

BEFORE THE BOARD OF PARDONS AND PAROLE  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 20.25.101, 20.25.202, ) PROPOSED AMENDMENT  
20.25.401, 20.25.505, 20.25.601, )  
20.25.801, 20.25.901, 20.25.902, )  
20.25.903, and 20.25.904 pertaining )  
to parole and executive clemency )

TO: All Concerned Persons

1. On December 15, 2015, at 2:00 p.m., the Board of Pardons and Parole will hold a public hearing at the Board of Pardons and Parole office located at 1002 Hollenbeck Road, Deer Lodge, Montana, to consider the proposed amendment of the above-stated rules.

2. The Board of Pardons and Parole will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, please advise the Board of Pardons and Parole of the nature of the accommodation needed no later than 5:00 p.m. on December 4, 2015. Contact Timothy Allred, Board of Pardons and Parole, 1002 Hollenbeck Road, Deer Lodge, MT 59722; telephone (406) 846-1404; fax (406) 846-3512; or e-mail tallred@mt.gov.

3. The rules proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

20.25.101 ORGANIZATION OF THE BOARD (1) The board is a quasi-judicial body and is administratively attached to the Department of Corrections. The board consists of seven members who are appointed by the Governor. ~~The board shall administer executive clemency and~~ The board shall make recommendations on executive clemency and administer parole processes and procedures, and ensure the effective application of and improvements to the clemency and release system as well as of the laws upon which they are based.

(2) through (5) remain the same.

(6) The board chair or designee, in consultation with the board members:

(a) assigns hearing panels to conduct parole hearings, revocation hearings, rescission hearings, administrative parole reviews, reconsideration of previous parole decisions, and to make ~~final decisions and~~ recommendations in matters of executive clemency;

(b) and (c) remain the same.

(7) through (9) remain the same.

AUTH: 46-23-218, MCA

IMP: 2-15-121, 2-15-124, 2-15-2302, 46-23-104, MCA

REASON: The board proposes amending ARM 20.25.101 based on the enactment of House Bill (HB) 43, L. 2015. Under HB 43, the Office of the Governor has the authority to make final decisions on executive clemency applications after receiving recommendations from the board.

20.25.202 DEFINITIONS (1) through (7) remain the same.

(8) "Hearing panel" means two or three board members appointed to conduct parole hearings, revocation hearings, rescission hearings, administrative parole reviews, and to make ~~final decisions and~~ recommendations in matters of executive clemency.

(9) through (20) remain the same.

AUTH: 46-23-218, MCA

IMP: 46-23-103, 46-23-104, 46-23-218, MCA

REASON: The board proposes amending ARM 20.25.202 based on the enactment of House Bill (HB) 43, L. 2015. Under HB 43, the Office of the Governor has the authority to make final decisions on executive clemency applications after receiving recommendations from the board.

20.25.401 HEARING PROCEDURE (1) An eligible offender may apply and come before a hearing panel or an out-of-state releasing authority for nonmedical parole consideration within two months of time fixed by law as calculated by the prison records department. During the parole hearing the hearing panel will consider all pertinent information regarding each eligible offender, including the factors set forth in ARM 20.25.505(2):

~~(a) the circumstances of the offender's current offense and any other offenses the offender has committed;~~

~~(b) the offender's social history and criminal record;~~

~~(c) the offender's prison record including disciplinary conduct, work history, treatment programs, classification and placement, and adjustment to prison; and~~

~~(d) reports of any physical, psychological, and mental health evaluations done on the offender.~~

(2) The presiding hearing panel member shall conduct hearings informally and shall have discretion to allow or not allow any proposed testimony. Board staff shall make a video and audio record of all hearings.

(3) remains the same.

(4) Criminal justice authorities or any other interested ~~interested~~ persons may submit written comments about an offender's possible parole to board staff at any time before the hearing. ~~The hearing panel will give interested persons' comments due consideration at the offender's hearing.~~

(5) A victim may present a statement regarding the effects of the crime on the victim. A victim's statement may also include but is not limited to concerning:

(a) the manner in which the crime was committed ~~effects of the crime on the victim;~~

(b) and (c) remain the same.

(6) At the presiding hearing panel member's discretion, the victim's statement and testimony will be kept confidential if the presiding member finds the victim's privacy interest outweighs the public's right to know. A recording of the hearing will not personally identify the victim without the victim's written consent.

~~(7) The hearing panel shall consider the victim's statement along with the other information presented in determining whether to grant parole.~~

(8) through (14) remain the same, but are renumbered (7) through (13).

AUTH: 46-23-218, MCA

IMP: 46-23-202, 46-23-203, 46-23-204, MCA

REASON: The board proposes amending ARM 20.25.401(1) by incorporating by reference the criteria for nonmedical parole contained in ARM 20.25.505. The board proposes removing the criteria set forth in ARM 20.25.401(1)(a) through (d) and incorporating the criteria into the proposed amendment of ARM 20.25.505(2).

The board proposes amending ARM 20.25.401(2) and (6) by adding language to clarify that an audio and video record of all parole hearings must be made, but such recordings may not personally identify a victim without his or her written consent. The proposed amendment is based on the enactment of House Bill (HB) 28, L. 2015, which requires the board to video and audio record parole hearings, but not personally identify a victim without his or her written consent.

The board proposes amending ARM 20.25.401(4) and (5) to reflect the enactment of HB 135, L. 2015. The proposed amendments incorporate the language of HB 135 pertaining to victim statements and statements of criminal justice authorities. The board's consideration of statements by a victim, criminal justice agency, or other interested person is addressed in the proposed amendment to ARM 20.25.505(2)(p).

20.25.505 CRITERIA FOR RELEASE GRANT DECISIONS ON NONMEDICAL PAROLE (1) remains the same.

(2) In making its determination regarding release, the hearing panel shall consider all available and pertinent information regarding the offender, including ~~may consider each of the following factors:~~

(a) the circumstances of the offense; ~~the offender's maturity, stability, sense of responsibility and development of traits and behaviors which increase the likelihood the offender will conform his/her behaviors to the requirements of law;~~

(b) the offender's social history and prior criminal record, including the nature and circumstances of the offense, date of offense, and frequency of previous offenses; ~~the adequacy of the offender's release plan;~~

(c) the offender's conduct, employment, and attitude in prison, including particularly whether the offender has taken advantage of opportunities for treatment and whether the offender is clear of major disciplinary violations prior to the hearing; ~~the offender's ability and readiness to assume obligations and undertake responsibilities;~~

(d) the reports of any physical, psychological, and mental evaluations that have been made; ~~the offender's education and training;~~

~~(e) the offender's maturity, stability, sense of responsibility, and development of traits and behaviors that increase the likelihood the offender will conform the offender's behavior to the requirements of law; the offender's family status and whether the offender has relatives who display an interest or whether the offender has other close and constructive associations in the community;~~

~~(f) the adequacy of the offender's release plan; the offender's employment history, occupational skills, and the stability of the offender's past employment;~~

~~(g) the offender's ability and readiness to assume obligations and undertake responsibilities; the type of residence, neighborhood or community in which the offender plans to live;~~

~~(h) the offender's education and training; the offender's past use of chemicals (including alcohol), and past habitual and/or abusive use of such chemicals;~~

~~(i) the offender's family status and whether the offender has relatives who display an interest or whether the offender has other close and constructive associations in the community; the offender's mental and/or physical makeup;~~

~~(j) the offender's employment history and occupational skills and the stability of the offender's past employment; the offender's prior criminal record, including the nature and circumstances of the offense, date of offense and frequency of previous offenses;~~

~~(k) the type of residence, neighborhood, or community in which the offender plans to live; the offender's attitude toward law and authority;~~

~~(l) the offender's past use of chemicals, including alcohol, and past habitual or abusive use of chemicals; the offender's conduct in the institution, including particularly whether the offender has taken advantage of opportunities for treatment, and whether the offender is clear of major disciplinary violations prior to the hearing;~~

~~(m) the offender's mental and physical makeup; the offender's behavior and attitude during any previous experience of supervision and the recency of such experience;~~

~~(n) the offender's attitude toward law and authority; any statement of the victim or victims of the offense;~~

~~(o) the offender's behavior and attitude during any previous experience of supervision and the recency of the supervision;~~

~~(p) written or oral statements from criminal justice authorities or any other interested person or the interested person's legal representative, including written or oral statements from a victim;~~

~~(o) and (p) remain the same, but are renumbered (q) and (r).~~

AUTH: 46-23-218, MCA

IMP: 46-23-201, 46-23-202, MCA

REASON: The board proposes amending ARM 20.25.505 to reflect the enactment of House Bill (HB) 135, L. 2015. The proposed amendments consist of reorganizing and restructuring the rule to conform with the statutory language of HB 135. The board does not believe the proposed amendment substantively changes the criteria considered when evaluating parole applications.

20.25.601 RESCISSION HEARING (1) through (2) remain the same.

(3) The presiding hearing panel member will conduct the rescission hearing informally and will make a an audio and video record of it. The offender has the right to be present at the hearing, but may waive that right and admit the allegations are true.

(4) and (5) remain the same.

AUTH: 46-23-218, MCA

IMP: 46-23-218, MCA

REASON: The board proposes amending ARM 20.25.601 based on the enactment of House Bill (HB) 28, L. 2015, which requires the board to video and audio record parole rescission hearings.

#### 20.25.801 ON-SITE HEARING AND REVOCATION OF PAROLE

(1) through (14) remain the same.

(15) The presiding hearing panel member will conduct the revocation hearing and will make an audio and video record of the hearing. The decision of the board in a revocation hearing is by a preponderance of the evidence. The board may consider:

(a) through (c) remain the same.

(16) remains the same.

AUTH: 46-23-218, MCA

IMP: 46-23-215, 46-23-1024, 46-23-1025, MCA

REASON: The board proposes amending ARM 20.25.801 based on the enactment of House Bill (HB) 28, L. 2015, which requires the board to video and audio record parole revocation hearings.

20.25.901 APPLICATIONS FOR CLEMENCY (1) through (3) remain the same.

(4) Clemency applications that have been submitted and denied prior to October 1, 2015, may be resubmitted to the board for additional consideration, subject to this section (4) and the applicable provisions of the administrative rules.

(a) If a resubmitted application is substantively similar to a previously denied application, then the board shall proceed as follows:

(i) Board staff will first assess whether an application is substantively similar to a previous application. The staff shall submit a report to the hearing panel with its assessment of whether the application is substantively similar to a previous application.

(ii) If an application is substantively similar to a previous application, the board's hearing panel may assess the application without further investigation, evaluation, or a hearing. The panel may rely on the existing record.

(iii) The panel may, in its discretion, direct that further investigation or evaluation be conducted, or that an additional hearing be held.

(b) If a resubmitted application includes substantive new material or evidence, the panel may request that an investigation be conducted with regard to

the new material or evidence. The panel, in its discretion, may also request a psychological evaluation or schedule a hearing that may be limited to the new material or evidence.

(c) Upon completion of its assessment, the board shall within ten working days forward to the Governor's office its recommendation to grant or deny clemency, together with all relevant documents. The board shall also forward to the Governor's office a proposed executive order if its recommendation is to grant clemency. If the board's recommendation is to deny clemency, it shall forward to the Governor's office and the applicant a board-recommended disposition summarizing the reasons for denial.

(d) If the board recommends denial of a resubmitted application without a hearing, it will give notice to the applicant and will post the recommended denial on the board's web site within 21 calendar days of the board's recommendation.

(e) The board shall conduct a hearing if, after review by the Governor's office, the Governor directs that a hearing be conducted. The board shall direct that further investigation into specific aspects of an application be conducted if requested by the Governor.

(4) and (5) remain the same, but are renumbered (5) and (6).

AUTH: 46-23-218, MCA

IMP: 42-23-301, MCA

REASON: The board proposes amending ARM 25.20.901 based on the enactment of House Bill (43), L. 2015. Under HB 43, the Office of the Governor has the authority to make final decisions on executive clemency applications after receiving recommendations from the board. The board therefore proposes amending the rule to implement a process under which it reviews executive clemency applications and makes recommendations to the Office of the Governor.

20.25.902 INVESTIGATIONS FOR CLEMENCY AND ORDER FOR HEARING (1) In cases in which the death penalty has not been imposed, the board staff will conduct a preliminary review of the application for clemency and submit a report to a hearing panel for its consideration.

(a) remains the same.

(b) If a hearing panel decides to reject the application, it shall within ten working days transmit the application to the Governor's office for review by the Governor. The board shall conduct a hearing, if after review by the Governor's office, the Governor directs that a hearing be conducted. The board shall direct that further investigation into specific aspects of an application be conducted if requested by the Governor.

(b) remains the same, but is renumbered (c).

~~(c)(d)~~ After receipt of the investigation report, the board staff's recommendation, and any other reports the panel has required, a hearing panel will consider the application and decide whether to hold a hearing deny on the application ~~or hold a hearing concerning the application.~~

(d) remains the same, but is renumbered (e).

~~(e)~~(f) If the panel recommends denial of the application without a hearing, ~~it will give notice to the applicant and will post the denial on the board's web site within 21 calendar days of the board's decision.~~ it shall:

(i) within ten working days transmit the application to the Governor's office for review by the Governor; and

(ii) forward a board-recommended disposition summarizing the reasons for denial and post the recommended denial on the board's web site within 21 calendar days of the board's decision.

(g) If ordered by the Governor, the board shall conduct a hearing. The board shall direct that further investigation into specific aspects of an application be conducted if requested by the Governor.

(2) If the board receives an application for clemency for an inmate for whom the death penalty has been imposed, the board will set a date for a hearing on the application. Board staff will give notice of the hearing date, as prescribed by law, and as described in (1)~~(d)~~(e).

AUTH: 46-23-218, MCA

IMP: 46-23-301, 46-23-302, MCA

REASON: The board proposes amending ARM 25 20.902 based on the enactment of House Bill (43), L. 2015. Under HB 43, the Office of the Governor has the authority to make final decisions on executive clemency applications after receiving recommendations from the board. The board therefore proposes amending the rule to implement a process under which it reviews executive clemency applications and makes recommendations to the Office of the Governor.

20.25.903 HEARING PROCEDURE FOR CLEMENCY (1) remains the same.

(2) The hearing panel that conducts the hearing will hear all relevant facts and information of the petitioner, petitioner's counsel and witnesses, as well as any opponents to the petition, and will make a an audio and video recording of the hearing including proof of publication of the order for hearing.

(3) through (5) remain the same.

AUTH: 46-23-218, MCA

IMP: 46-23-306, MCA

REASON: The board proposes amending ARM 20.25.903 based on the enactment of House Bill (HB) 28, L. 2015, which requires the board to video and audio record hearings on executive clemency.

20.25.904 DECISION RECOMMENDATION CONCERNING CLEMENCY

(1) Upon conclusion of the hearing the hearing panel will take the entire case under advisement or may issue an immediate ~~decision~~ recommendation. If the panel takes the case under advisement, it must make a ~~decision~~ recommendation in writing within 30 days to grant or deny clemency.

(a) In cases in which the death penalty has not been imposed, if the hearing panel makes a recommendation that the governor grant clemency, it will immediately forward all relevant documents and a proposed executive order to the governor for the governor's final determination. If the panel does not recommend a grant of clemency, it will not forward the application to the governor. the hearing panel will make a recommendation to grant or deny clemency.

(b) The hearing panel shall within ten working days forward to the Governor's office its recommendation to grant or deny clemency, together with all relevant documents for the Governor's final determination. If the hearing panel makes a recommendation that the Governor grant clemency, it shall also forward a proposed executive order to the Governor's office. If the panel does not recommend clemency, it will forward a board-recommended disposition summarizing the reasons for denial.

(b) remains the same, but is renumbered (c).

~~(2) The board staff will notify the applicant of the panel's decision in writing within 30 days of the hearing.~~

(3) remains the same, but is renumbered (2).

AUTH: 46-23-218, MCA

IMP: 46-23-301, 46-23-307, MCA

REASON: The board proposes amending ARM 25.20.904 based on the enactment of House Bill (43), L. 2015. Under HB 43, the Office of the Governor has the authority to make final decisions on executive clemency applications after receiving recommendations from the board. The board therefore proposes amending the rule to implement a process under which it reviews executive clemency applications and makes recommendations to the Office of the Governor.

The board also proposes amending the title to conform with the content of the rule.

4. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Timothy Allred, Montana Board of Pardons and Parole, 1002 Hollenbeck Road, Deer Lodge, MT, 59722; telephone (406) 846-1404; fax (406) 846-3512; or e-mail tallred@mt.gov, and must be received no later than 5:00 p.m., on December 23, 2015.

5. Timothy Allred, Board of Pardons and Parole, Executive Director, has been designated to preside over and conduct this hearing.

6. The Board of Pardons and Parole maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and e-mail or mailing address of the person to receive notices and specifies that the person wishes to receive notice regarding a particular subject matter or matters. Notices will be sent by e-mail unless a mailing preference

is noted in the request. A written request may be mailed or delivered to the person in 4 above or faxed to the office at (406) 846-3512, or may be made by completing a request form at any rules hearing held by the Board of Pardons and Parole.

7. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary sponsors of HB 28, HB 43, and HB 135 were contacted by letter on July 22, 2015.

9. The Board of Pardons and Parole has determined that under 2-4-111, MCA, the proposed rule amendments will not significantly and directly impact small businesses.

/s/ ROBERT LISHMAN  
Robert Lishman  
Staff Attorney, DOC  
Rule Reviewer

/s/ MARK STAPLES  
Mark Staples  
Chairperson  
Board of Pardons and Parole

Certified to the Secretary of State November 16, 2015.