

the county treasury. Without extending this discussion, it is my opinion in specific answer to your inquiries:

1. A deputy county engineer, employed to assist the county engineer in performing the various duties enjoined by law upon the county engineer, may not receive any compensation from the gasoline excise tax fund for the time he is engaged in the construction and maintenance of roads, which work is being paid for from the gasoline excise tax fund.

2. A deputy county engineer, employed to assist the county engineer in performing the various duties enjoined by law upon the county engineer, may not receive any compensation from the general ditch fund for the time he is engaged in the survey, construction or cleaning of county ditches, which work is being paid for from the general ditch fund.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

---

5744.

APPROVAL—BONDS OF CITY OF LIMA, ALLEN COUNTY,  
OHIO, \$13,000.00.

COLUMBUS, OHIO, June 24, 1936.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

---

5745.

PAROLE—PERSON FROM OHIO REFORMATORY ON PAROLE  
WHO IS CONVICTED OF ANOTHER OFFENSE—SHOULD  
BE TRANSFERRED TO OHIO PENITENTIARY—EFFECT  
OF VIOLATION OF PAROLE.

**SYLLABUS:**

1. *Neither the Department of Public Welfare nor the Board of Parole has the authority or power to stay the execution of a sentence imposed upon a parolee, who while out on parole, has been convicted and sentenced for another crime.*

2. *A person previously sentenced to a state penal institution, even though otherwise eligible for commitment to the Ohio State Reformatory cannot legally be committed to such institution by a sentencing court.*

3. *A parolee, who while out on parole, has been convicted and sen-*

tenced for the commission of another penal offense and sentenced to the Ohio Reformatory should be transferred to the Ohio Penitentiary by the Department of Public Welfare as provided by Sections 2140 and 2210-2, General Code.

4. Where the Board of Parole, for the violation of a parole, orders the recommitment of the parole violator to the institution from which the prisoner was paroled, such order of the board cannot interfere with or suspend the execution of a sentence imposed by a court on the parole violator for an offense committed by him while on parole even though by virtue of Section 2211-9, General Code, the Board of Parole has the power on the revocation of a parole to recommit the prisoner to the institution from which he was paroled. (Fourth paragraph of the syllabus of Opinions of the Attorney General for 1933, Vol. II, page 1273, approved and followed.)

COLUMBUS, OHIO, June 25, 1936.

HON. MARGARET M. ALLMAN, *Director, Department of Public Welfare, State Office Building, Columbus, Ohio.*

DEAR MADAM: This will acknowledge receipt of your letter which reads as follows:

"We respectfully request an opinion on the following subject:

H. S. was sentenced to the Ohio State Reformatory January 13, 1933, on a charge of Robbery—10 to 25 years. Paroled July 1, 1935.

On September 18, 1935, he was received at the Reformatory upon conviction for another crime, Robbery—10 to 25 years, and as a violator on the former sentence.

Under Section 2131 G. C., this second sentence to the Reformatory was in error by reason of this man's previously having been sentenced to a state prison, and sentence should have been to the Ohio Penitentiary.

Upon his return, the Board of Parole revoked the prisoner's parole to April, 1941, thus assessing 5 years and 6 months against him for parole violation.

Have we jurisdiction to (1) hold this man in the Reformatory on the first sentence until the Ohio Board of Parole grants him a final release from this sentence, and then transfer him to the Ohio Penitentiary on the second sentence under the provisions of Section 2210-2, G. C.; or (2) should he be entered on the second sentence and be transferred to the Ohio Penitentiary to

serve this sentence; The penalty for violation of the first sentence to be served after the termination of the second sentence.

The above recited case is typical of many cases now confined in penal and reformatory institutions; that is, men who are serving time for violation of parole by reason of the commission of another crime and who are not entered on the new sentence until the parole violation has been served.

The general question is: When a man absent from a penal or reformatory institution on parole or escape is sentenced for another crime, should he upon delivery to prison be entered on the new sentences or may he be received as a parole violator or escape on the first sentence and be required to serve time on the first sentence before being entered on the new sentence? Is the handling of such cases simply a matter of departmental policy?"

The primary legal question raised in your inquiry has been determined by this office in an opinion to be found in Opinions of the Attorney General for 1933, Vol. II, page 1273, wherein it was held:

“1. Whenever by the commission of a crime the terms of a parole are violated, the Board of Parole may revoke such parole and order the recommitment of the parole violator even though at the time of the revocation of the parole the parolee is incarcerated in a penal institution for the commission of a subsequent crime.

2. A prisoner who is sentenced to and incarcerated in the Ohio Penitentiary for the commission of a crime while out on parole from the Ohio State Reformatory may be declared a parole violator by the Board of Parole, in which event the board may either revoke the parole of the prisoner and order his recommitment to the Ohio State Reformatory on the expiration of the sentence to the Ohio Penitentiary or re-parole the prisoner or make such other disposition of the parolee as it sees fit, providing the Board of Parole does not exceed its authority.

3. The running of the sentence of a parolee who has violated the terms of his parole is not suspended or tolled until the Board of Parole declares such prisoner to be a parole violator. A person who is declared a parole violator by the Board of Parole because while on parole from the Ohio State Reformatory he has been convicted of a felony and sentenced therefor to the Ohio State Penitentiary, must be deemed a parole violator on the records of the Ohio State Reformatory as long as he remains without the confines of that institution, even though his return to the Ohio

State Reformatory is made impossible by virtue of his incarceration in the Ohio Penitentiary.

4. *Where the Board of Parole, for the violation of a parole, orders the recommitment of the parole violator to the institution from which the prisoner was paroled, such order of the board cannot interfere with or suspend the execution of a sentence imposed by a court on the parole violator for an offense committed by him while on parole even though by virtue of Section 2211-9 the Board of Parole has the power on the revocation of a parole to recommit the prisoner to the institution from which he was paroled.*" (Italics ours.)

It is apparent from the fourth paragraph of the syllabus that a parolee who is convicted and sentenced to serve another term of imprisonment in a penal institution of this state, commences to serve on the latest sentence and not on the sentence for which he was paroled. In other words, unless a contrary intention is indicated by the sentencing court in sentencing such a parolee the prisoner should be conveyed to the penal institution indicated by the sentencing court. The execution of the subsequent sentence unless the order of commitment indicates otherwise, cannot be stayed by the head of the penal institution to which the prisoner is committed or the Board of Parole for the purpose of permitting the parolee to finish out the unexpired portion of the previous sentence which he was serving constructively outside of the confines of a penal institution by virtue of a parole. In other words, a prisoner on parole who is convicted and sentenced for the commission of another crime while out on parole, should, on being committed to a penal institution for a second offense, be entered on the last sentence, and on the expiration and termination of such sentence such person can be compelled to serve the unexpired portion of his previous sentence, providing the Board of Parole on his subsequent commitment, has terminated his parole.

From an examination of the provisions of the Code of Criminal Procedure, as well as the statutes pertaining to the parole of prisoners, I find no provision which would authorize either the Board of Parole, or the head of a penal institution, or the Department of Public Welfare to stay the execution of a sentence imposed upon a parolee who, while out on a parole, has been convicted and sentenced for another offense. In other words, the execution of a sentence imposed upon a person convicted of a penal offense is not a matter lying within the discretion of either the Department of Public Welfare and its agents, or the Board of Parole. This conclusion finds support in Section 13455-1, General Code, which provides:

“A person sentenced for felony to the penitentiary or a reformatory, unless the execution thereof is suspended, shall be conveyed to the penitentiary or such reformatory, by the sheriff of the county in which the conviction was had, within five days after such sentence, and delivered into the custody of the warden or superintendent of such institution, with a copy of such sentence, and such convict shall be kept within such institution until the term of his imprisonment expires or he is pardoned or paroled. If the execution of such sentence is suspended, and the judgment be thereafter affirmed, he shall be conveyed to the penitentiary or such reformatory within five days after the judge directs the execution of sentence, provided, however, that the trial judge or other judge of said court, may, in his discretion and for good cause shown, extend the time of such conveyance.”

Sections 2131, 2140 and 2210-2, General Code, are pertinent and dispositive of your second question. Section 2131, General Code, reads:

“The superintendent shall receive all male criminals between the ages of sixteen and thirty years sentenced to the reformatory, if they are not known to have been previously sentenced to a state prison. Male persons between the ages of sixteen and twenty-one years convicted of felony shall be sentenced to the reformatory instead of the penitentiary. Such persons between the ages of twenty-one and thirty years may be sentenced to the reformatory if the court passing sentence deems them amenable to reformatory methods. No person convicted of murder in the first or second degree shall be sentenced or transferred to the reformatory.”

Section 2140, General Code, provides in part:

“The Ohio board of administration, with the written consent of the governor, may transfer to the penitentiary a prisoner, who, subsequent to his committal, shall be shown to have been more than thirty years of age at the time of his conviction or to have been previously convicted of crime. \* \* \*”

Section 2210-2, General Code, reads:

“If through oversight or otherwise, a prisoner is sentenced to the Ohio penitentiary or the Ohio state reformatory who is not legally eligible for admission thereto, the warden or superintendent of said institution shall receive said prisoner and shall

forthwith recommend to the department of public welfare, the transfer of said prisoner to the proper institution. Prisoners so transferred shall be entitled to the same legal rights and privileges as to the term of sentence, diminution of sentence and parole, as if originally sentenced and committed to the institution to which they have been transferred.”

Under the provisions of Sections 2131 and 2140, General Code, it is apparent that a person who has been previously convicted of a penal offense cannot, on the commission of another penal offense, be committed to the Ohio State Reformatory irrespective of whether said prisoner might otherwise qualify as far as admission to the Ohio State Reformatory is concerned. In Opinions of the Attorney General for 1934, Vol. I, page 712, it was held :

“A male person twenty years of age who previously had been convicted and sentenced to the Ohio State Reformatory, must be sentenced to the Ohio Penitentiary on being convicted and sentenced for a subsequent felony.”

In other words, if a parolee from the Ohio State Reformatory is convicted of another offense while out on parole, such person cannot be legally committed for such subsequent offense to the Ohio State Reformatory. If such prisoner is committed to the Ohio State Reformatory it is the duty of the Department of Public Welfare by virtue of the provisions of Section 2140 and Section 2210-2, General Code, to transfer said prisoner to the Ohio Penitentiary.

It therefore follows that the prisoner H. S., who while out on parole from the Ohio State Reformatory was convicted of the crime of robbery and committed to the Ohio State Reformatory, should be transferred to the Ohio Penitentiary where he should be incarcerated to serve the second sentence. If said prisoner has been declared by the Board of Parole to be a parole violator and his previous sentence tolled by such action, such prisoner may, on being released from the Ohio Penitentiary, be reconveyed to the Ohio State Reformatory to serve the unexpired portion of his first sentence.

Specifically answering your several questions, it is my opinion that :

1. Neither the Department of Public Welfare nor the Board of Parole has the authority or power to stay the execution of a sentence imposed upon a parolee, who while out on parole, has been convicted and sentenced for another crime.

2. A person previously sentenced to a state penal institution even

though otherwise eligible for commitment to the Ohio State Reformatory, cannot legally be committed to such institution by a sentencing court.

3. A parolee, who while out on parole, has been convicted and sentenced for the commission of another penal offense and sentenced to the Ohio Reformatory should be transferred to the Ohio Penitentiary by the Department of Public Welfare as provided by Sections 2140 and 2210-2, General Code.

4. Where the Board of Parole, for the violation of a parole, orders the recommitment of the parole violator to the institution from which the prisoner was paroled, such order of the board cannot interfere with or suspend the execution of a sentence imposed by a court on the parole violator for an offense committed by him while on parole even though by virtue of Section 2211-9, General Code, the Board of Parole has the power on the revocation of a parole to recommit the prisoner to the institution from which he was paroled. (Fourth paragraph of the syllabus of Opinions of the Attorney General for 1933, Vol. II, page 1273, approved and followed.)

Respectfully,

JOHN W. BRICKER,

*Attorney General.*

---

5746.

APPROVAL—APPLICATION FOR DELINQUENT RENTAL REDUCTIONS, ON OHIO CANAL LANDS IN SHADESVILLE, OHIO—MARY I. SEEDS; WEST CARROLLTON, OHIO—ALLEN B. AND CLARA E. SIMMONS; AND M&E CANAL LANDS IN DEFIANCE, OHIO—NORTHWESTERN SAVINGS AND LOAN COMPANY OF DEFIANCE, OHIO.

COLUMBUS, OHIO, June 25, 1936.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval a number of findings made by you with respect to requested adjustments of current and or delinquent rentals on leases of abandoned canal lands, which findings, as well as the applications therefor filed by the respective lessees, are under the authority of House Bill No. 467, enacted by the 90th General Assembly, 115 O. L., 512.

In one of the findings submitted to me, you have directed a reduction in the amount of the delinquent rentals under O&E Lease No. 141 held