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OPINION NO. 2012-02

PAROLE BOARD; PAROLE AND
PROBATION; CRIMINAL HISTORY:

The Division of Parole and Probation has express authority to investigate an inmate's criminal history to assist the Parole Board in making parole decisions. The secondary dissemination of criminal history record information to the Parole Board is permitted by federal regulations and policy. A parole and probation officer likely enjoys absolute quasi-judicial immunity from civil rights and state tort lawsuits for alleged factual errors in the report provided to the Parole Board to assist them in the parole determination process.

Chris Perry, Director
Nevada Department of Public Safety
555 Wright Way
Carson City, NV 89711-0525

Dear Director Perry:

You requested a written opinion addressing whether the Division of Parole and Probation has authority to conduct investigations into an inmate's criminal history for use by the Board of Parole Commissioners (Parole Board) to make parole decisions.

QUESTION ONE

Does the Division of Parole and Probation have authority to investigate an inmate's criminal history for use by the Parole Board to make parole decisions?

ANALYSIS

"An administrative agency's powers are generally limited to the powers set forth by statute, although 'certain powers may be implied even though they were not expressly granted by statute, when these powers are necessary to the agency's performance of its enumerated duties.'" *Stockmeier v. Bd. of Parole Comm'rs*, 255 P.3d 209, 212, 127 Nev. ____, ____, (Adv. Op. 19, May 19, 2011) (quoting *City of Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006)). "[F]or implied authority to exist, the implicitly authorized act must be essential to carrying out an express duty" of the agency. *Id.* (citing *Kilgore*, 122 Nev. at 335, 131 P.3d at 14). Accordingly the Division of Parole and Probation may investigate inmate criminal history if doing so is an enumerated statutory duty of the Division or if investigating an inmate's criminal history is essential to carrying out an enumerated statutory duty of the Division.

Investigations of inmate criminal histories is literally essential to the Parole Board's statutory duty of "determining whether to release a prisoner on parole" upon consideration of "[t]he seriousness of the offense and the history of criminal conduct of the prisoner." NRS 213.1099(2)(c). The Legislature has therefore expressly provided that Parole and Probation Officers shall "[i]nvestigate all cases referred to them for investigation by the Board [of Parole Commissioners]..." NRS 213.1096(1).

CONCLUSION TO QUESTION ONE

The Division of Parole and Probation has express authority to investigate an inmate's criminal history to assist the Parole Board in making parole decisions.

QUESTION TWO

Does providing reports of investigations to the Parole Board violate federal regulations restricting secondary release of police reports or criminal history?

ANALYSIS

Federal regulations limit agency access to National Crime Information Center (NCIC) criminal history record information. 28 C.F.R. § 20.35 and 20.38. NCIC criminal history information may only be disseminated to "criminal justice agencies" for criminal

justice purposes. 28 C.F.R. § 20.33. Federal regulations define a criminal justice agency as a governmental agency, including subunits of that agency, that engages in the “administration of criminal justice pursuant to a statute” and that allocates a substantial part of its annual budget to “the administration of criminal justice.” 28 C.F.R. § 20.3(g)(2); *see also*, 28 C.F.R. Pt. 20, App.

The Department of Public Safety is charged with the administration and enforcement of statutes contained in NRS Chapter 176A relating to probation and suspensions of criminal sentences and statutes contained in NRS Chapter 213 relating to pardons and paroles. NRS 480.110. The Division of Parole and Probation is a division of the Department of Public Safety. NRS 480.130, NRS 213.1071. The Division of Parole and Probation administers and enforces the provisions of NRS Chapter 176A and Chapter 213 relating to parole and probation, and performs such duties and exercises such powers as may be conferred upon it by those chapters and any other specific statute. NRS 480.140(5). The Division’s powers and duties relate primarily to the supervision of persons on probation and prisoners released on parole. NRS 213.1095–.1096. The Board of Parole Commissioners primarily performs functions associated with the determination of whether a prisoner, eligible for release on parole, should be released on parole. NRS 213.1099–.145.

A review of these enabling statutes establishes that the Parole Board and the Division of Parole and Probation (Division) are primarily engaged in the administration of criminal justice pursuant to statute. Given those primary duties, the Parole Board and the Division allocate a substantial part of their annual budgets to the administration of criminal justice. The Parole Board and Division are thus “criminal justice agencies” as defined by federal regulation. The reports being requested by the Parole Board, which contain criminal history record information, are used to aid the Parole Board in the parole determination process. This is a criminal justice purpose. *See* 28 C.F.R. Pt. 20, App. As a result, the federal regulations permit dissemination of criminal history record information from NCIC to the Parole Board.

Policies that have been approved by the FBI provide further guidance on secondary dissemination of information to the Parole Board. Pursuant to 28 C.F.R. § 20.35, the FBI’s Criminal Justice Information Services (CJIS) Advisory Policy Board was created for the purpose of providing policy recommendations to the FBI Director with respect to the philosophy, concept, and operational principles of various criminal justice information systems managed by the Division CJIS. The CJIS Advisory Policy Board has recommended, and the FBI has approved, the Criminal Justice Information Services Security Policy (CJIS Security Policy).

Section 5.1.3 of the CJIS Security Policy provides that if criminal history record information is released to another authorized agency, and that agency was not part of

the releasing agency's primary information exchange agreement(s), the releasing agency shall log such dissemination. Section 5.4.7 of the CJIS Security Policy requires the log be maintained for one year, and that the log must contain the name of the operator, the authorized receiving agency, the requestor, and the secondary recipient. Generally, the identification of the requestor and the secondary recipient shall take the form of a unique identifier that shall remain unique throughout the minimum one year retention period. *Id.* Section 5.6.1.1 of the CJIS Security Policy permits an agency to act as a servicing agency and perform transactions on behalf of authorized agency's requesting service. Servicing agencies may do so using the requesting agency's unique identifier, ORI, or they may use their own ORI to perform the inquiry transaction on behalf of the requesting agency if the means and procedures are in place to provide an audit trail for the current specified retention period. The Division is required to follow the procedures set out in the CJIS Security Policy for secondary dissemination of criminal history record information from NCIC to the Parole Board.

Since agency access to federal criminal history databases managed by the FBI can be cancelled if the agency fails to comply with applicable federal regulations and policies, the Division should consult with the state and federal officials who manage criminal history records information databases to ensure the Division complies with all applicable federal and state statutes, regulations and policies related to secondary dissemination of information to the Parole Board. See, 28 C.F.R. § 20.38.

CONCLUSION TO QUESTION TWO

The secondary dissemination of criminal history record information from NCIC to the Parole Board is permitted by federal regulations and policy. The Division should consult with state and federal officials to ensure they comply with applicable federal and state statutes, regulations and policies related to the dissemination of criminal history record information to the Parole Board.

QUESTION THREE

What is the Division of Parole and Probation's liability for mistaken information in its investigative reports provided to the Parole Board?

ANALYSIS

Although it is unknown what type of legal claim a prisoner might bring for alleged erroneous information in the report provided to the Parole Board, one type of claim might come in the form of a civil rights claim pursuant to 42 U.S.C. § 1983. Probation officers will likely enjoy absolute quasi-judicial immunity from Section 1983 damages claims related to alleged erroneous information contained in the reports. Under

analogous circumstances, the Ninth Circuit held that probation officers preparing presentence reports for state court judges are entitled to absolute judicial immunity from personal damage actions brought under Section 1983. *Demoran v. Witt*, 781 F.2d 155 (9th Cir. 1985); see also *Hili v. Sciarrotta*, 140 F.3d 210 (2nd Cir. 1998).

In *Demoran*, the plaintiff complained that a state probation officer, with malice and bad faith, prepared a probation report containing deliberately false statements and that, as a result, he received an improperly long sentence. *Demoran*, 781 F.2d at 156.

The *Demoran* court based its immunity finding on the following factors: (1) probation officers preparing presentence reports serve a function integral to the independent judicial process; (2) probation officers preparing presentence reports act as an arm of the sentencing judge and are under a duty to engage in impartial fact-finding; (3) the prospect of damages liability under Section 1983 would seriously erode the probation officer's ability to carry out his independent fact-finding function and thereby impair the sentencing judge's ability to carry out his judicial duties; and (4) there are "a plethora of procedural safeguards surrounding the filing of the presentence report," including the fact that the report is reviewed by the sentencing judge and is made available to defense counsel prior to the sentencing hearing. *Id.* at 157–158.

In the context of parole hearings, the Ninth Circuit has held that parole board officials are entitled to absolute quasi-judicial immunity from Section 1983 suits brought by prisoners for actions taken when processing parole applications". *Sellars v. Procunier*, 641 F.2d 1295, 1302 (9th Cir. 1981). Like a probation officer preparing a presentence report for a court, a probation officer preparing the report for the Parole Board is acting pursuant to a statutory duty and at the Parole Board's direction. The probation officer is acting as an arm of the Parole Board to assist it in its adjudicatory role. In this context, the probation officer would be expected to act as an impartial fact finder for the Parole Board. Although the authorizing statutes do not designate any safeguards surrounding the submission of the report to the Parole Board, the Division and the Parole Board can adopt procedures to enable the Parole Board to identify erroneous information in the reports. With reasonable safeguards in place, a probation officer will likely enjoy absolute quasi-judicial immunity from Section 1983 damages claims for erroneous information contained in the reports provided to the Parole Board.

A prisoner might also bring a state tort claim for alleged erroneous information in the report provided to the Parole Board. The Nevada Supreme Court has found, in limited circumstances, non-judicial officers are entitled to absolute quasi-judicial immunity from state tort claims as well. For example, in *Duff v. Lewis*, 114 Nev. 564, 571, 958 P.2d 82, 87 (1998), the Court granted absolute quasi-judicial immunity to a court-appointed psychologist involved in evaluating individuals in the context of a custody dispute when allegations of physical and sexual abuse had been made. In

Foster v. Washoe County, 114 Nev. 936, 943, 964 P.2d 788, 793 (1998), the Court extended quasi-judicial immunity to court appointed special advocates involved in a child abuse investigation. The Court concluded the special advocates were an integral part of the judicial process and that public policy considerations militated in favor of immunity for their actions during the child abuse investigation. *Id.* In *Matter of Fine*, 116 Nev. 1001, 1015, 13 P.3d 400, 409 (2000), the Court reaffirmed the proposition that court appointed experts are entitled to absolute quasi-judicial immunity when they provide information that a court may utilize in rendering a decision because they act, in that context, as an arm of the court. Finally, in *State of Nevada v. Second Jud. Dist. Ct.*, 118 Nev. 609, 55 P.3d 420 (2003), the Court addressed whether absolute quasi-judicial immunity should be applied to protect various State child protective services employees from a negligence lawsuit arising out of the death of a child in the care of a foster parent. Using the same analysis used in the Section 1983 context, the Court concluded as follows:

State employees engaged in child protective services are entitled to quasi-judicial immunity when they provide information to the court (e.g. reports, case plans, testing evaluations and recommendations) pertaining to a child who is or may become a ward of the State. We do not intend the aforementioned examples to be an exclusive list. Rather, they demonstrate some of the duties protective service workers engage in that are integral to the court's decision-making processes. When a state agency or its employees provide decision making expertise to the court, they act as an arm to the court and are entitled to absolute quasi-judicial immunity.

118 Nev. at 619, 55 P.3d at 426.

Under the same analysis set out above for Section 1983 claims, Parole and Probation Division officers will likely enjoy absolute quasi-judicial immunity from State tort claims arising out of alleged erroneous information contained in the reports provided to the Parole Board to assist them in the parole determination process.

CONCLUSION TO QUESTION THREE

For claims brought pursuant to 42 U.S.C. § 1983 and state tort claims, a parole and probation officer may enjoy absolute quasi-judicial immunity from suit for alleged factual errors in the report provided to the Parole Board to assist them in the parole determination process. Since the authorizing statute does not contain safeguards for

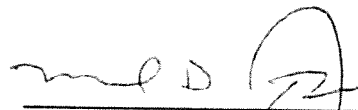
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accuracy, the Division and the Parole Board should adopt reasonable safeguards to identify erroneous information in the reports provided to the Parole Board.

Sincerely,

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Attorney General

By:



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