STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL October 3, 2014	No. I14-007 (R14-013) Re: Inmate's Parole Eligibility

To: Brian L. Livingston
Chairman
Arizona Board of Executive Clemency

Questions Presented

You requested an opinion seeking clarification of the legal obligations of the Arizona Board of Executive Clemency ("Board") concerning parole release hearings for parole eligible inmates. Specifically, you asked the following questions:

1. When an inmate who is deemed eligible for general parole, parole to his/her next consecutive sentence, absolute discharge, or home arrest, decides not to appear before the Board ("waives an appearance or refuses to appear") at his/her scheduled parole hearing, is the Board still required to conduct the scheduled hearing and determine whether to grant parole to the inmate?
2. If an inmate who is deemed eligible for general parole, parole to his/her next consecutive sentence, absolute discharge, or home arrest, refuses to appear at his/her regularly scheduled parole hearing, and the Board takes no action on the scheduled hearing date, is

the Board required to accommodate the inmate's subsequent request for a new parole hearing earlier than would be normally scheduled?

3. Can an inmate "waive a parole hearing" when the inmate has been certified as eligible for parole by the Department of Corrections? If so, does such a waiver release the Board from determining whether to grant parole to the inmate?

Summary Answer

1. Yes. When an inmate is certified as eligible for parole, absolute discharge, or home arrest, the Board or a hearing officer is required to conduct a parole hearing to approve or reject the inmate's application for parole, even if the inmate waives his/her appearance or refuses to appear at his/her parole hearing.
2. Yes. If an inmate refuses to appear at his/her regularly scheduled parole hearing, and the Board takes no action on the scheduled hearing date, the Board is required to accommodate the inmate's subsequent request for a new parole hearing.
3. Yes. An inmate who has been certified as eligible for parole can waive his parole hearing. An inmate's valid waiver, however, does not release the Board from making a decision on whether to grant parole to the inmate.

Background

"[T]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). A State may nevertheless create a liberty interest in parole through its statutory scheme governing the parole decision-making process. *Id.* at 12. In *Greenholtz*, for example, the Supreme Court concluded that the "expectancy of release provided" in the Nebraska statute at issue was "entitled to some measure of constitutional protection" and

examined the statutory procedures "to determine whether they provide the process that is due." 442 U.S. at 12; *see also Bd. of Pardons v. Allen*, 482 U.S. 369, 381 (1987) (holding that the state parole statute created a due process liberty interest in parole release by stating that the board "shall" release the prisoner, subject to certain restrictions). The Court ultimately held that the Nebraska statute "affords the process that is due" because it provides the inmate with "an opportunity to be heard, and when parole is denied it informs the inmate in what respects he falls short of qualifying for parole[.]" *Greenholtz*, 442 U.S. at 16.

The Arizona statute governing parole provides as follows:

> If a prisoner is certified as eligible for parole pursuant to § 41–1604.09 the board of executive clemency shall authorize the release of the applicant on parole if the applicant has reached the applicant's earliest parole eligibility date pursuant to §41–1604.09, subsection D and it appears to the board, in its sole discretion, that there is a substantial probability that the applicant will remain at liberty without violating the law and that the release is in the best interests of the state.

A.R.S. § 31–412(A). In *Stewart v. Arizona Board of Pardons and Paroles*, 156 Ariz. 538, 753 P.2d 1194 (App. 1988), the Arizona Court of Appeals concluded that this statute "creates a protected liberty interest in parole release." 156 Ariz. at 542–43, 753 P.2d at 1198–99 (citing *Greenholtz*, 442 U.S. at 12). Accordingly, the Board must afford Arizona inmates who become eligible for parole "an opportunity to be heard" and, "when parole is denied," must inform an inmate "in what respects he falls short of qualifying for parole." *Greenholtz*, 442 U.S. at 16.

The Director of the Arizona Department of Corrections is responsible for developing and maintaining "a parole eligibility classification system" for inmates. A.R.S. § 41–1604.09(A). Inmates who are certified as eligible for parole pursuant to the classification system "shall be given an opportunity to apply for release on parole." A.R.S. § 31–411(A). Although the statute contemplates an application by the inmate, a parole application may be submitted by someone

other than the eligible inmate. *See* Ariz. Op. Atty. Gen. No. I77–213, 1977 WL 22139 (Nov. 15, 1977).

The inmate is entitled to "an opportunity to be heard" on the parole application "either before a hearing officer designated by the board or the board itself, at the discretion of the board." A.R.S. § 31–411(B). The Board is vested with "exclusive power to pass upon" parole applications and must "either approve, with or without conditions, or reject the prisoner's application for parole." A.R.S. §§ 31–402(A), –411(C). In determining whether to grant parole, the Board must consider whether "there is a substantial probability that the applicant will remain at liberty without violating the law and that the release is in the best interests of the state." A.R.S. § 31–412(A).

When parole is denied, the Board provides the Director with "a written statement specifying the individualized reasons for the denial of parole," and the inmate has the opportunity to review the Board's statement. A.R.S. § 31–411(G). If the Board denies an inmate's parole application and the inmate remains eligible for parole under the classification system, the Director must recertify the inmate pursuant to A.R.S. § 41–1604.09(G). Under this provision, recertification occurs between one and four months after the hearing at which parole was denied. A.R.S. § 41–1604.09(G). However, the Board may prescribe that the inmate "shall not be recertified for a period of up to one year after the hearing." *Id.*

Analysis

1. When an Inmate Waives an Appearance or Refuses to Appear at His/Her Parole Hearing, the Board or a Hearing Officer Must Nonetheless Conduct the Scheduled Hearing and Determine Whether to Grant Parole to the Inmate.

The first question presented is whether the controlling case law and applicable statutory provisions require the Board to conduct a parole hearing and determine whether to grant parole

to an eligible inmate when the inmate "waives an appearance or refuses to appear" at his/her scheduled parole hearing. This inquiry implicates the first due process requirement under *Greenholtz*, which requires the State to provide a parole-eligible inmate with an "opportunity to be heard." 442 U.S. at 16.

The statute contains several interrelated provisions. Subsection 31–411(B) provides that a parole-eligible inmate "*shall* be given an opportunity to be heard either before a hearing officer designated by the board or the board itself, at the discretion of the board." (Emphasis added.) Subsection (C) states that "[a] prisoner who is eligible for parole or absolute discharge from imprisonment shall not be denied parole or absolute discharge from imprisonment without an opportunity to be heard before the board unless another form of release has been granted." A.R.S. § 31–411(C). The Board's Executive Director must "employ hearing officers as deemed necessary within the limits of legislative appropriation." A.R.S. § 31–402(G). Under A.R.S. § 31–402(G), "hearing officers shall conduct probable cause hearings on parole, work furlough and home arrest revocations or rescissions." *Id.* Hearings are "open to the public" and conducted "in an informal manner without adherence to the rules of evidence required in a judicial proceeding." Ariz. Admin. Code R5–4–102(A), (B).

The primary goal in interpreting a statute is to discern and give effect to legislative intent. *See, e.g., Harris Corp. v. Ariz. Dep't of Revenue*, 233 Ariz. 377, 381, ¶ 13, 312 P.3d 1143, 1147 (App. 2013). "[T]he plain language of the statute [i]s the most reliable indicator of its meaning." *State v. Mitchell*, 204 Ariz. 216, 218, ¶ 12, 62 P.3d 616, 618 (App. 2003). Unless the statutory language is ambiguous, its plain meaning governs. *Harris Corp.*, 233 Ariz. at 381, ¶ 13, 312 P.3d at 1147.

Here, the plain language of A.R.S. § 31–411(B) and (C) and A.R.S. § 31–402(G) requires either the Board or a hearing officer to conduct hearings for inmates who become eligible for parole or absolute discharge. These statutes state that the inmate "shall" be given the "opportunity to be heard," and that hearing officers "shall" conduct such hearings. "The use of the word 'shall' in a statute usually indicates the [L]egislature intended a mandatory provision." *Joshua J. v. Ariz. Dep't of Econ. Sec.*, 230 Ariz. 417, 421, ¶ 11, 286 P.3d 166, 170 (App. 2012); *see also Ins. Co. of N. Am. v. Superior Court (Villagrana)*, 166 Ariz. 82, 85, 800 P.2d 585, 588 (1990) ("The use of the word 'shall' indicates a mandatory intent by the [L]egislature."). The statute governing home arrest likewise contemplates such a hearing. *See* A.R.S. § 41–1604.13(E) ("Before holding a hearing on home arrest, the board on request shall notify and afford an opportunity to be heard to the presiding judge of the superior court in the county in which the inmate requesting home arrest was sentenced, the prosecuting attorney and the director of the arresting law enforcement agency.").

Although the Board might be able to satisfy the case-driven "opportunity to be heard" requirement through some means other than a hearing, the provisions of A.R.S. §§ 31–402(G) and 31–411(B) and (C), read together, direct the Board to conduct parole hearings or designate a hearing officer to do so. *See State v. Cid*, 181 Ariz. 496, 499–500, 892 P.2d 216, 219–20 (App. 1995) ("A complementary rule of statutory construction holds that, whenever possible, statutes which are in *pari materia* are read together and harmonized to avoid rendering any clause, sentence or word 'superfluous, void, contradictory or insignificant.'") (internal citations and quotation marks omitted). The Board must therefore conduct a parole hearing for an inmate even if the inmate waives his/her appearance or refuses to appear for his/her parole hearing.

The Board may consider the inmate's waiver of a hearing in determining whether "there is a substantial probability that the [inmate] will remain at liberty without violating the law and that the release is in the best interests of the state" under A.R.S. § 31–412(A). *See In re Shaputis*, 265 P.3d 253, 266 (Cal. 2011) ("An inmate who refuses to interact with the Board at a parole hearing deprives the Board of a critical means of evaluating the risk to public safety that a grant of parole would entail. In such a case, the Board must take the record as it finds it."); *Matter of Christianson v. Rodriguez*, 575 N.Y.S.2d 593, 593 (N.Y. App. Div. 1991) ("By persistently refusing to appear before the Board of Parole for both of his parole release hearings, petitioner has not only effectively waived his right to be present at said hearings, but he has forfeited his right to challenge the determination on the ground that the hearings were conducted in his absence.") (citations omitted).

In sum, because the Arizona statutes governing parole establish a "protected liberty interest in parole release," *Stewart*, 156 Ariz. at 542, 753 P.2d at 1198, a parole release hearing satisfies due process by providing an eligible inmate with an "opportunity to be heard" in the parole decision-making process, *Greenholtz*, 442 U.S. at 16. Although an inmate may waive his/her right to appear at the hearing or refuse to appear, Arizona law requires the Board or a hearing officer to conduct a parole hearing when an inmate becomes certified as eligible for parole.

2. If an Inmate Refuses to Appear at His/Her Parole Hearing, and the Board Takes No Action on the Scheduled Hearing Date, the Board is Required to Accommodate the Inmate's Subsequent Request for a New Parole Hearing.

The second question concerns the Board's responsibility to conduct a parole hearing upon the request of a parole-eligible inmate who refused to appear for his/her scheduled parole hearing, when the Board took "no action" on the scheduled hearing date. As discussed above,

either the Board or a hearing officer is required to conduct a parole hearing for eligible inmates pursuant to A.R.S. §§ 31–402(G) and 31–411(B) and (C). Moreover, under A.R.S. § 31–411(C), the Board is required to either approve or reject an inmate's application for parole or absolute discharge "[w]ithin thirty days after the date of the hearing officer's recommendations." Accordingly, the Board must conduct a parole hearing under these circumstances and make a determination on the inmate's application for parole.

Once a parole hearing is conducted and a parole determination is made, however, an inmate is not entitled "to bring successive applications for relief to the point that it becomes an unreasonable burden upon the parole board and indirectly upon the other prisoners whose applications the Board must consider." *Foggy v. Eyman*, 110 Ariz. 185, 188, 516 P.2d 321, 324 (1973) (holding no due process violation occurred where Board considered inmate's parole application and denied request for hearing on his application for commutation of sentence submitted less than one month later, reasoning that "the Board had just heard applicant's request for parole and was in a position to know that a hearing . . . would be futile"). At that point, the inmate denied parole is subject to the recertification procedures outlined in A.R.S. § 41–1604.09(G). *See* A.R.S. § 41–1604.09(G) (providing that parole eligibility classification "shall be reviewed by the director not less than once every six months," that "[a]ny prisoner who was certified as eligible for parole and denied parole and remains eligible . . . shall be recertified by the director not less than one nor more than four months after the hearing at which the prisoner was denied parole," and authorizing the Board to "prescribe that the prisoner shall not be recertified for a period of up to one year after the hearing" denying parole).

3. A Parole-Eligible Inmate Can Waive His/Her Parole Release Hearing, but the Waiver Does Not Relieve the Board of its Duty to Decide Whether to Grant Parole.

The third question presented is whether an inmate's decision to "waive a parole hearing," releases the Board from taking any action or making a decision on the inmate's parole application. In Arizona, inmates have "a right to reject an offer of parole[.]" *Sheppard v. State ex rel. Eyman*, 18 Ariz. App. 108, 110, 500 P.2d 639, 641 (1972), *overruled on other grounds by Thomas v. Ariz. State. Bd. of Pardons & Paroles*, 115 Ariz. 128, 129, 564 P.2d 79, 80 (1977). "Parole becomes effective only when accepted by the prisoner." *Id.* at 109, 500 P.2d at 640. This is consistent with the law in other states. *See State ex rel. Crosby v. White*, 456 P.2d 845, 847 (Mont. 1969) ("A prisoner should know at the time a parole is approved . . . just what conditions are attached to it so that he can choose whether to accept it or not."); *Pierce v. Smith*, 195 P.2d 112, 116 (Wash. 1948) ("One convicted of crime has the right to reject an offer of parole[.]"); *but see Bollinger v. Bd. of Parole & Post-Prison Supervision*, 920 P.2d 1111, 1114 (Or. App. 1996) (noting that although inmate had ability to waive parole under the former statute, newly enacted statute prohibited inmates from refusing an order granting parole).

If parole-eligible inmates have the right to reject parole, they necessarily have the lesser right to waive their parole hearings. Although the statutes do not expressly provide for the waiver of a parole hearing, case law addressing waiver of hearings in the parole revocation context supports this conclusion. *See Greenholtz*, 442 U.S. at 9–10 (recognizing that parole release and parole revocation "are quite different," noting that "[t]here is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires"); *Borchers v. Ariz. Bd. of Pardons & Paroles*, 174 Ariz. 463, 469, 851 P.2d 88, 94 (App. 1992) ("Unlike a parole revocation hearing, a parole release hearing . . . is not a true adversarial proceeding.").

The Board should take measures to ensure that inmates who desire to waive parole hearings do so knowingly, intelligently, and voluntarily, and to create a record that establishes the validity of the waiver. *See People ex rel. Frazier v. Warden, Rikers Island Corr. Ctr.*, 978 N.Y.S.2d 636, 641 (N.Y. 2013) ("A waiver will be deemed knowing, intelligent, and voluntary when the record demonstrates that the parolee's rights concerning the hearing and the effect of his waiver were explained to him"); *People ex rel. Moll v. Rodriguez*, 516 N.Y.S.2d 998, 1000 (N.Y. App. Div. 1987) ("The waiver of a preliminary [parole revocation] hearing must be knowing, intelligent and voluntary, and the basis for the hearing officer's determination of validity must appear in the record."); *McKenzie v. Pa. Bd. of Probation & Parole*, 963 A.2d 616, 621 (Pa. Commw. Ct. 2009) ("[T]he violation hearing waiver form here reflects [the parolee] voluntarily, knowingly and intelligently waived his right to a violation hearing[.]") (internal quotation marks omitted); *Ex parte Maceyra*, 690 S.W.2d 572, 577 (Tex. Crim. App. 1983) (holding that "in absence of an affirmative waiver, intelligently and knowingly given, a parolee is entitled to [a] parole revocation hearing") (citation omitted). Cases from other jurisdictions suggest that express advisories in written waivers signed by the inmate can satisfy the requirement of a knowing, intelligent, and voluntary waiver. *See, e.g., Frazier,* 978 N.Y.S.2d at 641 (reasoning "a writing that clearly and unambiguously demonstrates the parolee's desire to abandon his right to a preliminary hearing will be deemed valid"); *McKenzie*, 963 A.2d at 620 (noting under state law, "to effectuate a knowing and voluntary waiver in Parole Board cases, all that is required is for the Board to show that it followed its own regulations and provided the necessary information to the offender prior to the offender signing the written waiver form").

The Board can use its rule-making authority to require signed, written waivers or other comparable requirements designed to establish that an inmate validly waived a parole release

hearing. *See* A.R.S. § 31–401(G) ("The board may adopt rules, not inconsistent with law, as it deems proper for the conduct of its business. The board may from time to time amend or change the rules and publish and distribute the rules as provided by the administrative procedures act.").

Finally, even if an inmate validly waives his/her right to a parole hearing, such a waiver does not release the Board from determining whether to grant parole to the inmate. Under A.R.S. § 31–411(C), the Board must approve or reject an inmate's application for parole or absolute discharge from imprisonment. Consequently, although an inmate's waiver of his/her right to a parole hearing releases the Board from its obligation to conduct the hearing, it does not relieve the Board of its obligation to determine whether to grant parole to the inmate.

Conclusion

The Board must give parole-eligible inmates an "opportunity to be heard" in the parole release decision-making process. Arizona law fulfills this requirement exclusively through parole hearings conducted by the Board or hearing officers. An inmate may waive the right to a parole hearing. Although a valid waiver would relieve the Board of its duty to conduct the hearing, the Board must nonetheless make a decision on the inmate's parole application pursuant to A.R.S. § 31–411(C).

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