio Penitentiary?
>
> *Remarks*—We feel that we understand your opinion recently given as declaring such actions null and void, but to satisfy the officials of the Ohio Penitentiary I am asking an opinion in this specific case."

The following language appears therein:

> "Although Prisoner Harry Davis was an inmate of the London Prison Farm at the time of his parole, in contemplation of law, he was an inmate of the Ohio Penitentiary. The second paragraph of the syllabus of Opinion No. 905, supra, specifically answers the question that you now present. In order that I may not be misunderstood, it is my opinion that prisoner Harry Davis is not entitled to be considered as serving under the second sentence as prisoner No. 55,606. The action taken by the former Ohio Board of Clemency was without authority of law and hence null and void."

In view of the several opinions of this office referred to, I deem it unnecessary to comment at length upon the question presented by your first inquiry. Suffice it to say that the Legislature has seen fit to limit the power of the Ohio Board of Clemency with regard to the parole and release of prisoners of the Ohio Penitentiary who, while upon parole, violate the conditions thereof. I refer to Sections 2174 and 2175, supra.

You will note that although the Codifying Commission changed the phraseology of Section 7388-13, Revised Statutes to read "shall serve a second sentence, to begin at the *termination* of his service under the first or former sentence" the word "termination" as it now appears in Section 2175, supra, must be construed in the light of the language used in Section 7388-13, Revised Statutes, to the effect that such prisoner

"shall be subject to serve the second sentence, after the first sentence is served or annulled." In other words, the word "termination" as used in Section 2175, supra, refers to the "expiration" of sentence.

The Legislature has provided a method whereby deserving prisoners of the Ohio Penitentiary may be placed upon parole. If, while upon parole, such prisoners violate the conditions of such parole and are declared to be delinquent and entered upon the proceedings of the board (Section 2174, General Code), or if such prisoners, while upon parole, commit a new crime and are re-sentenced to the Ohio Penitentiary therefor (Section 2175, General Code), such prisoners, by such action place themselves in a class with reference to which the Ohio Board of Clemency is expressly prohibited from taking further action.

In connection with your second question you enclose a notice of "Application for Parole" which reads as follows:

"APPLICATION FOR PAROLE

Notice is hereby given that Harry L. White, No. 55221, a prisoner now confined in the Ohio Penitentiary, has been recommended to the Ohio Board of Clemency, by the warden and chaplain as legally eligible to a hearing for parole. Said application will be for hearing on or after February 7, 1928.

D. J. BONZO,
Dec. 12, 1927. Parole and Record Clerk."

Your attention is directed to 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." (Italics the writer's.)

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

"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."

Your attention is directed to the following language which appears in said opinion:

"The intent of the Legislature as expressed by the language used in Section 2171, General Code, was that both the warden and the chaplain of the Ohio Penitentiary, by some affirmative action, must 'commend to the favorable notice,' or 'put in a favorable light' such prisoners as 'have worth or ex-

cellence,' 'possess merit,' 'deserve,' 'merit,' 'have adequate worth or value' or 'character' before the Ohio Board of Clemency may consider such prisoner's application for parole. A prisoner may have long since served his 'minimum period of duration of sentence' as fixed by the trial court but the Ohio Board of Clemency cannot lawfully consider such prisoner's application for parole until the warden and chaplain recommend him as worthy of such consideration and notice of such recommendation is published as provided by law.

The duty of the warden and chaplain of the Ohio Penitentiary in recommending prisoners confined therein to the Ohio Board of Clemency for parole is to exercise an honest and conscientious discretion in view of all the facts and circumstances surrounding each case. Many facts, such as the nature of the crime for which the prisoner is incarcerated, his past record, his behaviour while in prison, his attitude toward society, his apparent reform or lack thereof, whether or not he has dependents requiring his services and other facts bearing on the question must be taken into consideration by the warden and chaplain in making their recommendations. It is for these officers to determine whether or not in their good judgment the prisoners in question are worthy before such a recommendation is made."

I take exception to the form of notice, which you submit, for the reason that the same reads "as legally eligible to a hearing for parole," this being the statement of a legal conclusion only and in no wise complying with the plain requirement of Section 2171, supra, to the effect that "notice of *such recommendation* shall be published for three consecutive weeks." In other words, Section 2171, supra, contemplates and provides for one notice only, viz.: a notice that the prisoner in question has been *recommended as worthy of consideration for parole* by the warden and chaplain of the Penitentiary. Whether or not a prisoner is "legally eligible to a hearing for parole" depends on:

1. Whether or not the prisoner in question has served within the penitentiary, the minimum term of imprisonment fixed by the trial court for the felony of which he was convicted.

2. Whether or not the prisoner in question has been 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.

Answering your second question specifically, it is my opinion that the form of notice which you enclose does not comply with the provisions of Section 2171, General Code.

In considering your third question, your attention is directed to three recent opinions of this office, addressed to the Ohio Board of Clemency, viz.: Opinion No. 849, dated August 10, 1927, Opinion No. 1381, dated December 16, 1927, and Opinion No. 727, dated July 11, 1927, to which last opinion you refer in your letter. Paragraph 2 of the syllabus of Opinion No. 849, reads:

"2. The Ohio Board of Clemency is without authority to suspend for a definite term of years, a parole granted to a prisoner, who, having violated the conditions of his parole or conditional release, has been declared to be delinquent by the Ohio Board of Clemency, which has entered such fact in

the proceedings of the board. Such prisoner must serve the unexpired period of the maximum term of his imprisonment."

The following language appears therein:

"There being no authority in the Ohio Board of Clemency to suspend *for a definite term of years,* a parole granted such prisoner and any action so attempting to suspend his parole was of no legal effect. Such prisoner, as provided in Section 2174, General Code, must serve the unexpired term of his imprisonment unless terminated by commutation or pardon and the Ohio Board of Clemency may not again legally consider his application for parole."

Opinion No. 1381 construes a specific case and the question therein presented and the conclusion reached appears in the discussion with regard to your first question herein. These conclusions are applicable to the question you now present.

Answering your third question specifically, it is my opinion that the Ohio Board of Clemency was without lawful authority to terminate the old sentence under No. 49588 so that such prisoner might begin a new sentence as No. 55221. Such purported action was null and void and such prisoner should, because of the provisions of Section 2175, General Code, be restored to serve as prisoner No. 49588.

Respectfully,
EDWARD C. TURNER,
*Attorney General.*

---

2095.

APPROVAL, BONDS OF THE VILLAGE OF FAIRVIEW, CUYAHOGA COUNTY—$81,200.00.

COLUMBUS, OHIO, May 14, 1928.

*Industrial Commission of Ohio, Columbus, Ohio.*

---

2096.

APPROVAL, BONDS OF THE VILLAGE OF BEXLEY, FRANKLIN COUNTY—$49,732.00.

COLUMBUS, OHIO, May 14, 1928.

*Industrial Commission of Ohio, Columbus, Ohio.*