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## Bill Analysis

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**Primary Sponsors:** Sens. Eklund and Lehner

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### SUMMARY

- Modifies parole procedures regarding uniform standards, presence of counsel, prisoner access to information and materials, and appeals of decisions by:
  - Requiring the Adult Parole Authority (APA) to adopt uniform standards that the Parole Board must follow in making parole decisions after the standards have taken effect and mandating certain conditions and criteria to be included in the standards;
  - Reassigning the duty to adopt rules governing Board proceedings from the Chief of the APA with approval of the Division of Parole and Community Services directly to the APA, mandating certain conditions and criteria to be included in the rules, and expanding the matters and procedures that must be addressed in the rules;
  - Requiring (instead of authorizing) the APA to provide for the investigation and examination of prisoners concerning their conduct in prison, current qualities and characteristics, skills and knowledge of a trade or profession, and community support to assess suitability to be at liberty without being a threat to society;
  - Modifying the standards for the APA's granting of parole to a prisoner in several ways, including requiring that it must grant parole to an eligible prisoner after compliance with the bill's other provisions unless the release would not further the interests of justice and be consistent with societal welfare and security;
  - Limiting the victim testimony that may be considered at a full Board hearing to testimony given at the hearing, precluding consideration of such testimony previously given, and specifying that such testimony may not be the sole reason for parole denial;
  - Enacting provisions expanding the presence and participation of counsel of a prisoner under consideration for parole at prehearing interviews and conferences related to the parole decision and at all hearings held to decide whether to grant parole;

- Modifying Administrative Procedure Act provisions to allow appeals of parole decisions to be brought under the act’s mechanism for appeals of agency adjudication orders;
- Requiring that the Parole Board make an official record of information and materials considered in making a parole decision for a prisoner and of all hearings related to the decision, specifying the content of the record, generally providing for prisoner access to the record after redaction of specified victim-related information; and
- Modifying provisions regarding full Parole Board hearings in several ways, including limiting the authority for requesting such a hearing and revising the list of persons who may appear and provide testimony at such a hearing.
- Revises the Parole Board composition by:
  - Modifying the qualifications to be appointed as a Board member, other than the victim representative and the new offender representative, to require qualification by education or experience in general;
  - Specifying that Board members must have diversity of race, gender, and occupation;
  - Requiring that Board membership include at least one member from each of six specified professional categories; and
  - Requiring DRC’s Director, in consultation with the Governor, to appoint a new Board member, who must be a person who has experienced incarceration.
- Specifies that all of its provisions described above apply with respect to:
  - All parole proceedings conducted and parole decisions made on or after its effective date, regardless of whether the subject prisoner committed, or was convicted of, the subject offense prior to, on, or after that date; and
  - Each prisoner who, on or after its effective date, is serving a prison term under which the prisoner is eligible for parole, regardless of whether the prisoner committed, or was convicted of, that offense prior to, on, or after that date.

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## **DETAILED ANALYSIS**

### **Uniform parole standards – adoption by Adult Parole Authority and Parole Board compliance**

#### **Adoption of standards**

The bill requires the Adult Parole Authority (APA) to adopt, as soon as possible but not later than 90 days after the bill’s effective date, rules establishing uniform standards that the Parole Board must follow in making parole decisions after those rules have taken effect. The rules adopted must promote fairness and consistency in the outcome of parole decisions, must be structured and policy-driven to promote fairness and consistency in the outcome of the decisions, and must include specified provisions described below. Any subsequent amendment or rescission of the rules, or subsequent adoption of other rules establishing the standards must be in accordance with the Administrative Procedure Act. The rules must provide for all of the following:<sup>1</sup>

1. The use of evidence-based risk assessment for recidivism for each offender;
2. The use of evidence-based tools for assessing the offender’s readiness for reentry; and
3. That a prisoner under consideration for parole must be granted parole unless the Board or panel conducting the parole decision proceeding decides, at the proceeding, that one or more of the following applies (this is a “presumption of parole”):
  - a. Regardless of the prisoner’s current security level: (i) the prisoner while incarcerated committed institutional rule infractions that compromised the security of a prison or the safety of prison staff or inmates, or caused physical harm or involved the threat of physical harm to the prison staff or inmates, or committed a violation of law that was not prosecuted, (ii) the infractions or violations demonstrate that the prisoner has not been rehabilitated, and (iii) the prisoner’s behavior while incarcerated demonstrates that the prisoner continues to pose a threat to society;

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<sup>1</sup> R.C. 5149.10(A)(1) and (F); also R.C. 5149.01(E).

- b. Regardless of the prisoner's current security level, the prisoner has been placed by the Department of Rehabilitation and Correction (DRC) in extended restrictive housing at any time within the year preceding the date of the hearing;
- c. At the time of the proceeding, the prisoner is classified by DRC at a security level of at least three, four, or five.

### **Compliance with standards**

Under the bill, the Parole Board, in making a decision as to whether to grant a parole to a prisoner at any time after the uniform parole standards described above have taken effect, must comply with those standards.<sup>2</sup>

### **APA rules governing Parole Board proceedings – consistent with bill's provisions**

The bill does all of the following regarding the adoption of rules governing Parole Board proceedings:<sup>3</sup>

1. It reassigns the duty to adopt rules governing Board proceedings from the Chief of the APA subject to the approval of the Chief of the Division of Parole and Community Services directly to the APA;
2. It specifies that the rules must promote fairness and consistency in the outcome of parole decisions, must be consistent with the provisions described below in "**Presence and participation of prisoner's counsel**" and "**Official record and prisoner access**," and must provide for specified matters and procedures (see (4), below);
3. It specifies that any subsequent amendment or rescission of the rules, or subsequent adoption of other rules establishing the standards, must be in accordance with the Administrative Procedure Act; and
4. It expands the matters and procedures that currently must be provided for in the rules to require that, in addition to those matters and procedures, the rules also must provide for the procedure to be followed in institutional parole review (defined as the initial Board hearing conducted by Board members with a prisoner), which must require video conferencing and the recording of the video conferencing. The matters and procedures currently specified, retained by the bill, are: (a) the convening of, and procedures to be followed in, full Board hearings, (b) general procedures to be followed in other Board hearings and by the Board's hearing officers, (c) a requirement that a majority of Board members must agree to any recommendation of clemency sent to the Governor, and (d) for parole hearings, procedures for considering the report of the warden of the prison in which the eligible prisoner is held.

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<sup>2</sup> R.C. 2967.03(C)(3).

<sup>3</sup> R.C. 5149.10(A)(1); also R.C. 5149.01(C).

## Initiation of, and preliminary, parole matters

The bill modifies existing provisions regarding the initiation of parole matters and the investigation and examination of prisoners by:<sup>4</sup>

1. In the provision that authorizes the APA to exercise its functions and duties regarding the parole of a prisoner who is eligible for parole upon the initiative of the head of the prison or on its own initiative, specifying that the provision applies with respect to a prisoner who is eligible for parole “under statute”; and
2. Requiring (instead of authorizing) the APA to investigate and examine, or cause the investigation and examination of, prisoners concerning their conduct in prison, their current qualities and characteristics (instead of their mental and moral qualities and characteristics), their skills and knowledge of a trade or profession (instead of only their knowledge of a trade or profession), and their community support to assess suitability to be at liberty without being a threat to society (instead of their former means of livelihood, their family relationships, and any other matters affecting their fitness to be at liberty without being a threat to society).

## Standards for granting of parole, in general

### Modification by the bill

The bill modifies the standards for the APA’s granting of parole to a prisoner for whom parole is authorized. Currently, the APA may grant parole if, in its judgment, there are reasonable grounds to believe that granting the parole would further the interests of justice and be consistent with the welfare and security of society and it has complied with requirements regarding victim notice and consideration of victim and other specified statements. Under the bill, the standards must specify all of the following:<sup>5</sup>

1. That the APA must grant parole to any prisoner for whom parole is authorized or who otherwise is eligible for parole after compliance with the provisions described above in **“Uniform parole standards – adoption by APA and Parole Board compliance,”** the “presumption of parole” provision described above in **“Uniform parole standards – adoption by APA and Parole Board compliance,”** and the provisions described below in **“Presence and participation of prisoner’s counsel”** and **“Official record and prisoner access,”** unless the APA, after reviewing the prisoner’s institutional progress and the factors enumerated in Ohio Administrative Code (O.A.C.) 5120:1-1-07 (see below) or that section’s successor, can show that release would neither further the interests of justice nor be consistent with the welfare and security of society;

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<sup>4</sup> R.C. 2967.03(A).

<sup>5</sup> R.C. 2967.03(B).

2. That the APA still must comply with the current requirements regarding victim notice and consideration of victim and other specified statements before granting parole; and
3. That if a victim, victim's representative, or the victim's spouse, parent, sibling, or child appears at a full Board hearing and gives testimony as authorized by current law (see "**Full Parole Board hearings**," below), the APA must consider the testimony "given at that time" in deciding whether to grant a parole, but the APA may not consider any such testimony previously given by any such person and any such testimony given and considered shall not be the sole reason for a denial of parole. Currently, the provision specifies only that the APA must consider "the testimony" in determining whether to grant parole.

### **O.A.C. 5120:1-1-07 factors**

In its provision described above, the bill refers to factors enumerated in an Administrative Code section that currently must be considered in determining whether to release an inmate on parole. The Administrative Code provision states that, in considering the release of the inmate, the Parole Board must consider the following:<sup>6</sup>

1. Any reports prepared by any institutional staff member relating to the inmate's personality, social history, and adjustment to institutional programs and assignments;
2. Any official report of the inmate's prior criminal record, including a report or record of earlier probation or parole;
3. Any presentence or postsentence report;
4. Any recommendations regarding the inmate's release made at the time of sentencing or at any time thereafter by the sentencing judge, presiding judge, prosecuting attorney, or defense counsel and any information received from a victim or a victim's representative;
5. Any reports of a physical, mental, or psychiatric examination of the inmate;
6. Any other relevant written information concerning the inmate as may be reasonably available, except that no document related to the filing of a grievance under O.A.C. 5120-9-31 may be considered;
7. Written or oral statements by the inmate, other than grievances filed under O.A.C. 5120-9-31;
8. The equivalent sentence range under Senate Bill 2 (effective July 1, 1996), for the same offense of conviction if applicable;
9. The inmate's ability and readiness to assume obligations and undertake responsibilities, as well as the inmate's own goals and needs;

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<sup>6</sup> Ohio Administrative Code (O.A.C.) 5120:1-1-07, not in the bill.

10. The inmate's family status, including whether the inmate's relatives display an interest in the inmate or whether the inmate has other close and constructive association in the community;
11. The type of residence, neighborhood, or community in which the inmate plans to live;
12. The inmate's employment history and occupational skills;
13. The inmate's vocational, educational, and other training;
14. The adequacy of the inmate's plan or prospects on release;
15. The availability of community resources to assist the inmate;
16. The inmate's physical and mental health as they reflect upon the inmate's ability to perform the inmate's plan of release;
17. The presence of outstanding detainers against the inmate; and
18. Any other factors that the Board determines to be relevant, except for documents related to the filing of a grievance under O.A.C. 5120-9-31.

### **Presence and participation of prisoner's counsel**

The bill enacts provisions addressing the presence and participation of counsel of a prisoner under consideration for parole, that specify as follows:<sup>7</sup>

1. Regarding prehearing interviews and conferences related to the parole decision, that: (a) the prisoner may have counsel present, (b) counsel who is present may advise the prisoner but is not entitled to ask questions, present information, or otherwise participate in the interview or conference, and (c) the state is not required to appoint or provide counsel to the prisoner for the interview or conference or to pay any cost of counsel who represents or accompanies the prisoner at or to the interview or conference; and
2. At all hearings held to decide whether to grant parole to the prisoner, including a full Parole Board hearing, that: (a) the prisoner may have counsel present, (b) counsel representing the prisoner at the hearing is entitled to fully participate in the hearing, including asking questions and presenting information, and (c) the state is not required to appoint or provide counsel to the prisoner for the hearing or to pay any cost of counsel who represents or accompanies the prisoner at or to the hearing.

### **Administrative Procedure Act appeals**

The bill includes the APA within the definition of "agency" that applies to the Administrative Procedure Act (R.C. Chapter 119), but only with respect to: (1) the adoption of rules, (2) the conduct of hearings, provided that if any provision of the Pardon, Parole, and Probation Law or the Adult Parole Authority Law conflicts with the provisions of the act, the

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<sup>7</sup> R.C. 2967.03(C)(1) and (4) and 5149.101(C).

provision of the Pardon, Parole, and Probation Law or Adult Parole Authority Law controls and the hearings must be conducted in accordance with that provision instead of the provision of the act, and (3) parole decisions made by the Parole Board and only with respect to appeals of those parole decisions. The bill also includes within the definition of “adjudication” that applies to that act a parole decision made by the Parole Board.<sup>8</sup>

The Administrative Procedure Act governs specified types of activities of, and related to, Ohio’s administrative agencies. The activities covered by the act include the adoption of administrative rules, conduct of administrative hearings, imposition of adjudication orders with respect to certain agency activities, and appeals under a mechanism in the act of adjudication orders made by agencies. The act generally applies only with respect to government entities that are included within the definition of “agency” that applies to the act. The APA and Parole Board currently are not included within that definition.

The effect of the bill’s third change described above is to allow appeals of parole decisions to be brought under the Administrative Procedure Act’s mechanism for appeals of agency adjudication orders – related to this, the bill in an existing provision that currently specifies that parole decisions are final, adds in an exception for appeals that the bill authorizes under the act.<sup>9</sup> Under existing provisions of the act, unchanged by the bill,<sup>10</sup> appeals of this nature could be brought by the person adversely affected by the decision in the Franklin County Court of Common Pleas. The provisions of the existing mechanism for appeals of agency orders will apply to any appeal of a parole decision.

## **Official record and prisoner access**

The bill enacts provisions regarding the making of an official record related to parole decisions and prisoner access to the record, that specify all of the following:<sup>11</sup>

1. That if the Parole Board is considering whether to grant parole to a prisoner, it must make an official record of all information and materials it is considering in making the decision and, prior to making the decision but subject to the limitation described below in (3), it must grant the prisoner full access to, and the right to copy, the record;
2. That if the Board is holding a hearing, including a full Board hearing, to decide whether to grant parole to a prisoner: (a) the Board must prepare and maintain an official record of the hearings, (b) the official record must consist of an audio recording of the hearing and, in addition, also may include a video recording or a transcription of the hearing, (c) the Board must permit the prisoner to hire a court reporter, at the prisoner’s expense and, if the prisoner does so, it must permit the court reporter to attend the hearing and record and make a transcript of the hearing, and (d) subject to the

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<sup>8</sup> R.C. 119.01, 2967.03(C)(7), and 5149.10(D).

<sup>9</sup> R.C. 5149.10(D).

<sup>10</sup> R.C. 119.12, not in the bill.

<sup>11</sup> R.C. 2967.03(C)(2), (5), and (6), 5149.07, and 5149.101(F).



limitation described below in (3), the Board must grant the prisoner full access to the record and permit the prisoner to review the record;

3. That if any record described above in (1) or (2) contains information about a victim and if granting the prisoner access to the record and permitting the prisoner to review the record as described above in (1) or (2) would limit or interfere with the victim's right to be treated with fairness and respect for the victim's safety, dignity, and privacy guaranteed by Section 10a of Article I of the Ohio Constitution (i.e., Marsy's Law), both of the following apply:
  - a. The personally identifiable information about the victim that, if released to the prisoner as described above in (1) or (2), would limit or interfere with that right must be redacted from the record before the prisoner is granted access to, or is permitted to review, the record; and
  - b. If the prisoner has an attorney, the redaction requirement described in clause (a) of this paragraph does not apply with respect to the release of information to the attorney, provided the attorney agrees prior to the release to not discuss the personally identifiable information with, or disclose the personally identifiable information to, the prisoner; and
4. The official records and information and materials that the APA considers in making a parole determination and of Parole Board hearings made as described above in (1) and (2) must be included in the central files and records pertaining to the APA's work that existing law requires DRC to maintain.

## **Full Parole Board hearings**

The bill modifies existing provisions regarding full Parole Board hearings by doing all of the following:<sup>12</sup>

1. Specifying that the existing authority of a Parole Board hearing officer, a Board member, or the Office of Victims' Services to petition the Board for a full Board hearing that relates to the proposed parole or reparole of a prisoner applies only when the prisoner fails to meet the conditions of presumptive parole, as described above;
2. Revising a portion of the existing list of persons who may appear and give testimony or submit written testimony at a hearing of the full Board regarding the proposed parole or reparole of a prisoner to specify that the victim's representative of the victim of the original offense for which the prisoner is serving the sentence may appear and give or submit testimony only at that victim's request. Currently, this portion of the list does not require that the victim make the request; other portions of the existing list, unchanged by the bill, include: (a) the prosecuting attorney of the county in which the prisoner was indicted and law enforcement officers of the agency that assisted in

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<sup>12</sup> R.C. 5149.101(A)(1), (B), (C), (E), and (F).

prosecuting the offense, (b) the sentencing judge or that judge's successor, (c) the victim of the offense for which the prisoner is serving the sentence, (d) the victim of any behavior that resulted in parole being revoked, (e) with respect to a full Board hearing held upon request of a victim, representative, or family member, the victim's spouse, parent or parents, sibling, and child or children, and (f) counsel or another person designated by the victim as a representative.

3. Requiring that the Board prepare and maintain an official record of the hearings and specifying that the record is to be available as described above in "**Official record and prisoner access**"; and
4. Specifying that, with respect to the rules the APA has adopted under existing law for the implementation of the full Board hearing provisions, any subsequent amendment or rescission of these rules, or subsequent adoption of other rules for the implementation of those provisions, must be in accordance with the Administrative Procedure Act.

### **APA and Parole Board information as public records**

The bill modifies existing provisions that pertain to the inclusion or exclusion of the APA and Parole Board information as public records. Under the bill:<sup>13</sup>

1. Institutional records maintained on incarcerated individuals are not public records;
2. Subject to the limitation described below in (3), minutes, actions, findings, recommendations, determinations, records, adjudications, decisions, and orders made or kept by the APA or the Parole Board are public records (currently, the provision specifies that minutes, actions, findings, recommendations, determinations, and orders made and kept by the APA are public records);
3. If any minutes, actions, findings, recommendations, determinations, records, adjudications, decisions, and orders made or kept by the APA or Parole Board that are a public record as described above in (2) contain information about a victim and if the release of, or granting access to, the information would limit or interfere with the victim's right to be treated with fairness and respect for the victim's safety, dignity, and privacy guaranteed by Section 10a of Article I of the Ohio Constitution (i.e., Marsy's Law), both of the following apply: (a) the personally identifiable information about the victim that, if released or made available as a public record, would limit or interfere with that right must be redacted from the minutes, actions, findings, recommendations, determinations, records, adjudications, decisions, or orders before they are released or made available as a public record, and (b) if the prisoner has an attorney, the redaction requirement described in clause (a) of this paragraph does not apply with respect to the release of information to the attorney, provided the attorney agrees prior to the release to not discuss personally identifiable information with, or disclose personally identifiable information to, the prisoner; and

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<sup>13</sup> R.C. 149.43(A)(1)(b) and 5149.11.

4. The current provision in the state's Public Records Law's definition of "public records" that excludes, without exception, all records pertaining to parole proceedings will no longer include or cover records that are described above in (2).

## **Parole board members**

With respect to Parole Board members and terms, the bill:<sup>14</sup>

1. Retains the current provisions specifying that Board membership is to consist of up to 12 members and, subject to the provisions described in (5), below, the current terms of members (currently, terms generally are for six years, with the reappointments and term limits also set at six years; but currently, the term of the member who represents crime victims is four years and, apparently, the Chairperson does not have a set term);
2. Modifies the qualifications to be appointed as a Board member, other than the currently required member who represents crime victims and the member described below in (5), to specify that no person may be appointed a member of the Board who is not qualified by education or experience (currently, the provision specifies that no person may be appointed a member who is not qualified by education or experience in correctional work, including law enforcement, prosecution of offenses, advocating for the rights of victims of crime, probation, or parole, in law, in social work, or in a combination of the three categories);
3. Specifies that Board members must have diversity of race, gender, and occupation;
4. Requires that Board membership must include at least one member from each of the following categories: (a) a psychologist or mental health professional by training, occupation, or both training and occupation, (b) a social worker or another qualified individual with reentry experience, (c) a substance abuse specialist by training, occupation, or both training and occupation, (d) a forensic scientist, criminologist, or data analyst, (e) a law enforcement professional, corrections officer, probation officer, or parole officer, and (f) a criminal lawyer with prosecutorial or criminal defense experience; and
5. Requires DRC's Director, in consultation with the Governor, to appoint one Board member, who must be a person who has experienced incarceration, to a four-year term, and specifies that this member is an unclassified DRC employee, is to be compensated in the same manner as other Board members and be reimbursed for actual and necessary expenses incurred in the performance of Board duties, may vote on all cases heard by the full Board, and has such duties as are assigned by the Board's Chairperson.

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<sup>14</sup> R.C. 5149.10(A)(1), (A)(3), (A)(4), and (B)(2).

## Application of bill's provisions

The bill specifies that all of its provisions described above apply with respect to the following:<sup>15</sup>

1. All parole proceedings conducted and parole decisions made on or after the bill's effective date, regardless of whether the prisoner who is the subject of the proceeding committed, or was convicted of, the offense for which the offender is imprisoned prior to, on, or after that effective date; and
2. Each prisoner who, on or after the bill's effective date, is serving a sentence of imprisonment under which the prisoner is eligible for parole, regardless of whether the prisoner committed, or was convicted of, that offense prior to, on, or after that effective date.

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## HISTORY

Action	Date
Introduced	02-12-20

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<sup>15</sup> Section 3.