

N.D.A.G. Letter to Marion (Aug. 19, 1986)

August 19, 1986

Mr. James L. Marion
North Dakota Parole and Pardon Board
P.O. Box 5521
Bismarck, ND 58502

Dear Mr. Marion:

Thank you for your letter dated July 8, 1986.

You have inquired as to whether the longest period of time an inmate can be delayed for parole consideration is three years, the term of appointment of individual Parole Board members. This question has arisen as the result of a Parole Board decision to delay parole consideration for an inmate for a period of ten years.

North Dakota state law requires that an inmate be guaranteed an initial parole consideration by the State Parole Board. N.D.C.C. §12-59-05 provides:

12-59-05. CONSIDERATION BY BOARD -- GUARANTEE. At a meeting to be determined by the parole board, within one year after a prisoner's admission to the penitentiary, or within six months after the prisoner's admission to the state farm, at such intervals thereafter as it may determine and by application pursuant to section 12-59-08, the board may deny or grant parole or continue consideration to another meeting. The board shall consider all pertinent information regarding each prisoner, including the circumstances of the offense, the presentence report, the previous social history and criminal record, the conduct, employment, and attitude in prison, and the reports of such physical and mental examinations as have been made.

However, any later parole consideration will be within the discretion of the State Parole Board. As noted above, N.D.C.C. §12-59-05 provides discretion to the Parole Board, after the initial parole consideration, to deny or grant parole or continue consideration of such parole to another meeting "at such intervals thereafter as it may determine and by application pursuant to section 12-59-08."

N.D.C.C. §12-59-08 provides:

12-59-08. APPLICATION FOR PAROLE -- HEARING --EMERGENCY PAROLES. All applications for parole shall be filed with the clerk of the board. Applications may be heard at a meeting to be determined by the parole board, after the initial consideration guaranteed by section

12-59-05. In the event of an emergency application, the ex officio members of the board of pardons, acting as authorized by section 12-55-04, may, in accordance with section 12-55-19, grant such emergency parole. Thereafter the parolee shall be under the supervision and jurisdiction of the parole board.

After the required initial parole consideration, the Parole Board is given the discretion to hear an application for parole "at a meeting to be determined by the parole board."

North Dakota state law does not set forth a right to parole. The United States Court of Appeals for the Eighth Circuit has held that North Dakota has not created a protected liberty interest in parole. Patten v. North Dakota Parole Board, ____ Fed.2d ____ (8th Cir. 1986).

Other than the required initial consideration of N.D.C.C. §12-59-05, the Parole Board will give consideration to a request for parole at a later meeting only after an application for parole has been filed with the clerk of the board. Action upon this application will not be limited in duration to the terms of the members of the Parole Board. Since each of the Parole Board members have terms which are staggered, there will be a new Parole Board member appointed each year. The action of the State Parole Board, regardless of the makeup of the membership of that board, is that of the board and not the individual members. Unless modified by the Parole Board at a later date, the decision of the Parole Board will continue.

The Parole Board is, by law, vested with discretion as to whether or not to grant parole and upon what conditions such parole shall be granted. This parole process, other than the initial consideration required by N.D.C.C. §12-59-05, will be commenced by the filing of an application for parole by an inmate. When the application for parole has been submitted to the Parole Board, the board will then take action upon such application.

Although the Parole Board may take into consideration the actions of such board at an earlier date, nothing in North Dakota state law makes it mandatory that such board be bound by such an earlier decision. I can foresee situations whereby circumstances may have changed from the time of the earlier Parole Board consideration to the date of the new application for parole. However, the board, may, in its discretion, reaffirm the findings and conclusions of the earlier Parole Board and continue its consideration of the parole application to a future meeting. A parole board, regardless of its membership, could very well continue the decision of an early parole board without change. If a change is made to an earlier decision of the board, such change would occur not because of the expiration of the appointive terms of members of that board but, rather, due to facts and circumstances which the present board, in its discretion, determines to be justification for such a change.

I cannot read N.D.C.C. §§12-59-01 and 12-59-05 to say that the longest period of time an inmate can be set off for parole consideration is three years. The Parole Board may, in its discretion, continue the decision of an earlier board or it may modify that decision. These actions of the board are not dependent upon the terms of any members of the board.

Absent an application for parole requesting modification of the earlier board's decision, such decision will continue since the present parole board would have no basis to act upon such a request absent the filing of an application for parole with the clerk of the board.

Although the Parole Board is vested with discretion in all parole matters, I do believe it important that some continuity in the decision-making process be present in these matters. By staggering the terms of membership of the State Parole Board and N.D.C.C. §12-59-01, it is clear that the North Dakota Legislature recognized that such continuity is important.

I trust that this letter has adequately responded to your inquiry.

Sincerely,

Nicholas J. Spaeth

dfm