

Beaumont, TX, Beaumont Muni, RNAV (GPS) RWY 31, Orig
 Beaumont, TX, Beaumont Muni, VOR/DME RWY 13, Amdt 3
 Beaumont, TX, Beaumont Muni, VOR/DME RWY 31, Amdt 4
 Beaumont, TX, Beaumont Muni, GPS RWY 13, Orig (Cancelled)
 Fort Worth, TX, Fort Worth Meacham, GPS RWY 34R, Orig-A
 Lubbock, TX, Lubbock Intl, LOC BC RWY 35L, Amdt 18A
 Lufkin, TX, Angelina County, GPS RWY 7, Orig-A
 Lufkin, TX, Angelina County, NDB RWY 7, Amdt 2A
 Lufkin, TX, Angelina County, VOR/DME RNAV RWY 7, Amdt 3A
 Lufkin, TX, Angelina County, VOR/DME RNAV RWY 15, Amdt 4A
 Tyler, TX, Tyler Pounds Field, RNAV (GPS) RWY 4, Orig
 Tyler, TX, Tyler Pounds Field, RNAV (GPS) RWY 13, Orig
 Tyler, TX, Tyler Pounds Field, RNAV (GPS) RWY 22, Orig
 Tyler, TX, Tyler Pounds Field, RNAV (GPS) RWY 31, Orig
 Tyler, TX, Tyler Pounds Field, GPS RWY 31, Orig (Cancelled)
 Tyler, TX, Tyler Pounds Field, NDB RWY 13, Amdt 17E
 Tyler, TX, Tyler Pounds Field, VOR/DME RWY 22, Amdt 3D
 Tyler, TX, Tyler Pounds Field, VOR/DME RWY 4, Amdt 3D
 Suffolk, VA, Suffolk Muni, RNAV (GPS) RWY 4, Orig
 Suffolk, VA, Suffolk Muni, GPS RWY 4, Orig-B (Cancelled)

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DEPARTMENT OF JUSTICE

Parole Commission

28 CFR Part 2

Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Serving Sentences Under the District of Columbia Code

AGENCY: United States Parole Commission, Justice.

ACTION: Final rule.

SUMMARY: The U.S. Parole Commission is amending the rule that governs reparole decisions for District of Columbia prisoners whose paroles have been revoked. The amendment clarifies the Commission's intent that, in the case of a prisoner whose parole was revoked by the District of Columbia Board of Parole prior to August 5, 2000, the Commission may make findings of fact concerning issues that were not resolved by the Board at the prisoner's revocation hearing, without having to conduct a new revocation hearing. The

amendment is intended to correct an interpretation according to which the Commission could not, at a parole reconsideration hearing, inquire into such matters as prior criminal conduct that was not adjudicated by the Board. Because a prisoner whose parole has been revoked upon charges sufficient to warrant his return to prison stands on the same legal footing as any other prisoner who makes an application for parole, the procedures for determining that prisoner's suitability for a grant of reparole are the procedures for initial parole hearings. In such hearings, the public safety requires the Commission to inform itself to the fullest possible extent concerning the prisoner's prior criminal conduct.

EFFECTIVE DATE: August 16, 2001.

FOR FURTHER INFORMATION CONTACT:

Office of General Counsel, U.S. Parole Commission, 5550 Friendship Blvd, Chevy Chase, Maryland 20815, telephone (301) 492-5959. Questions about this publication are welcome, but inquiries concerning individual cases cannot be answered over the telephone.

SUPPLEMENTARY INFORMATION: Under the National Capital Revitalization and Self-Government Improvement Act of 1997, Public Law 105-33 (at D.C. Code Section 24-1231), the U.S. Parole Commission assumed jurisdiction to make parole, reparole, and parole revocation decisions for all eligible District of Columbia felony offenders, effective August 5, 2000. Prior to that effective date, and for a two-year period commencing August 5, 1998, the Commission had jurisdiction only to grant paroles and reparaes to eligible District of Columbia prisoners, while the D.C. Board of Parole retained jurisdiction to supervise District of Columbia parolees and to revoke their paroles. Under the procedures of the D.C. Board of Parole, when a decision was made to revoke parole on charges sufficiently serious to return the parolee to prison, the Board would continue the revoked parolee to a reconsideration hearing at a later date. Only at such a reconsideration hearing would the Board consider the offender for a new grant of parole, or "reparole," pursuant to D.C. Code Section 24-206(a). Under that statute a prisoner whose parole has been revoked "* * * unless subsequently reparaed, shall serve the remainder of the sentence originally imposed less any commutation for good conduct which may be earned by him after his return from custody."

Accordingly, reconsideration hearings for such offenders, whether conducted by the D.C. Board of Parole prior to August 5, 1998, or by the U.S. Parole

Commission after August 5, 1998, have been conducted under the procedures applicable to initial parole hearings.

When the Commission adopted a rule of procedure to govern reparole decisions pursuant to D.C. Code Section 24-206(a), it required that reparole hearings would be conducted according to the procedures set forth at 28 CFR 2.72 for initial parole hearings, and specified that "* * * the Commission's decision to grant or deny reparole on the parole violation term shall be made by reference to the reparole guidelines at § 2.21." See 28 CFR 2.81(a) and (d), originally published at 63 FR 39183 (July 21, 1998), as 28 CFR 2.87, recodified at as 28 CFR 2.81 at 65 FR 45894 (July 26, 2000). These guidelines require the Commission to assess the seriousness of the prisoner's past misconduct while on parole.

At the time the Commission adopted its rule governing reparole decisions, it did not anticipate that it would be faced with a significant number of reparole applicants whose paroles had been revoked by the D.C. Board of Parole on charges sufficient to warrant revocation and return to prison, but without resolving all of the charges concerning the offender's conduct while on parole. For example, the Board would revoke parole on non-criminal charges, and make "no finding" on criminal charges if such charges were pending trial or had been dismissed. In order to determine the offender's suitability for a grant of reparole, and to apply the guidelines at 28 CFR 2.21, the Commission is obliged to consider all relevant information concerning the offender's conduct during his previous periods of parole, notwithstanding the Board's decision not to resolve all such matters at the revocation hearing. The Commission's duty to protect the public safety requires it to be fully apprised of each prisoner's real potential for further criminal conduct before it can responsibly grant a reparole.

The interpretation has been urged upon the Commission that, because 28 CFR 2.81 incorporates by reference the "reparole guidelines" at 28 CFR 2.21, it also incorporates the provision at § 2.21 that new criminal conduct ". . . may be determined either by a new federal, state, or local conviction or by an independent finding by the Commission at [a] revocation hearing." See 28 CFR 2.21(a)(2) (2000). Proponents of this view believe that the Commission cannot consider any allegations of criminal conduct that were not adjudicated by the Board of Parole at the revocation hearing. This interpretation is incorrect because § 2.21(a)(2) is not a

"guideline" for decision making, and was intended by the Commission to apply solely in the context of a reparole decision made by the Commission during a Commission-conducted revocation proceeding. Under the rules of the Commission for federal offenders (which are now applied to District of Columbia offenders whose revocation hearings are conducted by the Commission after August 5, 2000), the Commission will attempt to address and resolve, at the revocation hearing, all allegations of criminal and non-criminal conduct bearing upon the period of parole in question. The reparole guidelines at § 2.21 will be assessed based upon the Commission's findings of fact, and a reparole decision will be issued by the Commission at the same time as the revocation decision itself. Because this was not the practice of the D.C. Board of Parole, the Commission did not intend that the fact-finding provisions of § 2.21(a)(2) would be applicable in the context of a reconsideration hearing conducted for a D.C. offender whose parole was previously revoked by the D.C. Board of Parole. When issues of fact relevant to the question of reparole have been left unresolved by the Board, the Commission must be able to address them at the reparole stage.

When the Commission adopted 28 CFR 2.81, the Commission intended that such unresolved issues of fact be determined at a reconsideration hearing under the procedures of 28 CFR 2.72, just as in the case of any other parole applicant with adjudicated allegations bearing upon the prisoner's suitability for release to the community. At an initial parole hearing, there may be adjudicated allegations of criminal conduct, including dismissed criminal charges and other allegations of unlawful behavior described in the presentence investigation report or other documents, which the Commission must resolve in order to determine whether the prisoner is safe to release on parole. Under Rule 32(c)(1) of the Federal Rules of Criminal Procedure, federal sentencing judges have the option, when allegations in a presentence investigation report are challenged at the sentencing hearing, of determining that "no finding is necessary." In such cases, the Commission is permitted to make an independent determination of fact notwithstanding the court's decision to make "no finding." See, e.g., *Ochoa v. United States*, 819 F.2d 366 (2d. Cir. 1987) and *Lewis v. Beeler*, 949 F.2d 325(10th Cir. 1991). The same principle applies to a reparole applicant whose

parole was revoked by the D.C. Board of Parole. *Sparks v. Gaines*, 2001 WL 568004 (D.D.C. May 17, 2001).

Moreover, the due process that governs the decision to revoke parole and to return a parolee to prison under *Morrissey v. Brewer*, 408 U.S. 471 (1972), no longer applies once the revocation proceeding is concluded, and the parolee has been returned to prison. Under D.C. Code Section 24-206(a), the offender is legally presumed to have been returned to prison to serve the remainder of his sentence "unless subsequently reparaoled," so the Commission's fact-finding procedures may constitutionally be the same for parole as well as reparole applicants.

The Commission is therefore amending 28 CFR 2.81(d) to clarify its intent that it will apply the guidelines of § 2.21, to call reparole decisions, but will follow the fact-finding procedures that apply to initial hearings under § 2.72. See 28 CFR 2.19(c), incorporated for D.C. offenders at 28 CFR 2.89 (2000).

Implementation

This amendment to 28 CFR 2.81 shall be fully retroactive to all reparole decisions of the Commission from August 5, 1998, forward, and shall apply to all reparole decisions made by the Commission in the future with respect to offenders whose paroles were revoked by the D.C. Board of Parole. Moreover, the amended rule shall also apply to any reparole consideration by the Commission where new information has arisen since the time of the offender's revocation hearing, and that information is relevant to the offender's suitability for reparole. This interpretative rule conforms to Commission's original intent, and does not constitute in any respect a change in the Commission's decision-making policy or practice.

Regulatory Assessment Requirements

The U.S. Parole Commission has determined that this final rule does not constitute a significant rule within the meaning of Executive Order 12866. The final rule will not have a significant economic impact upon a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 605(b), and is deemed by the Commission to be a rule of agency practice that does not substantially affect the rights or obligations of non-agency parties pursuant to Section 804(30)(c) of the Congressional Review Act.

List of Subjects in 28 CFR Part 2

Administrative practice and procedure, Prisoners, Probation and Parole.

The Final Rule

Accordingly, the U.S. Parole Commission is adopting the following amendment to 28 CFR Part 2.

PART 2—[AMENDED]

1. The authority citation for 28 CFR Part 2 continues to read as follows:

Authority: 18 U.S.C. 4203(a)(1) and 4204(a)(6).

2. Section 2.81 is amended to add the following two sentences to the end of paragraph (d):

§ 2.81 Reparole decisions.

* * * * *

(d) * * * If the prisoner is serving a period of imprisonment imposed upon revocation of his parole by the D.C. Board of Parole, the Commission shall consider all available and relevant information concerning the prisoner's conduct while on parole, including any allegations of criminal or administrative violations left unresolved by the Board, pursuant to the procedures applicable to initial hearings under § 2.72 and § 2.19(c). The same procedures shall apply in the case of any new information concerning criminal or administrative violations of parole presented to the Commission for the first time following the conclusion of a revocation proceeding that resulted in the revocation of parole and the return of the offender to prison.

Dated: July 6, 2001.

Edward F. Reilly, Jr.,

Chairman, U.S. Parole Commission.

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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1926

RIN 1218-AA65

Safety Standards for Steel Erection

AGENCY: Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

ACTION: Final rule; delay of effective date.

SUMMARY: By this document the Occupational Safety and Health