

# KANSAS LEGISLATIVE RESEARCH DEPARTMENT

68-West-Statehouse, 300 SW 10th Ave.  
Topeka, Kansas 66612-1504  
(785) 296-3181 • FAX (785) 296-3824

kslegres@klrd.ks.gov

<http://www.kslegislature.org/klrd>

February 16, 2011

**To:** Senator Terry Bruce

**From:** Robert Allison-Gallimore, Research Analyst

**Re:** "Neutral and Detached" Hearing Body for Parole Revocations

You requested more information regarding the "neutral and detached" due process requirement for a hearing body considering parole revocation, as highlighted by Kansas Parole Board member Patricia Biggs in her memorandum for the Senate Corrections Budget Subcommittee. Ms. Biggs suggests the state could be subject to legal action for due process violations if Parole Board responsibilities are transferred to personnel within the Department of Corrections.

The language quoted by Ms. Biggs is drawn from the United States Supreme Court's decision in *Morrissey v Brewer*, 408 U.S. 471, 488-89 (1972). In this decision, the Supreme Court established the "minimum requirements of due process" for probation revocation final hearings. The requirements are: (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." Kansas and federal courts continue to apply these minimum requirements in the parole context. See, e.g., *Bull v. State*, 31 Kan. App. 2d 584, 587, 69 P.3d 201 (2003); *United States v. Bennett*, 561 F.3d 799, 801-02 (8th Cir. 2009).

There is little guidance available as to what may constitute a "neutral and detached" hearing body, other than a "traditional parole board." The lack of case law in this area likely is due to the fact that the vast majority of states have in place what could be characterized as a "traditional parole board": a panel of individuals, appointed by the governor, who make parole decisions. These panels are usually independent agencies or else affiliated with the state department of corrections (or its equivalent) for administrative purposes only. Thus, there has not been much opportunity for parolees to challenge non-traditional parole bodies to determine whether such bodies meet the "neutral and detached" requirement.

In those few states where the parole board function is incorporated in the department of corrections or equivalent agency, it appears the members of the decision making panel are usually still appointed by the governor, such as in Michigan. In Maryland, the Parole Commission is within the Department of Public Safety and Correctional Services, and its members are appointed by the Secretary of that department, with the approval of the governor and the state senate. In Minnesota, the commissioner of corrections is given the authority to

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Attachment 2

make "supervised release" (parole) decisions. The department of corrections has a "Hearings and Release Unit" responsible for supervised release decisions.

The only court decisions found regarding the "neutral and detached" requirement from these jurisdictions are a few (mostly unpublished) cases from Michigan federal courts. In these cases, the courts consistently rejected the argument that the previous Michigan parole board structure, in which members were appointed by the corrections director, did not constitute a "neutral and detached" body. See, e.g., *Crowley v. Renico*, 81 Fed. Appx. 36 (6th Cir. 2003); *Young v. Trombly*, No. 00-CV-10488-BC, 2002 WL 1461755 (E.D. Mich. 2002).

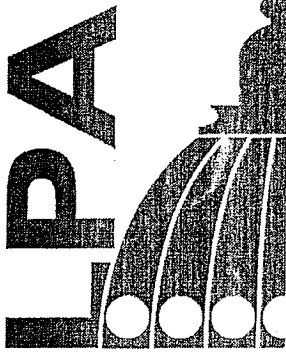
I found one other decision discussing the "neutral and detached" requirement in a parole context. In *State v. Turnbull*, 114 Ariz. 289, 291-92, 560 P.2d 807 (1977), the Arizona Court of Appeals stated: "Morrissey, supra, mandates as yet another factor of 'minimum due process' the requirement of a 'neutral and detached hearing body' to determine if reasonable grounds for revocation existed. [Citation omitted.] Essentially, Morrissey's 'neutral and detached hearing body' requires simply an independent decision maker, one other than the correctional official who has made the initial report of violation or who has recommended revocation."

The Kansas Legislative Division of Post Audit briefly discussed related issues in its October 2009 report, "Adult Correctional Agencies: Determining Whether Functions Could Be Combined To Gain Cost Efficiencies." The report concluded there might be safeguards that could be implemented to address Parole Board concerns. A copy of the relevant portion of that report is attached.

The Office of the Revisor of Statutes staff also could assess possible legal action under various parole board structures. Please let me know if you would like more detail regarding anything in this memorandum, have any further questions, or would like this memorandum distributed to any additional parties.

RAG/kal

Enclosure



# **PERFORMANCE AUDIT REPORT**

## **Adult Correctional Agencies: Determining Whether Functions Could Be Combined To Gain Cost Efficiencies**

A Report to the Legislative Post Audit Committee  
By the Legislative Division of Post Audit  
State of Kansas  
October 2009

House Bill 2340, which was introduced but not passed during the 2009 legislative session, would have moved the parole function under the Department of Corrections. The fiscal note prepared for that bill estimated a cost savings of \$158,000 by lowering Board members' compensation to be commensurate with other Department staff who had a generally equal level of responsibility and knowledge.

According to the Secretary, the role and duties of the Board members would not have changed, only their compensation amounts. Although this action would reduce the cost of the Board, it would be achieved as the result of a policy decision, not through improved efficiency.

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***Parole Board Members  
Raised a Number of  
Concerns About Merging  
The Board's Function  
Into the Department of  
Corrections***

We asked Parole Board members and others to identify any issues or concerns about moving the Board into the Department of Corrections. They cited the following concerns:

- **The merger might alter the current role of the Board.** Currently, the Board acts as a quasi-judicial body conducting hearings and making final decisions concerning an inmate's release or re-admittance into prison. If the Board were merged with the Department, it potentially could be used as a means to help control prison populations, which could adversely affect its judicial role.
- **Having the Department perform both preliminary parole hearings and final parole hearings could be perceived as denying an inmate a neutral hearing.** Parole Board members in both Kansas and Indiana mentioned this to us as a risk area. In Kansas, the Department currently conducts preliminary parole hearings for inmates, and the Board conducts final parole hearings. The concern is that having the Department do both could violate an inmate's right to due process.

Because the Parole Board in Michigan is placed within that state's Department of Corrections, we talked to Michigan Board officials about any problems they've had with that organizational structure. They acknowledged that the Board sometimes is used as a means of reducing prison populations. In addition, they said at one time the Michigan Parole Board performed both the preliminary and final hearing through Department of Correction staff, and that arrangement didn't create any problems.

Both of the issues identified above likely could be addressed through other safeguards, if necessary. For example, Board members could still be appointed by the Governor or outside hearing officers could be used to make final decisions when necessary. However, because we didn't identify the potential for achieving additional efficiency-related cost savings, and because other states typically don't structure their parole board functions and duties this way, we didn't pursue this area further.