

STATE OF TENNESSEE

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Opinion No. 05-175

Use of Two Way Video Conferencing at Parole Hearings

QUESTIONS

1. With regard to parole grant hearings, are Board members, hearing officers and/or victims permitted to participate from remote locations by the use of two way video conferencing?
2. With regard to parole revocation hearings, are hearing officers permitted to conduct such hearings from a remote location by the use of two way video conferencing?

OPINIONS

1. Parole grant hearings may be conducted by the use of two way video conferencing with Board members, hearing officers and victims participating from remote locations provided no more than one Board member participates. Electronic participation at hearings attended by two or more Board members is governed by Tenn. Code Ann. §8-44-108.
2. Hearing officers may conduct parole revocation hearings from a remote location using two way video conferencing.

ANALYSIS

The Board is not required by its enabling statute to meet in order to consider parole decisions. *Arnold v. Tennessee Board of Paroles*, 956 S.W.2d 478, 480 (Tenn. 1997). For the past several years, the Board has chosen to circulate each case file in turn to each of the Board members assigned to a case. Each member separately and independently reviews the case and formulates his decision without conferring with any other member, relying solely on the record compiled by the hearing officer. *Id.* at 479. A single Board member or hearing officer conducts parole hearings. Parole grant hearings conducted by a single Board member or hearing officer do not have to comply with the Open Meetings Act. *Id.* at 480.

The Board is developing procedures whereby parole grant hearings are conducted via two way video conferencing. No Board member would be physically present at the hearing. Instead, the members would be able to see and hear the inmate, and the inmate would be able to see and hear the participating members. The members would announce their vote at the conclusion of the hearing.

If more than one Board member chooses to attend a parole grant hearing, the hearing should comply with the open meetings provisions of Tenn. Code Ann. §8-44-101 *et. seq.* except as exempted by the Open Parole Hearings Act, Tenn. Code Ann. §40-28-501 *et. seq.* The Open Parole Hearings Act specifically provides that “[i]n accordance with the provisions of [the Open Meetings Act], parole hearings and parole revocation hearings shall be open to the public, except as provided in subsection (b) [.]” Tenn. Code Ann. §40-28-502(a)(1)

“Meeting” is defined by the Open Meetings Act as “the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter.” Tenn. Code Ann. §8-44-102(b)(2). “Quorum” is defined as “[t]he minimum number of members . . . who must be present for a deliberative assembly to legally transact business.”¹ *Black’s Law Dictionary*, 1284 (8th ed. 2004). Arguably, since the Board is not required to meet or to deliberate in order to make parole grant decisions, there is no minimum number of members who must be present to legally transact business. The better practice, though, is to comply with the Open Meetings Act as actions taken at a meeting in violation of the Act are void and of no effect. Tenn. Code Ann. §8-44-105. The General Assembly has condemned the use of electronic communication to decide or deliberate public business in circumvention of the spirit or requirements of the Open Meetings Act. Tenn. Code Ann. §8-44-102(c). Electronic participation at hearings attended by two (2) or more Board members, then, would be governed by Tenn. Code Ann. §8-44-108.²

Parole grant hearings may be conducted by the use of two way video conferencing with Board members and hearing officers participating from remote locations provided no more than one Board member participates.³ Tenn. Code Ann. §40-28-105(b) provides that the Board “shall schedule hearings at each correctional institution or facility at such times *as may be necessary* to discharge its duties.” (Emphasis added). Tenn. Code Ann. §40-28-104(b)(1) provides that the executive director of the Board shall supervise “the scheduling of appropriate hearings at each

¹There are seven members of the Board. Tenn. Code Ann. §40-28-103(a). The grant of parole requires the concurrence of three or four members depending on the underlying criminal offense. Tenn. Code Ann. §40-28-105(d). The statute provides that a majority of members of the board constitutes a quorum for official administrative business. *Id.*

²Briefly, Tenn. Code Ann. §8-44-108 provides that if a physical quorum is not present at the meeting location, in order for a quorum of members to participate by electronic means the governing body must make a determination that such participation is necessary. That determination, inclusive of the facts and circumstances on which it was based, must be included in the minutes and filed with the Secretary of State within two (2) working days. The definition of necessity includes the requirement that the matters to be considered need timely action, physical presence by a quorum of the members is not practical within the period of time requiring action, and participation by a quorum of the members by electronic means is necessary. Any documents discussed at the meeting must be provided in advance to those members not physically present. All votes must be by roll call vote. Meetings must be audible to the public at the location specified in the notice. Each member participating must be able to simultaneously hear and speak to each other during the meeting. The persons present at each location must be identified.

³All Board members participating in a parole grant decision must review the inmate’s entire parole board file before voting. *See* Tenn. Code Ann. §§40-28-101(a), 40-28-106(d)(1), 40-28-114(5), 40-28-118, 40-28-119.

correctional institution or facility *as may be required.*” (Emphasis added). The parole statutes do not outline requirements for a grant hearing. With the advent of video technology a hearing at the facility with all participants physically present is neither necessary nor required. To the extent that Tenn. Code Ann. §§40-28-104(b)(1) & 40-28-105 might appear to require that hearings be held at the correctional facilities, it is sufficient that the prisoner is present at the facility for the hearing.

Parole grant hearings do not implicate due process. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979); *Miller v. Tennessee Board of Probation and Parole*, 119 S.W.3d 696, 701 (Tenn. Ct. App. 2003). There is no requirement that victims, if they choose to testify, must be physically present at a hearing to do so. Indeed, the Board is expressly permitted to consider confidential written victim impact statements. Tenn. Code Ann. §40-28-504. Accordingly, we conclude that the law permits victims to testify at parole grant hearings from a remote location via two way video equipment.

Parole revocation hearings as opposed to parole grant hearings have due process implications. *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). A parolee contesting revocation does not have the same due process rights as does a trial defendant, but is entitled to the “opportunity to be heard in person” and to present witnesses and documentary evidence. 408 U.S. at 489; *see also* Tenn. Code Ann. §40-28-122(b). There is little authority addressing the definition of “opportunity to be heard in person.” At least one court has permitted a victim to testify at a parole revocation hearing by means of video conferencing technology. *Wilkins v. Wilkinson*, 157 Ohio App. 3d 209, 809 N.E.2d 1206 (2004). Provided two way video conferencing as implemented permits free and unimpeded visual and auditory communication between the hearing officer, witnesses, parolee and counsel and a mechanism is developed for the introduction of documentary evidence, we think the courts in Tennessee would approve its use by hearing officers in parole revocation hearings.

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