

DEPARTMENT OF JUSTICE**Parole Commission****28 CFR Part 2****Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Serving Sentences Under the United States and District of Columbia Codes**

AGENCY: United States Parole Commission, Department of Justice.

ACTION: Interim rule with request for comments.

SUMMARY: The Parole Commission is implementing, as an interim rule, an administrative remedy for those parole-eligible District of Columbia prisoners who contend that the Commission's use of the parole guidelines at 28 CFR 2.80(b) through (m) have significantly increased the risk of their punishment in violation of the Ex Post Facto Clause of the Constitution. Under the remedial plan, the Commission will schedule new parole hearings for those prisoners who meet the plan's eligibility criteria, unless the Commission grants the applicant a parole effective date after a pre-hearing assessment on the record. In conducting the new consideration, the Commission will apply the parole guidelines of the former District of Columbia Board of Parole that were promulgated in March 1985 and published in May 1987. The Commission is amending § 2.80 by replacing paragraph (o), which describes a procedure no longer employed by the Commission, with the remedial plan.

DATES: Effective date is August 17, 2009. Comments must be received by September 15, 2009.

ADDRESSES: Submit your comments, identified by docket identification number USPC-2009-02 by one of the following methods:

1. *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments.
2. *Mail:* Office of the General Counsel, U.S. Parole Commission, 5550 Friendship Blvd., Chevy Chase, Maryland 20815.
3. *Fax:* 301-492-5563.

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:**Public Participation and Request for Comments**

We encourage you to submit comments on the interim rule through one of the methods described above. If you choose to use the rulemaking portal on the Internet, your comments will be posted without change to <http://www.regulations.gov> and will include any personal information you included in your correspondence. Your comments are most helpful when you provide us with the reasons behind the opinions or conclusions you express in your correspondence.

Background

The U.S. Parole Commission is responsible for making parole release decisions for District of Columbia felony offenders who are eligible for parole. DC Code 24-131(a). The Commission took over this responsibility on August 5, 1998 as a result of the National Capital Revitalization and Self-Government Improvement Act of 1997 (Pub. L. 105-33). The Commission immediately promulgated regulations to implement its new duties, including paroling policy guidelines at 28 CFR 2.80. 63 FR 39172-39183 (July 21, 1998). In promulgating the decisionmaking guidelines, the Commission used the basic approach and format of the 1987 guidelines of the District of Columbia Board of Parole, but made modifications to the Board's guidelines in an effort to incorporate factors that led to departures from the guidelines. 63 FR 39172-39174. In 2000, the Commission modified the guidelines for DC prisoners, creating suggested ranges of months to be served based on the pre- and post-incarceration factors evaluated under the guidelines, which in turn allowed the Commission to extend presumptive parole dates to prisoners up to three years from the hearing date. 65 FR 45885-45903. Also in 2000, the U.S. Supreme Court decided the case of *Garner v. Jones*, 529 U.S. 244 (2000), indicating that parole rules that allow for the use of discretionary judgment may come within the proscription of the Ex Post Facto Clause of the Constitution. For over twenty years, federal appellate courts had rejected claims that the Commission's use of discretionary guidelines for parole release decisions violated the constitutional ban against ex post facto laws. As a result of the Supreme Court's decision in *Garner*, the U.S. Court of Appeals for the District of Columbia Circuit held that parole release guidelines may constitute laws that are covered by the Ex Post Facto Clause. *Fletcher v. District of Columbia*, 391 F.3d 250 (DC Cir. 2004) (*Fletcher II*).

Following upon the *Fletcher II* decision and the decision in *Fletcher v. Reilly*, 433 F.3d 867 (DC Cir. 2006) (*Fletcher III*), the U.S. District Court for the District of Columbia (Huvelle, District Judge) held that the Parole Commission's application of its 2000 paroling guidelines for several DC Code prisoners violated the Ex Post Facto Clause. *Sellmon v. Reilly*, 551 F.Supp.2d 66 (D.D.C. 2008). Several other prisoner-plaintiffs were denied relief by the district court. The court ordered that the Commission conduct new parole hearings for the successful plaintiffs, using the 1987 Board of Parole guidelines, instead of the Commission's parole guidelines at 28 CFR 2.80(b) through (m). The *Sellmon* decision affects only the plaintiffs in that case. But other complaints brought in the District of Columbia would now likely result in a similar outcome, at a significant cost to the Commission. Therefore, the Commission is establishing an administrative remedy to avoid further ex post facto challenges to its parole determinations for DC prisoners.

Discussion of the Interim Rule and Implementation

As the *Sellmon* decision showed, not every DC prisoner must be reconsidered under the 1987 guidelines to avoid ex post facto problems. The Ex Post Facto Clause only requires that an offender be punished according to the law in effect at the time of his offense. If the prisoner committed his crime before the effective date of the 1987 guidelines (March 4, 1985), then the Commission is not required to apply those guidelines to his case. Similarly, the Commission is not required to apply the 1987 guidelines to a DC prisoner who committed his crime after August 4, 1998 (the last date the former Board exercised its parole release authority). Therefore, the Commission is adopting the following criteria for eligibility under the remedial plan: (1) The prisoner committed the crime after March 3, 1985 and before August 5, 1998; (2) the prisoner received his initial hearing after August 4, 1998 and therefore has not been considered for parole under the 1987 Board guidelines; (3) the prisoner is not incarcerated on a parole revocation; and (4) the prisoner does not have a parole effective date or a presumptive parole date before January 1, 2010. The Commission will ask the institutions to provide notice of the remedial plan to eligible prisoners. After the interim rule becomes effective, cases will be added to hearing dockets as the Commission's workload permits until the remedial proceedings are completed.

At the hearing under the remedial plan the hearing examiner will evaluate the prisoner for parole using the Board's 1987 guidelines. The Commission has employed these guidelines for some DC prisoners since 1992, and continues to use the 1987 guidelines for a DC prisoner who had his initial hearing before August 5, 1998. 28 CFR 2.80(a)(4). The "1987 guidelines" include the salient factor score, the calculation of points for pre- and post-incarceration factors, the point assignment grid, the decisions indicated by the prisoner's point score, and the reasons for departing from the guidelines listed in the decision worksheet at Appendix 2-1 of the former Board's rules. Because the suggested reasons include the term "other," the Commission is not restricted to the listed reasons in making departures from the guidelines.

A 1991 policy guideline of the DC Board provides definitions of terms used in scoring post-incarceration factors of the 1987 guidelines ("negative institutional behavior" and "sustained program or work assignment achievement"), and in giving reasons for departing from the outcome indicated by the guidelines point score (e.g., "unusually extensive or serious prior record"). For prisoners who committed their crimes while the policy guideline was in effect (from December 16, 1991 to October 23, 1995), the Commission will follow the definitions given in the 1991 policy guideline for scoring negative behavior or sustained achievement, and in using the departure reasons that have been identified by the Board in its rules and the policy guideline. But again, the Commission is not restricted from relying on "other" reasons for departing from the guidelines, reasons not listed in the rules and the policy statement, with one caveat. The Commission will not depart from the guidelines for the reason that the prisoner has not served a sufficient prison term to be "accountable" for his crime or because his release would depreciate the seriousness of his offense. Under the former Board's policy the factor of offense accountability or punishment for the crime is satisfied by the prisoner's service of the minimum term imposed by the sentencing judge.

The 1991 policy guideline sets standards for guideline departure that arguably raise doubts as to whether the standards, in some cases, sufficiently protect the public safety. For example, the Board defined the aggravating factor of "unusually extensive or serious prior record" as "at least five (5) felony convictions for commission, or attempted commission, of * * * [arson,

assault, murder, kidnapping, etc.]." The aggravating factor of "history of repetitive sophisticated criminal behavior" is defined as "three (3) or more convictions, including the current conviction, for: a. Serious crimes involving premeditation or methodical planning; or b. Assaultive or fraudulent criminal behavior." These definitions would seem to preclude a departure from the guidelines for the prisoner who has committed murder while on parole for murder, or who is in custody for a new rape conviction with a prior conviction for forcible sodomy or rape. These are the types of cases the Commission will have to carefully consider when deciding whether "other" reasons exist for a guidelines departure. The Board itself appears to have recognized the problems created by its 1991 policy guideline because it wrote a revised statement in 1995 that superseded the 1991 policy guideline and removed specific standards, such as the number of convictions and types of crimes, in describing the terms for departure.

The remedial hearing will be conducted using the initial hearing guidelines of the former DC Board. If the hearing examiner does not recommend parole, the examiner will recommend a rehearing date 12 months from the initial hearing date under the former Board's rule on the timing for rehearings, unless the examiner finds a good reason to depart from the normal rehearing schedule. If the examiner's recommended rehearing date has already passed, the examiner will then apply the 1987 guidelines for rehearing decisions and make a recommendation on the premise that the case is a rehearing case.

If a prisoner has been granted a presumptive parole date under the Commission's guidelines at § 2.80(b)-(m), the presumptive date will not be rescinded unless the Commission would rescind the date for one of the accepted bases for such action, i.e., new criminal conduct, new institutional misconduct, or new adverse information. The interim rule also provides that the Commission may set a presumptive parole date for a prisoner who is considered under the remedial plan if the Commission determines that the prisoner needs to successfully complete a treatment program to reduce the risk his release would pose to the community, and the prisoner's eligibility for entry into the program includes an expected release date within a certain number of months or years. In these cases, the Commission may grant the presumptive parole date on the condition that the prisoner successfully completes the particular

treatment program. The Commission may rescind the presumptive date if the prisoner failed in the program or one of the other accepted bases for rescission of a presumptive date were present.

At the quarterly business meeting held on May 14, 2009, the Commission received written and oral comments from interested organizations on a proposed remedial plan to use the 1987 guidelines for some DC prisoners. The comments came from representatives of the District of Columbia Public Defender Service, the Washington Lawyers' Committee on Civil Rights and Urban Affairs, the attorney who represented the plaintiffs in the *Sellmon* case, and the U.S. Attorney's Office for the District of Columbia. Several commenters questioned the plan's eligibility criteria, especially the limitation regarding offenders who committed their crimes before the Board's guidelines became effective in March 1985. In their view, the Commission should apply the 1987 guidelines to those offenders as well as offenders who committed their crimes when the guidelines were in effect. Concerns were also expressed regarding the proposal's allowance that the Commission be able to depart from the Board's guidelines for reasons "other" than those listed in the Board's regulations and policy guidelines. The issues raised by the commenters are substantial and worthy of careful consideration before the Commission adopts a final rule implementing a remedial plan.

The Commission will amend § 2.80 by replacing paragraph (o), which describes conversion procedures no longer used by the Commission, with the interim remedial plan. The Commission is proceeding expeditiously with an interim rule because key personnel who are presently available to implement the plan will be lost through retirement by the end of the calendar year.

Executive Order 12866

The U.S. Parole Commission has determined that this interim rule does not constitute a significant rule within the meaning of Executive Order 12866.

Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Under Executive Order 13132, this rule does not have sufficient federalism implications requiring a Federalism Assessment.

Regulatory Flexibility Act

The interim 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(3)(c) of the Congressional Review Act.

Unfunded Mandates Reform Act of 1995

This rule will not cause State, local, or tribal governments, or the private sector, to spend \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. No action under the Unfunded Mandates Reform Act of 1995 is necessary.

Small Business Regulatory Enforcement Fairness Act of 1996 (Subtitle E—Congressional Review Act)

This rule is not a “major rule” as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Subtitle E—Congressional Review Act), now codified at 5 U.S.C. 804(2). The rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on the ability of United States-based companies to compete with foreign-based companies. Moreover, this is a rule of agency practice or procedure that does not substantially affect the rights or obligations of non-agency parties, and does not come within the meaning of the term “rule” as used in Section 804(3)(C), now codified at 5 U.S.C. 804(3)(C). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 28 CFR Part 2

Administrative practice and procedure, Prisoners, Probation and parole.

The Interim 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. Amend § 2.80 by revising paragraph (o) to read as follows:

§ 2.80 Guidelines for DC Code Offenders.

* * *

(o)(1) A prisoner who is eligible under the criteria of paragraph (o)(2) may receive a parole determination using the 1987 guidelines of the former District of Columbia Board of Parole (hereinafter “the 1987 guidelines”).

(2) A prisoner must satisfy the following criteria to obtain a determination using the 1987 guidelines:

(i) The prisoner committed the offense of conviction after March 3, 1985 and before August 5, 1998;

(ii) The prisoner is not incarcerated as a parole violator;

(iii) The prisoner received his initial hearing after August 4, 1998; and

(iv) The prisoner does not have a parole effective date, or a presumptive parole date before January 1, 2010.

(3) If an eligible prisoner applies for a hearing under the 1987 guidelines, a hearing examiner shall review the case on the record. If the hearing examiner recommends that the prisoner receive a parole effective date and the Commission concurs in the recommendation, the case shall not be scheduled for a hearing. If the hearing examiner does not recommend a parole effective date, the examiner shall recommend a hearing on an appropriate hearing docket.

(4) At the hearing, the hearing examiner shall evaluate the prisoner’s case using the 1987 guidelines as if the prisoner were receiving an initial hearing shortly before the date of parole eligibility. If the prisoner has passed the rehearing date that the examiner determines is appropriate under the circumstances presented by the case, the examiner shall also evaluate the case under the rehearing guidelines. The Commission shall also use the former Board’s policy guidelines in making its determinations under this paragraph, according to the policy guideline in effect at the time of the prisoner’s offense.

(5) If the Commission denies parole after the hearing, and the prisoner received a presumptive parole date under the parole determination that preceded the hearing under this paragraph, the prisoner shall not forfeit the presumptive parole date unless the presumptive date is rescinded for institutional misconduct, new criminal conduct, or for new adverse information.

(6) Decisions resulting from hearings under this paragraph may not be appealed to the Commission.

Dated: July 8, 2009.

Isaac Fulwood,

Chairman, United States Parole Commission.
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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 159

[DOD–2008–OS–0125/RIN 0790–AI38]

Private Security Contractors (PSCs) Operating in Contingency Operations

AGENCY: Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

ACTION: Interim final rule.

SUMMARY: This part establishes policy, assigns responsibilities and provides procedures for the regulation of the selection, accountability, training, equipping, and conduct of personnel performing private security functions under a covered contract during contingency operations. It also assigns responsibilities and establishes procedures for incident reporting, use of and accountability for equipment, rules for the use of force, and a process for administrative action or the removal, as appropriate, of PSCs and PSC personnel. For the Department of Defense, this IFR supplements DoD Instruction 3020.41, “Contractor Personnel Authorized to Accompany the U.S. Armed Forces,” which provides guidance for all DoD contractors operating in contingency operations.

This part is of critical importance. It is being published as an Interim Final Rule because there is insufficient policy and guidance regulating the actions of DoD and other governmental PSCs and their movements in the operational area. It will procedurally close existing gaps in the oversight of Private Security Contractors (PSCs), ensure compliance with laws and regulations pertaining to Inherently Governmental functions, and ensure proper performance by armed contractors. The expansion of troops in Afghanistan will result in a corresponding increase in the number of PSCs performing in that Area of Operations. This part is required to ensure implementation of necessary guidance for all U.S.G. PSCs across the CENTCOM area of responsibility. Further, the publication of this IFR is required to meet the mandate of Section 862 of the 2008 National Defense Authorization Act. The Congress has expressed continuing concern that