

1-1964

The Effect of a Pardon on License Revocation and Reinstatement

Michael F. Welch

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

Michael F. Welch, *The Effect of a Pardon on License Revocation and Reinstatement*, 15 HASTINGS L.J. 355 (1964).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol15/iss3/10

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

THE EFFECT OF A PARDON ON LICENSE REVOCATION AND REINSTATEMENT

Conviction of a felony or a crime involving moral turpitude is perhaps the most common ground for license revocation in California. Some of the governing sections of the California Business and Professions Code provide that the felony must be related to the particular occupation in which the licensee is engaged,¹ but most provide for revocation upon conviction of any felony or crime involving moral turpitude.² This note investigates the right to reinstatement of one who has received a pardon for the offense which formed the basis of his license revocation.

History and Effect of Pardon

The power to pardon a convicted felon can be traced to the power of a father to punish or forgive. With the advent of community life, this familial power was transferred to the communal leader, becoming eventually an unlimited power in the hands of the sovereign. In England, the crown utilized the power to pardon in time of war to enhance its military strength and also to curry the favor of lords with friends in need of a pardon. Pardons were also granted upon the payment of money, in celebration of feast days, or upon changes in social conditions (amnesty). In short, the pardoning power was subject to no restrictions. Pardons were often used to avoid the rigid requirements of the law. They might have been granted to minors, insane persons, or those claiming self-defense in homicide cases. Such situations are now provided for by law, but that was not always the case.³

The power to pardon usually resides in the chief executive who holds a position analogous to that formerly held by the sovereign. The pardoning power of the crown was unlimited because the crown was the source of all power.⁴ In a democracy, however, sovereignty rests in the people who in turn may delegate powers as they see fit.⁵ For this reason, the people may vest any governmental agency with the pardoning power or they may dispense with it altogether. Today, the pardoning power of the chief executive remains virtually unlimited.⁶ A governor may still grant pardons at his discretion, but an abuse of his power need not go unredressed.⁷ Pardons even

¹ E.g., CAL. BUS. & PROF. CODE §§ 1320(k) (clinical laboratory technicians), 2555.1 (dispensing opticians), 5577 (architects), 5675 (landscape architects).

² E.g., CAL. BUS. & PROF. CODE §§ 3094 (optometrists), 2685(d) (physical therapists), 2761(f) (nurses), 6576 (barbers), 7211.9(d) (trainers of guide dogs for the blind), 7431(j) (cosmetologists).

³ For a complete study of the history of pardon see 3 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURE 1-53 (1939).

⁴ *Id.* at 88 (citing LIEBER, CIVIL LIBERTY AND SELF-GOVERNMENT, appendix II, *A Paper on the Abuse of the Pardoning Power* 433).

⁵ *Id.* at 87-88; *Jamison v. Flanner*, 116 Kan. 624, 634, 228 Pac. 82, 87 (1924).

⁶ In California, the pardoning power of the Governor is found in CAL. CONST. art. VII, § 1. This power is limited only in treason and impeachment cases, and if one has been twice convicted of a felony the approval of a majority of the Supreme Court of California is required.

⁷ See 3 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURE 150-53 (1939), regarding the impeachment of Governor Walton of Oklahoma.

today are exercised "to dispose of cases where the legal rules have produced a harsh, unjust, or popularly unacceptable result."⁸ They are also used as release procedures in some states, especially for reasons of innocence.⁹

The effect of a pardon has been variously defined. The United States Supreme Court in *Ex Parte Garland*¹⁰ stated: "[W]hen the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense."¹¹ On the other hand, some California cases have stated that a pardon implies guilt and does not erase the fact of the commission of the crime or the conviction, nor wash out the moral stain; nor does it restore offices forfeited in consequence of conviction.¹²

Varying interpretations of the effect of a pardon result from the failure of the courts to distinguish between the reasons for which the pardon was granted.¹³ A pardon for innocence is an acquittal, and must be given all the effects of an acquittal. "A pardon for other reasons is not an acquittal; it leaves the determination of the convict's guilt stand, and only relieves him from the legal consequences of that guilt."¹⁴ Thus the statement in *Garland* is too broad and should be limited to only those pardons granted for innocence.¹⁵

Effect of Penal Code Section 4853

In California the effect of a pardon has been codified in Penal Code section 4853,¹⁶ a loosely written provision which has never been adequately

⁸ Weihofen, *Pardon: An Extraordinary Remedy*, 12 ROCKY MT. L. REV. 112, 120 (1940).

⁹ Professor Weihofen argues that the use of a pardon as a release procedure usurps the function of parole; and that in instances of innocent persons, the case should be reopened and a reversal of the wrongful conviction entered. *Id.* at 112-20.

¹⁰ 71 U.S. 333 (1866).

¹¹ *Id.* at 380.

¹² *E.g.*, *People v. Briggs*, 9 Cal. 2d 508, 71 P.2d 214 (1937); *People v. Dutton*, 9 Cal. 2d 505, 71 P.2d 218 (1937); *In re Lavine*, 2 Cal. 2d 324, 41 P.2d 161 (1935).

¹³ See Weihofen, *The Effect of Pardon*, 88 U. PA. L. REV. 177 (1939).

¹⁴ *Id.* at 179.

¹⁵ The pardon removes all legal punishment for the offense. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.

Williston, *Does a Pardon Blot Out Guilt?* 28 HARV. L. REV. 647, 653 (1915). Professor Weihofen contends this is the correct rule if applied only to pardons not granted for innocence. Weihofen, *supra* note 13, at 178.

¹⁶ [I]t shall . . . restore . . . all rights, privileges, and franchises of which he has been deprived . . . provided, that nothing herein contained shall abridge . . . the power . . . conferred by law on any board . . . to revoke or suspend any such right, privilege or franchise for any act or omission not involved in said conviction; . . . nothing in this article shall affect any of the provisions of the Medical Practice Act . . . or the power . . . conferred by law upon any board that issues a certificate which permits any person . . . to apply his . . . art or profession on the person of another.

CAL. PEN. CODE § 4853.

judicially interpreted. The provision restores all the "rights, franchises, and privileges of which the pardonee has been deprived in consequence of said conviction." This broad statement, standing alone, could lend itself to the interpretation that a licensee's reinstatement is concomitant with the pardon. Moreover, the section makes no reference to licensees other than to deny the right to reinstatement to those licensed under the Medical Practice Act and to those who apply their "art or profession on the person of another." It is doubtful whether the specific references of the section denying the right of reinstatement to certain licensees can be construed to give this right to all other licensees. A possible interpretation is that since the pardon does not eradicate the guilt, it alone is not indicative that the pardonee has been purged of the moral deficiency inherent in his conviction and for which his license was revoked, and that there was therefore no intention to restore him to his occupational status on the basis of the pardon alone. Under this interpretation, the specific references are superfluous.

Certificate of Rehabilitation

Subsequent to the passage of section 4853,¹⁷ chapter 3.5¹⁸ was added to the Penal Code. This chapter provides a procedure whereby a felon may acquire a pardon based upon a certificate of rehabilitation. After release from a state prison and upon evidence of a three-year period of exemplary conduct since his release, the convicted felon may file for a certificate of rehabilitation.¹⁹ Upon receipt of the certificate, the governor may grant a full pardon.²⁰ Under section 4852.15 the pardonee receives not only the benefits of the ordinary pardon²¹ but additional benefits as well. These include the right to possess firearms²² and dispensation from impeachment as a witness on the basis of conviction of a felony.²³ These additional benefits indicate an intention to rehabilitate reformed felons into useful citizens.²⁴ However, section 4852.15 is on its face even more restrictive in its treatment of licensees than section 4853, and specifically denies the right to reinstatement to attorneys and *all* licenses, including those licensed under the Medical Practice Act and those who apply their "art or profession on the person of another."²⁵

¹⁷ Cal. Stat. 1941, ch. 106 § 15, p. 1129, based on Cal. Stat. 1933, ch. 945 § 1, p. 2476.

¹⁸ Cal. Stat. 1943, ch. 400 § 1, p. 1922; CAL. PEN. CODE §§ 4852.01-2.

¹⁹ CAL. PEN. CODE §§ 4852.01, 4852.03, 4852.05. A step by step account of the procedure may be found in MacGregor, *Adult Probation, Parole, and Pardon in California*, 38 TEXAS L. REV. 887, 907 (1960).

²⁰ CAL. PEN. CODE § 4852.16.

²¹ See CAL. PEN. CODE § 4853.

²² Unless convicted of a felony involving the use of a dangerous weapon, CAL. PEN. CODE § 4852.17; 28 OPS. CAL. ATT'Y GEN. 178 (1956).

²³ See CAL. CODE CIV. PROC. § 2051.

²⁴ "It would seem . . . that the act is a forward step in our system of penology, and that it will be of significant benefit to men who have made their mistake and subsequently have proved their inclination and ability to become constructive members of society." Mosk, *Certificate of Rehabilitation and the New Pardon Procedure*, 18 CAL. S. BAR J. 172, 175 (1943).

²⁵ "Nothing . . . shall be construed to . . . require the reinstatement of the right

With the certificate of rehabilitation a new type of pardon has been introduced.²⁶ It is not merely another release procedure, usurping the function of parole, because by its very terms it is only available to one who has been released from a state prison.²⁷ It is not granted at the governor's discretion, but only upon approval of a superior court and upon fulfillment of the stated requirements laid down by the chapter. The pardon gained by the certificate is, then, a pardon falling somewhere between a normal (discretionary) pardon, and a pardon granted for innocence. It is therefore anomalous that the restrictions on the effect of this new type of pardon are more inclusive than those under the traditional pardon. Certainly, those professionals who work in a position of trust or confidence with the public should be expected to conform to rigid standards of conduct. But to place all licensees in this category and preclude them from pursuing their chosen occupations merely because they are licensees defeats the purpose of the certificate of rehabilitation.

Effect on Reinstatement

Under present procedure, reinstatement is granted in the discretion of each licensing board.²⁸ This discretion is broad, and if the particular occupation is striving for public respect or seeking to limit competition,²⁹ the board may well be niggardly with reinstatements. Prior to 1961, the individual agencies were empowered to appoint their own hearing officers.³⁰ This resulted in an undesirable commingling of the hearing function with that of fact finding.³¹ This defect was remedied in 1961, by the transfer to the Division of Administrative Procedure of all hearing officers formerly attached to the various agencies.³² However, decisions of hearing officers remain subject to ratification by the particular board involved. A further or privilege to practice or carry on any profession . . . the practice . . . of which requires the possession . . . of a license" CAL. PEN. CODE § 4852.15.

²⁶ "[A] totally new procedure . . ." Mosk, *supra* note 24, at 172.

²⁷ CAL. PEN. CODE § 4852.01.

²⁸ See CAL. GOV. CODE §§ 11512, 11517; *Hohreiter v. Garrison*, 81 Cal. App. 2d 384, 184 P.2d 323 (1947).

²⁹ Ostensibly, licensing legislation is for the benefit and welfare of the public. However in most instances the impetus for such legislation comes from the profession and not the public. The profession's prime goal is often to limit competition, raise the income of its members, or gain respect. See generally, COUNCIL OF STATE GOVERNMENTS, OCCUPATIONAL LICENSING LEGISLATION IN THE STATES (1952). "Some analyses imply that self-interest is the only or primary motive impelling members of the occupation in this desire for legislation." *Id.* at 57.

³⁰ See CAL. GOV. CODE § 11502 as added by Cal. Stat. 1945, ch. 867, § 1, p. 1627.

³¹ Even though administrative agencies retaining staff hearing officers were meticulous in removing staff hearing officers from investigation and prosecution, which is far from the case in several agencies, the fact that the hearing officer is an employee of the investigating and prosecuting agency, with the attendant control over . . . promotion . . . pay . . . layoff . . . are sufficient . . . to instill into such hearing officers enough desire to please the agency and to adopt an institutionalized approach which cannot help but reflect itself into some fact finding processes.

Report of the Senate Interim Committee on Administrative Regulations and Adjudications 17, 1 APPENDIX, SENATE JOURNAL (1959).

³² See CAL. GOV. CODE § 11502 as added by Cal. Stat. 1961, ch. 2048 § 10, p. 4269.

improvement could be made by removing the power of reinstatement from the individual boards and placing it with the court having cognizance over the granting of the certificate of rehabilitation. The decision would be based upon the report submitted by the investigating officer that prepared the certificate of rehabilitation. One or more representatives from the occupation in which the petitioner seeks reinstatement could be appointed to work with the court and investigating officer on each case. By this means the petitioner could be reinstated to his occupation at the time he receives his executive pardon.

No cases have been found involving a licensee seeking reinstatement under the Administrative Procedure Act³³ after receipt of a pardon based on the certificate of rehabilitation. However, two cases³⁴ in which attorneys were denied reinstatement after receiving this new type of pardon have given rise to vigorous dissents by Justice Carter; he pointed out that "it is not like the ordinary pardon where the motive or basis may be merely sympathy or forgiveness."³⁵

Conclusion

The difficulty arises from the fact that there are actually three types of pardon available in California: those granted under the certificate of rehabilitation, those granted for innocence, and those granted for other reasons. The latter two types of pardon are both subject to Penal Code section 4853. In failing to distinguish between the two types of pardon, both innocent and culpable pardonees may be deprived of the right to pursue their occupations under this section, although it is clear that the innocent pardonee should be entitled to reinstatement of his license.

In contrast to the pardon governed by section 4853, the certificate of rehabilitation represents a new type of pardon. Unfortunately the statutory provisions governing the traditional pardon have not only been transplanted³⁶ to the certificate of rehabilitation, but have been broadened and now expressly encompass all licensees. The result, of course, is to eliminate one of the most useful purposes of the certificate—that of permitting one, upon rehabilitation, to pursue his chosen occupation. The pardon granted on the certificate is available only to those deemed worthy. Such a pardon should carry great weight in a reinstatement proceeding, whereas a pardon granted at the discretion of the governor should carry little or no weight in such a proceeding.

*Michael F. Welch**

³³ CAL. GOV. CODE §§ 11370-529.

³⁴ *Roth v. State Bar*, 40 Cal. 2d 307, 253 P.2d 969 (1953). *Feinstein v. State Bar*, 39 Cal. 2d 541, 248 P.2d 3 (1952).

³⁵ *Feinstein v. State Bar*, 39 Cal. 2d 541, 555, 248 P.2d 3, 12 (1952).

³⁶ Compare CAL. PEN. CODE § 4852.15 with § 4853.

* Member, Second Year Class.