

8.1. A.9. Executive Clemency - Pardons, Exceptional Pardons, Reprieve, or Remission of Fines and Forfeiture:

I Policy Index:

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Office of Primary Responsibility: South Dakota Board of Pardons and Paroles

II Purpose:

To provide procedural guidance to the public, board staff and the Board of Pardons and Paroles on the process of executive clemency – standard, exceptional and expedited pardons and reprieve or remission of fines and forfeitures.

III Definitions:

Forms of Clemency:

The term clemency means a pardon, commutation, reprieve, or remission of fine or forfeiture (See SDCL 24-14-2).

Reprieve or Remission of Fines and Forfeitures:

A recommendation made by the Board of Pardons and Paroles and/or action taken by the Governor to reduce and/or remove a fine or forfeiture.

Victim, Definition:

A person against whom a crime or delinquent act is committed. In the case of a victim who is killed or incapacitated as a result of the crime or delinquent act, or who is a minor, the term also includes any spouse, parent, child, sibling, or as designated by the court, grandparent, grandchild, or guardian. The term does not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor or incapacitated victim (See SD Constitution Article 6 Section 29).

Exceptional Pardon:

Upon the expiration of five years following the release from a Department of Corrections facility, an applicant who was convicted of not more than one felony which was not an offense punishable by life imprisonment may apply to the Board of Pardons and Paroles for an exceptional pardon. If an applicant was convicted of a crime that did not result in serving a prison sentence, the applicant may apply for an exceptional pardon if at least five years have passed from the date of his/her offense, if he/she was not convicted of more than one felony, and if the offense was not punishable by life imprisonment (See SDCL 24-14-8).

Expedited Pardon:

Applicants who qualify for an exceptional pardon may use an expedited process if their offense(s) meets the following criteria: Class II misdemeanor(s) and/or petty offense(s) at least five (5) years old and/or nonviolent Class I misdemeanor(s) at least ten (10) years old. Individuals who have a felony conviction or violent misdemeanor or are requesting restoration of firearms rights or have had a conviction within the proceeding five (5) years, excluding traffic offenses are not eligible for the expedited process. Expedited pardons may not be used for speeding tickets (See AR 17:60:05:26).

IV Procedures:

Delegation of Authority by Governor:

The Governor may, by executive order, delegate to the Board of Pardons and Paroles the authority to hear applications for pardon, commutation, reprieve, or remission of fines and forfeitures, and to make its recommendations to the Governor (See SDCL 24-14-1).

Notice to Prosecuting Attorney, Sentencing Judge, Attorney General, and Law Enforcement of Hearing for Clemency:

The executive director shall notify the attorney who prosecuted the person applying for clemency or the attorney's successor in office, the sentencing judge, the attorney general, and the sheriff or local law enforcement agency where the offense was committed at least thirty (30) days prior to a hearing by the board (See SDCL 24-14-3).

Publication of Notice of Application for Clemency:

All applicants shall publish once each week for three consecutive weeks in the official newspaper of the city closest to where the offense was committed. The notice shall include the current name of the applicant and any additional name(s) used when convicted, the public offense for which the applicant was convicted, the date of conviction, and the term of imprisonment. The last publication shall be published at least twenty (20) days before the hearing. The affidavit of the publisher of the paper showing the notice has been published shall accompany the application. This notice requirement does not apply to an applicant requesting an exceptional or expedited pardon (See SDCL 24-14-4).

Victim Notification, Content:

Upon the scheduling of a clemency hearing, the Board of Pardons and Paroles shall notify the victim pursuant to SD Constitution Article 6 Section 29. The victim holds the right, upon request, to be informed in a timely manner of clemency and expungement procedures, to provide information to the Governor, the court, any clemency board and other authority in these procedures, and to have that information considered before a clemency or expungement decision is made, and to be notified of such decision in advance of any release of the offender.

Submission to Board of Application for Clemency - Governor not bound by Board Recommendation:

The Governor may submit an application for clemency to the Board of Pardons and Paroles for its recommendation. The Governor may, by executive order, delegate to the board the authority to consider applications for clemency and make recommendations to the Governor. The Governor is not bound to follow any recommendation returned by the board (See SDCL 24-14-5).

Recommendation for Clemency to be in Writing - Record of Finding and Reasons:

Whenever the Board of Pardons and Paroles recommends clemency to the Governor, the recommendation shall be in writing. The board shall keep a record of its findings and the reasons for its recommendation (See SDCL 24-14-7).

Notice Requirements on Application for Exceptional Pardon - Reference by Governor:

Applications for exceptional pardons shall be in accordance with SDCL 24-14-3, 24-14-5, and 24-14-4.1. The notice requirement contained in SDCL 24-14-4 does not apply to exceptional pardons (See SDCL 24-14-9).

Recommendations for Exceptional Pardon:

The Board of Pardons and Paroles may recommend exceptional pardons to the Governor (See SDCL 24-14-10).

Effects of Pardon - Disabilities Removed:

Any person who has been granted a pardon under the provisions of this chapter shall be released from all disabilities consequent on the person's conviction (See SDCL 24-14-11).

Records Sealed:

Upon the granting of a pardon under the provisions of this chapter, the Governor shall order that all official records relating to the pardoned person's arrest, indictment or information, trial, finding of guilt, application for pardon, and the proceedings of the Board of Pardons and Paroles shall be sealed (See SDCL 24-14-11).

Filing of Document making Pardon Public:

The Governor shall file a public document with the Secretary of State certifying that the Governor has pardoned the person in compliance with the provisions of this chapter. The document shall remain a public document for five (5) years and after five (5) years that document shall be sealed (See SDCL 24-14-11).

Failure to Acknowledge Proceedings Not Perjury:

The pardon restores the person, in the contemplation of the law, to the status the person occupied before arrest, indictment, or information. No person as to whom such order has been entered may be held thereafter under any provision of any law to be guilty of perjury or of giving a false statement by reason of such person's failure to recite or acknowledge such arrest, indictment, information, or trial, in response to any inquiry made of such person for any purpose (See SDCL 24-14-11).

Prior Conviction for Habitual Offender Law:

For the sole purpose of consideration of the sentence of a defendant for subsequent offenses or the determination of whether the defendant is a habitual offender under chapter 22-7 or whether the defendant has prior driving under the influence conviction pursuant to chapter 32-23, the pardoned offense shall be considered a prior conviction (See SDCL 24-14-11).

Eligibility for Clemency (Old Law):

An application for clemency (pardon) may not be heard for one (1) year after the date of the judgment. If an application for clemency is denied, an inmate may not again present an application for clemency for a period of one (1) year (See SDCL 24-15-10).

Eligibility for Clemency (New Law):

An application for clemency (pardon) may not be heard by the board for one (1) year after the date of the judgment. If an application for clemency is denied, an inmate may not again present an application for clemency for a period of one (1) year (See SDCL 24-15A-23). An inmate is ineligible to apply for clemency if the inmate reaches the initial parole date set pursuant to SDCL 24-15A-32. If an inmate is released on parole or the inmate's sentence has been discharged pursuant to SDCL 24-15A-7, the inmate may apply for clemency pursuant to SDCL 24-15A-23 (See SDCL 24-15A-23.1).

Suspended Imposition of Sentence:

Any application submitted for a crime receiving a suspended imposition of sentence will not be considered eligible for a pardon. Upon receipt of an ineligible application, board office staff will return the application to the applicant (See ARSD 17:60:05:25).

Designation of Hearing Officers - Written Recommendation:

The chair of the board may designate individual board members as hearing officers who may conduct hearings pursuant to this chapter and chapters 24-13, 24-14, and 24-15, to take testimony and make recommendations to the board. The recommendation shall be in writing and reviewed by the board or a panel of the board who may adopt the recommendations.

Designation of Panels to Conduct Hearings - Final Action - Exception

The chair of the board may designate panels of two (2) or more board members to conduct hearings pursuant to this chapter and chapters 24-13, 24-14, and 24-15, to take testimony and take final action, exclusive of a clemency recommendation to the Governor in accordance with SDCL 24-13-4.6.

Notice to Sex Offender Applicants:

The following conditions apply for those individuals that are applying for executive clemency on a crime(s) that are defined by South Dakota statutes as a sex crime:

- A. In addition to the completed application, anyone with a present or past sex offense conviction may be required to provide current assessments as outlined below. If required by the hearing officer or panel, a hearing will not be scheduled before the full board or presented to the Governor's office until the evaluation has been completed.
- B. Assessments:
 - 1. Psychosexual Evaluation: The assessment should include multiple personality assessment(s), actuarial (i.e. MnSost-R, RRASOR or STATIC-99) and sexual interest testing with the ABEL assessment or plethysmograph. A comprehensive and detailed history polygraph should be included as part of the psychosexual report or as a separate document.
 - 2. Psychosexual Evaluator: Must be a recognized sex offender specialist within the state of residence and licensed in their respective field at the Ph.D. or master's level. The board requires that the evaluator have a professional membership with the Association for the Treatment of Sexual Abusers (ATSA).
 - a. The board may see professional review of all documents submitted by a local ATSA psychologist.
 - b. All costs incurred are the responsibility of the applicant.

Notice to Drug and Alcohol Offenders:

The following conditions apply for those individuals that are applying for executive clemency for drug and alcohol convictions or related convictions as defined by South Dakota statutes:

- A. If the offense for which an applicant is seeking clemency involved drugs or alcohol or the applicant was under the influence of drugs and alcohol at the time the offense was committed or the applicant currently or in the past has abused drugs or alcohol, the board will strongly suggest the applicant complete a chemical dependency evaluation be included in his/her application. A licensed/certified evaluator must complete evaluations. If required, the application will not be presented to the Governor's office until the evaluation has been completed.
- B. The board may seek professional review of all documents submitted by a local community agency or by the South Dakota Division of Drug and Alcohol.
- C. All costs incurred are the responsibility of the applicant.

Notice to Applicants with Mental Health Issues:

The following conditions apply for those individuals that are applying for executive clemency that are or have been diagnosed as having mental health issues or related convictions as defined by South Dakota statutes:

- A. In addition to the completed application, anyone with a present or past diagnosis of mental health issues may be required to provide a current psychological evaluation completed by a licensed Ph.D. or Ed.D. If required by the hearing officer or panel, a hearing will not be scheduled before the full board or presented to the Governor's office until the evaluation has been completed.
- B. The board may seek review of all documents presented by local mental health professionals.
- C. All costs incurred are the responsibility of the applicant.

Application Process:

- A. A standard application (Executive Clemency Application - SDPA-1) and an expedited application can be submitted electronically through the pardon website – doc.sd.gov/pardon. Paper applications are also available from the board office or from the pardon website.
- B. Applicants should make copies of all documents prior mailing the originals to the parole board office. The application and all attached documents become the property of the Board of Pardons and Paroles once submitted and will not be returned to the applicant.
- C. Incomplete applications will be returned to the applicant with an explanation. The applicant may provide the missing information and resubmit the application (See ARSD 17:60:05:17).

Notifications and Publication and Personal Plea and other Supporting Documents:

- A. Applicants are responsible for completing and sending to the state's attorney in the county(s) the offense was committed the Notice of Executive Clemency Hearing (application form SDPA-3).
- B. Applicants are responsible for completing and sending to a newspaper in the county(s) the offense was committed the Notice of Publication (application form SDPA-2). Applicants are responsible for the return of the affidavit (Notice of Publication form) to the Board of Pardons and Paroles prior to a scheduled hearing (Exception: exceptional and expedited applications do not require publication).
- C. All applicants are also required to include a letter of personal plea, a statement of offense, release of information, certified copy of sentence and judgment, proof of payment, and current photo identification card with the application.
- D. All supporting documents, letters of support, recommendations, or affidavits must accompany the completed application.

Hearing Process:

- A. Once the application and all supporting documents are received by the board office, staff will review for completeness, set hearing date and time, and notify the applicant of the scheduled date and time in writing.
- B. Staff will notify and request information through email from the attorney general, the state's attorney, sentencing judge, clerk of courts, and sheriff from the county(s) where the offense was committed at least thirty (30) days prior to the hearing (this section does not apply to inmate or parolee applications, whereas notification is done prior to the full board hearing if recommended) requesting relevant information, documentation, and comments or recommendations regarding clemency.
- C. Staff will send the victim(s) a hearing notification letter if their contact information is provided to or made available by board office staff.
- D. Staff will run a background check (Triple III/NCIC) on the applicant and prepare an executive summary and recommendation paperwork for the file.
- D. Each applicant will have a hearing before the full board. Board members will review the application, supporting documents, publication and notification documents, and conduct a personal interview with the applicant and take testimony from other interested parties. The possible outcomes of the hearing are to deny, table, continue to another full board hearing, or recommend the application to the Governor.
- E. The board will hear up to eight (8) standard/exceptional clemency cases a month plus any expedited applications.

- F. Expedited applications are presented to a panel as a paper review and do not necessitate a personal appearance (See ARSD 17:60:05:26).

Board Office Process:

- A. See Operational Memorandum 9.1.A.9 - Executive Clemency - Pardons.

Application Process for Inmates and Parolees:

- A. The application process is the same as outlined in this policy with the following exceptions:
1. A panel will conduct a hearing as a paper review and review the application prior to the provisions of notification and publications.
 2. Upon review, a determination will be made whether a personal appearance hearing before the full board will be granted or denied.
 3. If a personal appearance hearing is granted, the inmate/parolee will be notified to proceed with the notification and publication requirements. If denied, the process stops, and he/she may apply again in one (1) year.
 4. Once the inmate/parolee is notified of the personal appearance hearing, the process will follow the steps outlined in this policy and the board office operational memorandum 9.1. A.9 - Executive Clemency – Pardons.

Board Recommendations:

- A. The board may recommend executive clemency to the Governor. The board will announce their decision at the hearing and board office staff will notify the applicant in writing of the decision within ten (10) working days.
1. An auxiliary board member may substitute for an absent board member. A recused board member is not counted as a “present” board member for voting requirements.
 2. Hearing panels have full discretion to refer any matter, consideration, or hearing to the full board for additional discussion, to determine a final decision, and/or to schedule the offender for a hearing before the full board.
 3. A denial of a pardon recommendation by a panel shall be reviewed by the board. The board may adopt, modify, or reject the denial and recommend a pardon (See SDCL 24-15A-11.2).
 4. No person may be recommended for clemency without the concurrence of two board members (See SDCL 24-15A-11). No recommendation to the Governor for the pardon of an offense, including an exceptional pardon authorized by SDCL 24-14-8, may be made by less than the majority vote of all board members present of the Board of Pardons and Paroles (See 24-15A-11).
- B. The board may continue an executive clemency hearing for cause up to six (6) months (See ARSD 17:60:05:05). This may be at the board's discretion, seeking additional information, or at the request of the applicant.
- C. The board may deny an application, of which they may not reconsider or rehear that particular application. The applicant may be informed as to the board's reasoning and that they may present a new application in

one (1) year, or the board may offer a recommendation as to a time for reapplication (See ARSD 17:60:05:10).

- D. Recommended applications will be sent to the Governor's office for review and decision. The record and all papers filed with the application will be furnished to the Governor with a copy of the board's recommendation (See ARSD 17:60:05:09).
- E. The factors to be considered by the board in all hearings for clemency will include those listed under ARSD 17:60:05:12.
1. Substantial evidence indicates that the sentence is excessive or constitutes a miscarriage of justice;
 2. The applicant's innocence of the crime for which the applicant was convicted under South Dakota law has been proven by clear and convincing evidence;
 3. The applicant has shown remarkable rehabilitation;
 4. Substantial evidence indicates that the board should be in a position at the earliest possible time to deal with the applicant as a parolee under supervision;
 5. Review of the applicant's personal and family history; the applicant's attitude, character, capabilities, and habits; the nature and circumstances of the offense or offenses; and the effect the applicant's clemency will have on the victims of the crime and the community indicates that applicant has carried the stigma of the crime for a long enough period to justify its removal;
 6. The applicant wishes to pursue a professional career from which society can benefit, but a conviction prevents it; and
 7. The applicant's age and medical status is such that it is in the best interest of society that the applicant receive clemency.

Governor's Decision - Notifications:

- A. Upon notification from the Governor's office of an executive clemency decision, board office staff will notify the applicant of the decision in writing within ten (10) business days and will mail (certified) the Order granting pardon to him/her.
- B. In all decisions that result in a granted pardon, board office staff will notify the following of the pardon and include a certified copy of the order:
1. South Dakota Department of Criminal Investigation (DCI);
 2. Clerk of Courts in the county(s) where the offense was committed.
 3. DOC Central Records Office (copy not certified).
- C. The application and related documents will be scanned onto an electronic network for permanent storage and then destroyed. The Order granting pardon and board recommendation paperwork are kept permanently in board office spaces.
- D. Information regarding granted pardons is confidential and cannot be disseminated to the public.

V Related Directives:

SDCL Chapters: 24-13, 24-14, 24-15, 24-15A and 1-26
South Dakota Administrative Rules Chapters 17:60 and 17:61

VI Revision Log:

November 2003: New

April 2008: **Add** Board and web addresses, section on hearing process, special sections on sex offenders, drug and alcohol convictions and mental health issues.

May 2009: **Revise** and re-ordered policy. **Add** additional statutes, redesigned for inclusion of board office operational memorandum by removing office process from policy.

August 2011: **Revise** grammar. **Remove** from page one Publication of Notice of Application for Clemency; (upon notice of hearing from the board for clemency **consideration**), page 4 Notice to (Applicants with mental Health Issues. **Amend** from “Notice to Diagnosed mental health applicants”), page 5 send notice certified to the State’s Attorney, page 6 Governor’s Decision-Notifications: Deleted #2 FBI because DCI notifies FBI.

January 2013: Reviewed, no changes

August 2014: Grammar and formatting changes. **Move** “Reprieve or Remission of Fines and Forfeitures” up in Section III. **Add/Update** language in several sections to match that of Administrative Rules. **Add** section and language throughout on Expedited Pardon. **Add** “Suspended Imposition of Sentence” under Section III. **Change** Section title “Application Process for Inmates and Parolees”. **Add** to “Governor’s Decision- Notifications” that staff will mail pardon certified to applicant.

December 2016: **Remove** Notice to all applicants (page 3), language reference 2-panel hearings. **Update** Language (page 4) of notice to drug and alcohol offenders, website address for online pardon application, formatting changes.

December 2018: **Add** Victim definition/notification process per SD Constitution. **Add** number of clemency cases considered per month. **Add** clemency considerations from administrative rule.

March 2020: Definitions – Notices to Agencies – **Update** sending hearing notices “by certified mail/mail” to email. Procedures – Hearing Process – **Change** Expedited Pardons to review by a Panel instead of Full Board.

Procedures – Board Recommendations – **Add** in sections on auxiliary members, recused members. **Add** in sections on Hearing Panels referring any case / denial cases to Full Board. **Change** favorable recommendation requirements from majority of appointed board members to majority of board members present due to statute change. **Move** various sections from “Definitions” to “Procedures.”

Myron Rau (Original Signature on File)

03/11/2020

Myron Rau, Chair

Date