



## INVESTIGATIVE REPORT PUBLIC SUMMARY

Ombudsman Complaint A2016-1399  
August 24, 2017

### SUMMARY

A citizen who has been convicted of a felony in Alaska filed a complaint about the Alaska Department of Corrections Parole Board. The complainant asserted that the Parole Board was obstructing his ability to submit a plea to the governor for executive clemency under A.S. 33.20.070. The Ombudsman opened an investigation into whether the Alaska Department of Corrections Parole Board violated the complainant's right to due process of law by denying him the opportunity to request executive clemency from the governor.

The complainant wrote a letter to the Governor of Alaska in December, 2015 asking that he reinstate the Executive Clemency Application Process so that he could pursue a request for clemency. Seven months later, the complainant received a letter from the Office of the Commissioner of the Department of Corrections apologizing for the delayed response and stating that the Parole Board and Governor's Office were in the process of updating the clemency regulations and procedures. The complainant contacted the Office of the Ombudsman after receiving that letter.

The Ombudsman found the allegation that the Parole Board had acted contrary to law by collecting applications for clemency without taking further action to forward them to the governor for consideration was *justified*. Applicants for executive clemency have a due process right to ensure that their applications are meaningfully conveyed to the governor's office. The Ombudsman found that the Parole Board's actions (or inactions) interfered with applicants' rights to due process of law.

## ANALYSIS

The Alaska State Constitution provides that “the governor may grant pardons, commutations, and reprieves, and may suspend and remit fines and forfeitures.”<sup>2</sup> Alaska Statute 33.20.070 echoes the State Constitution, stating that “the governor may grant pardons, commutations of sentence, and reprieves, and suspend and remit fines and forfeitures in whole or part for offenses against the laws of the State of Alaska or the Territory of Alaska.”

Since statehood, Alaska governors have followed national trends towards clemency. From 1959 to 1966, Governor Egan issued 99 awards of clemency, 66 of which were total pardons. From 1994 to 2002, Governor Knowles issued just two awards of clemency, both pardons.<sup>3</sup> Granting clemency has shifted from being seen as a normal exercise of a governor’s power, often in batches around the Christmas holiday, to a rare override of judicial authority reserved for the most unusual cases.

### I. STATUTORY REVISION

In 2005, days before leaving office, Governor Frank Murkowski pardoned the Whitewater Engineering Corporation for its conviction of the criminally negligent homicide of Gary Stone. The decision to issue the pardon was entirely internal to the governor’s office, with no input from the Parole Board or the family of the deceased. Mr. Stone’s widow learned of the pardon when she was contacted by the press, and the distress she and her family experienced was widely reported by the Alaska media.<sup>4</sup>

In 2007, Governor Palin signed legislation that revised AS 33.20.080, the statute that had authorized the governor to refer clemency requests to the Parole Board for investigation. The legislation required the governor to notify the Parole Board before granting clemency, triggering a process of notice to the public and victims before any grant could be effected. The change appears designed to prevent future governors from suddenly granting pardons or other clemency in secret, particularly in the waning days of an administration, as had happened in the Whitewater case.<sup>5</sup>

The changes made in 2007 gave rise to confusion about responsibility for applications for clemency. Authority to grant clemency has always rested exclusively with the governor. Prior to 2007, AS 33.20.080 gave the governor a way to have requests investigated. However, it was not likely that the Parole Board would routinely handle the majority of clemency requests made to the governor. As governors shifted to referring most or all clemency requests to the Parole Board, a

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<sup>2</sup> Alaska Const., art. 3 §21.

<sup>3</sup> 28 *Alaska Law Review* 57-96 at 84 (2011).

<sup>4</sup> See Pat Forgey, *How Controversial Pardon Made It Through*, Juneau Empire, Feb. 21, 2007, available online at [http://juneauempire.com/stories/022107/loc\\_20070221003.shtml#\\_WVamE2Wzcs](http://juneauempire.com/stories/022107/loc_20070221003.shtml#_WVamE2Wzcs) (accessed June 30, 2017 at 10:40 a.m.).

<sup>5</sup> See Minutes of House Judiciary Standing Committee, January 22, 2007.

bureaucratic procedure evolved with forms and formal requirements for submission of clemency requests directly to the Parole Board.

The revised statute expanded the scope of the Parole Board's involvement when the governor refers a request. However, the new statute eliminated the Parole Board's duty to investigate every case the governor refers, unless the governor provides formal notice that he or she is considering granting clemency. With no duty to investigate, but cases still being referred by the governor's office, the Parole Board's role was unclear.

The current statute does not require the governor to refer all clemency requests to the Board for investigation, only those he or she is considering granting. The Board's duty to investigate and notify victims only arises after it receives formal notice that the governor has already decided to consider granting clemency. Since the law changed in 2007, no governor has notified the Board that he or she was considering granting clemency.<sup>7</sup> Thus, the Board has had no duty to investigate any of the requests for clemency that it has received since 2007.

## II. CONSTITUTIONAL DUE PROCESS

While the Parole Board has not violated any statutory duty by declining to act on requests for clemency, the actions or inactions of the Parole Board raise an issue of constitutional due process if they interfere with applicants' rights to petition the governor for clemency. There is obviously no right to be pardoned or to receive any other kind of clemency. The governor may grant, deny, or ignore every request for clemency. However, because clemency is a possible option that the state offers, citizens have the right, as a matter of due process, to at least ask to be considered for clemency.<sup>8</sup> While the state is not required to help applicants apply for clemency, there is a difference between not assisting with applications and preventing applications from being considered. Clemency requests sent directly to the governor are routinely forwarded to the Parole Board in the expectation that some action will be taken, as was the normal procedure before 2007. However, no formal notice that would trigger a Parole Board investigation is given. When the Parole Board received applications directly, it filed them away and provided no notice to the governor when a clemency request was received.

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<sup>7</sup> While Governor Walker publicly announced that he was considering clemency in the case of "The Fairbanks Four," it does not appear that he ever formally notified the Parole Board to initiate an investigation.

<sup>8</sup> In *Lewis v. State, Dept. of Corrections*, 139 P.3d 1266 (Alaska 2006), the Alaska Supreme Court held "We agree with the superior court that some due process protections apply to clemency proceedings. Because the state allows prisoners to apply for executive clemency, it must provide applicants with some procedural due process during the clemency process."

## RECOMMENDATION

The Parole Board can assure due process without spending any more money or devoting a large amount of staff time to the matter. All that is required is to meaningfully inform the governor whenever an application for clemency is received. In consultation with the Parole Board, the Ombudsman recommended that it prepare a summary of each application for clemency it has received, including all information provided that favors the application, and forward that to the governor with a memo advising the governor that the applicant's complete file is available for review and that, in accordance with AS 33.20.080, the Parole Board will be taking no further action on the application until the Board receives formal notice that the governor is considering granting clemency to the applicant.

## PAROLE BOARD RESPONSE

The Parole Board **concurred with the finding** that “applicants for clemency have a due process right to ensure their applications are meaningfully conveyed to the governor’s office.” The Parole Board **accepted the recommendation** and updated the process for reviewing and forwarding clemency applications to the governor’s office.

## CONCLUSION

The Ombudsman appreciates the efforts taken by the Parole Board to participate in the investigation and to efficiently and effectively resolve the problem identified in this complaint.