

school lot may be sold at any time after the building burned, if, in the judgment of the board of education, it is not needed for school purposes, and it is not necessary to wait four years.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

3271.

GOVERNOR—POWER TO COMMUTE DEFINITE SENTENCE TO INDEFINITE SENTENCE—LIMITATIONS NOTED.

SYLLABUS:

1. *The Governor can commute a definite sentence to an indefinite sentence but can not fix a maximum term for such indeterminate sentence which would exceed the maximum time the prisoner would serve under the definite sentence after deducting the "good time" provided for by section 2163, General Code.*

2. *The Governor, in granting a conditional commutation of a definite sentence to an indefinite sentence, can fix as a maximum term for such indefinite sentence any term providing it does not exceed the maximum term imposed by the trial court.*

COLUMBUS, OHIO, May 28, 1931.

HON. JOHN MCSWEENEY, *Director of Public Welfare, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your letter of recent date, which reads as follows:

"A number of prisoners are now confined in the Ohio Penitentiary serving definite sentences, that is, cases where the statutory maximum was fixed by the sentencing court as the judicial minimum. For example, No. 55722, was given a sentence of from 20 to 20 years on a charge of 'Forcing entrance to a safe.' The statutory minimum for this crime is one year. It is understood that the reason for the court's imposing this extreme minimum was the belief that this man had been implicated in the killing of a police officer. Since the admission of the prisoner to the Penitentiary, this belief has been refuted by the confession of another man that he killed the officer. It is, therefore, believed that the penalty given No. 55722, is too long.

The question has arisen as to what action may be taken either by the Governor or the Board of Clemency to effect the release of such prisoners who are serving definite or 'flat' sentences.

Is it possible for the Governor to commute a definite sentence establishing a minimum or a maximum, or both a minimum and maximum, other than that imposed by the sentencing court, and by so doing make the prisoner eligible to parole by the Ohio Board of Clemency?"

Your inquiry raises the question of whether or not the Governor can commute a definite sentence to an indefinite or indeterminate sentence. Commutation of a sentence has been defined by many authorities as a substitution of a lower

for a higher degree of punishment or a change of punishment to a less severe one. The authorities also hold that the new penalty becomes the one fixed by law and takes the place of the original sentence. See *Ex parte Victor*, 31 O. S. 206; *State ex rel. Murphy vs. Wolfer*, 127 Minn. 102; *In re Hall*, 34 Neb. 206; *People ex rel. vs. Larkman*, 244 N. Y. S. 431; Opinions of the Attorney General, 1927, page 2605; Opinions of the Attorney General, 1928, page 815; Opinions of the Attorney General, 1931, Opinion No. 3021.

The question presented by your inquiry was indirectly passed upon in the case of *People ex rel. vs. Jennings*, 248 N. Y. 46. The syllabus reads in part as follows:

“Commutation by the governor of a determinate to an indeterminate sentence does not entitle the prisoner to his immediate discharge \* \* \*.”

The prisoner was originally sentenced to serve a fixed term of twenty years for the crime of manslaughter and after serving approximately nine years, his sentence was commuted by the Governor to an indeterminate term with a minimum of the years he had already served and a maximum of twenty years. The syllabus and the facts in that case indicate that a definite sentence can be commuted to an indefinite sentence.

The Constitution of the State of New York empowers the Governor to grant pardons, commutations and reprieves, and is similar to article III, section 11 of the Constitution of Ohio, which empowers the Governor of this state to grant pardons, commutations and reprieves. Inasmuch as the people have delegated to the Governor the power to forgive a crime by means of a pardon or by lessening or reducing the penalty for a crime by commutation, I am of the opinion that the Governor can commute a definite sentence to an indefinite sentence, providing the Governor, in the exercise of his power to commute a definite sentence to an indefinite sentence, does not change the judgment of the sentencing court to a harsher or more severe sentence. Although the power conferred on the Governor by article III, section 11 of the Constitution, to pardon and reprieve, or to commute a sentence is practically unrestricted, yet that grant of power does not authorize the state, through its executive, to impose a greater punishment than that imposed by the trial court.

By virtue of the provisions of section 2163, General Code, a prisoner serving a definite sentence is entitled to diminution of sentence for good behavior. “Good time” so earned is deducted from his sentence, thus making it possible for the prisoner to obtain his freedom without serving the maximum sentence decreed by the court. In the case of *Crooks vs. Sanders*, Supt., 115 S. E. 760 (South Carolina), it was held that the provisions of a “good time” statute are a part of the original sentence. That rule was stated by the court in the following language:

“A statute in existence at the time a convict is sentenced, which allows credits for time on account of good behavior, becomes a part of the sentence.”

Though not directly in point, the following language of the court, at page 28, in the case of *Reeves vs. Thomas, Warden*, 122 O. S. 22, is indicative of the same conclusion:

“The plain letter of Section 2163 grants to a person confined in the penitentiary, whose sentence is definite, the diminution periods set forth in the statute. The effect of the sentence of the trial court, even though

imposed under Section 2166, General Code, was to make a definite sentence, and therefore the same came within the provisions of Section 2163, and Reeves is entitled, as one having a definite sentence, to the benefit of such section."

Inasmuch as the benefits of the "good time" statute (section 2163, General Code) are considered a part of the original sentence, it will be necessary for the Governor, in commuting a definite sentence to an indefinite sentence, to take into consideration the "good time" that the prisoner may earn while serving his definite sentence. To commute a definite sentence to an indefinite sentence, without taking into consideration the provisions of section 2163, General Code, may result in a sentence which in effect would not be a reduction or lessening of the original sentence but rather a longer sentence than that imposed by the trial court.

It must be remembered that the consent of a prisoner is not necessary in commuting his sentence. See *Biddle, Warden, vs. Perovich*, 274 U. S. 480. The reason that the consent of a convict is not necessary in order to make a commutation effective is because "The state does not need the consent of a convict to relinquish its control over him or terminate its right to his servitude as a penalty for a violation of law."

Termination of a definite sentence by reason of the "good time" provisions of section 2163, General Code, does not require any action on the part of the Ohio Board of Clemency, since the sentence of the prisoner is, by law, shortened on account of his good behavior. Commutation of a definite sentence to an indefinite sentence, without fixing a maximum sentence which would allow to the prisoner the "good time" he is entitled to by the provisions of section 2163, would in effect be a sentence more onerous than that originally imposed by the court, since the release of the prisoner would be dependent upon not only the approval and the discretion of the Board of Clemency but also the recommendation of the warden and chaplain of the penitentiary. Section 2171, General Code, reads in part as follows:

"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."

Section 2172, General Code, reads as follows:

"A prisoner shall not be released upon parole, either conditionally or absolutely, unless, in the judgment of the board of managers, his release will not be incompatible with the welfare of society. Such judgment shall be based upon the record and character of the prisoner as established in the penitentiary."

It is apparent from these two sections that good behavior of a prisoner serving an indefinite sentence is in itself insufficient to secure the release of the prisoner from the penitentiary, since it is within the discretion of the Ohio Board of Clemency to parole a person only when the board deems that "his release will not be incompatible with the welfare of society." Under a definite sentence the liberation of a prisoner from a penal institution depends merely on his good behavior, regardless of whether or not his release from a penal institution will be compatible with the welfare of society. It must also be remembered that a pris-

oner serving an indeterminate sentence is eligible to parole only after he has served the minimum term, but it does not necessarily follow that, having served the minimum term, he will be paroled, since the Ohio Board of Clemency, by virtue of the provisions contained in sections 2160 and 2172, General Code, may not grant his application if, in the judgment of the Ohio Board of Clemency, the release of the prisoner will be detrimental to society, even though the conduct of the prisoner is beyond reproach. In other words, good behavior is sufficient in itself to secure freedom for a person serving a definite sentence. It is therefore apparent that commutation of a definite sentence to an indefinite sentence, without taking into consideration the "good time" provisions of section 2163, General Code, would deprive the prisoner of a substantial right which he possessed when he was sentenced by the trial court.

The discussion heretofore had in this opinion, concerning the necessity of fixing a new maximum sentence after commuting a definite to an indefinite sentence, does not apply when the Governor grants a conditional commutation as authorized by the provisions of section 99, General Code, which reads in part as follows:

"A pardon or commutation of sentence may be granted upon such conditions as the governor may impose, which shall be stated in the warrant; but such pardon or commutation shall not take effect until the conditions so imposed are accepted by the convict and his acceptance indorsed upon the warrant, signed by him, and attested by one witness. In case of commutation of sentence, such witness shall go before the clerk of the court in whose office the sentence is recorded and prove the signature of the convict."

Inasmuch as the conditions of a commutation granted by the Governor, by virtue of section 99, must be accepted by the convict, the Governor, as a condition precedent to the granting of a conditional commutation, could commute a definite sentence to an indefinite sentence without the necessity of fixing a new maximum which would include the "good time" that the convict would be entitled to under section 2163, General Code. This is so because the prisoner has a right to refuse or accept the new sentence created by the conditional commutation, whereas the prisoner has no choice of accepting or rejecting a commutation. If a prisoner has served the minimum term of the commuted sentence granted on condition or otherwise, the Ohio Board of Clemency may consider the application for parole of the convict. This was the holding of my predecessor which may be found in the Opinions of the Attorney General, 1927, page 2605, the third paragraph of the syllabus reading as follows:

"Where a commutation has been granted by the governor to a prisoner convicted of a felony so as to render such prisoner eligible for parole by the Ohio Board of Clemency, he may be paroled by such board the same as though he were eligible under the sentence originally imposed and upon violation of his parole such prisoner may be returned into custody to serve the remainder of his sentence."

It is therefore my opinion that:

1. The Governor can commute a definite sentence to an indefinite sentence but can not fix a maximum term for such indeterminate sentence which would

exceed the maximum time the prisoner would serve under the definite sentence after deducting the "good time" provided for by section 2163, General Code.

2. The Governor, in granting a conditional commutation of a definite sentence to an indefinite sentence, can fix as a maximum term for such indefinite sentence any term providing it does not exceed the maximum term imposed by the trial court.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

3272.

OFFICES COMPATIBLE—MEMBER OF COUNTY BOARD OF EDUCATION AND VICE-PRESIDENT OF RURAL BOARD OF EDUCATION.

*SYLLABUS:*

*Under the authority of Section 4728, General Code, a vice-president of a board of education of a rural school district may be appointed as a member of the county board of education and occupy both positions concurrently.*

COLUMBUS, OHIO, May 28, 1931.

HON. MARCUS McALLISTER, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—Your recent letter reads:

"Your opinion is earnestly solicited on the following statement of facts:

"A is a member and vice president of the board of education of a township rural school district, of this county, and he was recently appointed to fill a vacancy existing on the county board of education. He is, at present, holding as a member of both boards.

"Would the fact that he is an officer of one board make an exception to the provisions of Section 4728 of the General Code of Ohio?"

The designation in your letter of a "township rural school district" no doubt refers to a rural school district since, by the terms of Section 4679, General Code, school districts of this state are divided into city school districts, village school districts, rural school districts, and county school districts.

Section 4728, General Code, to which you refer, reads as follows:

"Each county school district shall be under the supervision and control of a county board of education composed of five members, who shall be electors residing in the territory composing the county school district and who may or may not be members of local boards of education. The members of such county board in office when this act goes into effect shall continue in office until their successors are elected and qualified."

This section clearly authorizes a member of a board of education of a rural school district to be at the same time a member of a county board of education. See also Opinions of the Attorney General for 1927, page 25.