

Virginia provides compassionate release to (1) eligible prisoners with terminal illnesses through the **Executive Medical Clemency/Medical Pardon** process<sup>1</sup> and (2) eligible prisoners who are elderly through **Geriatric Conditional Release**.<sup>2</sup>

## **EXECUTIVE MEDICAL CLEMENCY/MEDICAL PARDON**

### **I. ELIGIBILITY**

**Medical Condition** - Executive Medical Clemency, also referred to as a Medical Pardon, may be granted to prisoners who are terminally ill.<sup>3</sup>

- A prisoner is eligible for consideration if he or she has a terminal illness, as defined by the Virginia Department of Corrections (Department), and death is “imminent.”<sup>4</sup>
  - “Terminal illness” is defined as an illness expected to result in death within 10 to 12 months of the date of the medical clemency physician’s report.<sup>5</sup>
  - “Imminent death” means that the prisoner has “an estimated three months or less to live.”<sup>6</sup>

**Exclusions** - To be eligible for Clemency, a prisoner must not be eligible for parole.<sup>7</sup>

**Other Criteria** - In addition, to be eligible for consideration a prisoner must have family members or others “willing and able” to assume responsibility for his or her care.<sup>8</sup>

### **II. APPLICATION/REFERRAL**

**Request/Petition** - A prisoner or other petitioner can submit a request for Executive Clemency/Medical Pardon by writing a letter to the Governor of Virginia, submitted through the Secretary of the Commonwealth.<sup>9</sup> Family members may submit the request if they have written consent from the prisoner.<sup>10</sup>

- Note that if a prisoner is incapacitated and unable to provide consent, the family member can proceed without written consent. (If applicable, the family member can note in the request that the prisoner previously voiced or wrote of his or her desire for clemency.)<sup>11</sup>

The request/letter must include all of the following information:

- The prisoner’s name and any aliases, date of birth, and Social Security number;
- The Department’s prisoner identification number and facility location;

- Sentences and “other dispositions” of all misdemeanor and felony convictions, including dates, courts, and details;
- Date of parole eligibility, if applicable, and date of mandatory release;
- A general description of the prisoner’s medical condition and prognosis; and
- The name, address, phone number, email address, and relationship to the prisoner of the person willing to assume responsibility for his or her care, and a statement of ability to provide that care.<sup>12</sup>

### **III. DOCUMENTATION AND ASSESSMENT**

Prior to 2017, Department operating procedures stated that the Secretary of State referred petitions to a Medical Clemency Coordinator.<sup>13</sup> However, the 2017 operating procedure referencing clemency deleted all references to a Coordinator and provides the following instructions:

All [Department of Corrections] organizational units should provide an updated progress report in a timely manner as requested by the Secretary of the Commonwealth and the Parole Board with information regarding the offender’s treatment, programming, work history, educational record, mental and physical health needs, disciplinary record, interactions with staff and offenders, cognitive functioning, proposed home plan, and support system.<sup>14</sup>

The Department’s current “re-entry planning” procedures for terminally ill prisoners provide detailed guidance on the release process and discharge assistance.<sup>15</sup> However, the guidance is not specific to prisoners who are seeking Executive Medical Clemency, which makes the time frames included (up to 12 months to complete some of the paperwork) unrealistic for individuals who have less than three months to live.

- However, note that the Secretary of the Commonwealth’s website states that “medical pardons” are handled through an “expedited process,” and individuals are instructed to contact their office by phone (804-692-2542) or email (pardons@governor.virginia.gov) for information.<sup>16</sup>

### **IV. DECISION-MAKING PROCESS**

**Decision Maker** - Only the Governor of Virginia has the power to grant clemency to prisoners who are terminally ill.<sup>17</sup> However, the Virginia Parole Board (Board) is responsible for investigating and reporting its recommendations to the Governor.<sup>18</sup>

**Conditions and Pre-Release Planning** - If the Governor grants the request, the Department’s Community Release Unit will create the release authorization, detailing the appropriate reporting instructions for the prisoner’s “release status.”<sup>19</sup>

- *Conditions* - As a condition of being released, the prisoner must agree in writing to have their physician provide information on his or her current medical condition to the Department whenever requested.<sup>20</sup>
- Pre-Release Planning -
  - Before a prisoner’s anticipated release date, a Re-entry Counselor is directed to work on a “home plan.”<sup>21</sup> For prisoners who have ongoing medical issues, the Re-entry Counselor is instructed to complete a “Problematic Release Plan,” defined as a plan that requires extra coordination to facilitate the release.<sup>22</sup>
  - Medical staff also complete the “medical pre-release preparation” process for prisoners who are terminally ill. This includes preparing a Medical Discharge Summary, ensuring that prisoners who need equipment such as wheelchairs have access to equipment when they’re released, and arranging for a supply of discharge medications and other needed medical supplies.<sup>23</sup> They also begin the public benefits application process<sup>24</sup> and healthcare staff are directed to complete all medically-related information in the benefits’ applications.<sup>25</sup>

## **V. POST-DECISION**

**Denials and Appeal Rights** - If the request for Executive Medical Clemency is denied, the petitioner cannot appeal. However, a new request can be submitted two years after the date of the denial letter.<sup>26</sup>

**Revocation/Termination** - Although referred to as a Medical Pardon, it is considered a “conditional” pardon. As a condition of being released, a prisoner granted release under these clemency rules must agree in writing to have a physician provide medical updates to the Virginia Department of Corrections whenever requested. If a request for updated medical information is not honored, the Medical Clemency/Medical Pardon release can be terminated immediately.<sup>27</sup>

## **VI. REPORTING/STATISTICS**

There is no publicly available information from the Governor’s office or the Secretary of the Commonwealth on how many prisoners have been granted Medical Pardons/Executive Clemency due to a terminal illness.

# GERIATRIC CONDITIONAL RELEASE (CONDITIONAL RELEASE BASED ON AGE)

## I. ELIGIBILITY

**Age** - Older prisoners may be eligible for Geriatric Conditional Release if they are:

- Age 60 or older, having served at least 10 years of their sentence; or
- Age 65 or older, having served at least five years of their sentence.<sup>28</sup>

**Exclusions** - Prisoners convicted of a Class 1 felony<sup>29</sup> are not eligible for Conditional Release based on age.<sup>30</sup>

## II. APPLICATION/REFERRAL

**Automatic Consideration** - The Virginia Parole Board (Board) is directed to “automatically” review prisoners incarcerated for felonies committed after Jan. 1, 1995, within a year after they become eligible for Geriatric Conditional Release.<sup>31</sup>

**Petition** - Prisoners incarcerated for felonies committed *before* Jan. 1, 1995, who are within 90 days of the minimum requirement of age and time served, can submit a *Petition for Conditional Release of Geriatric Offender* to the Board.<sup>32</sup> The prisoner must identify “compelling reasons” for a conditional release.<sup>33</sup>

## III. DOCUMENTATION AND ASSESSMENT

**Victim Notification** - The Board will notify the Department’s Victim Services office as required under Virginia Law, with the victim receiving written notification that the prisoner has petitioned for Geriatric Conditional Release.<sup>34</sup> The victim will be given 60 days to provide any comments and concerns to the Board.<sup>35</sup> “Consideration of any conditional release will be suspended until a crime victim has had the 60-day period to provide comments.”<sup>36</sup>

## IV. DECISION-MAKING PROCESS

**Decision Maker** - The Virginia Parole Board makes all decisions regarding Geriatric Conditional Release.

**Decision Process** -

- *Initial Review* - Members of the Board review the prisoner’s case and/or petition, the Department’s “central file” for the prisoner, and any other relevant information.<sup>37</sup> If the prisoner’s Conditional Release due to age is denied at this step by a majority vote of the Board, the process ends.<sup>38</sup> If it is not denied in the initial review, the case is automatically advanced to an “assessment review.”<sup>39</sup>

- *Assessment Review* - A member of the Board, or a designated staff person, conducts a “personal assessment interview” with the prisoner. The interviewer completes a written assessment of the prisoner’s “suitability” for Conditional Release and makes a recommendation to grant (or not grant) release, detailing the supporting reasons.<sup>40</sup> If a Board member conducts the review, his or her vote to grant or not grant Conditional Release must be recorded.<sup>41</sup>
- *Final Vote and Decision* - All other parole consideration factors, including victim input, apply in Conditional Release decisions.<sup>42</sup> The case is then directed to the other members of the Board for review and decision.
  - The decision requires the concurrence of at least three members of the Board. In the cases of prisoners serving life sentences, Conditional Release will not be granted unless four members of the Board agree.<sup>43</sup>
  - Once a final decision has been made, the crime victim will be notified of the Board’s action.<sup>44</sup>

#### Conditions and Pre-Release Planning -

- *Pre-release Planning* - Transition, health care, and mental health staff are directed to complete applications for federal and state benefits that are available to elderly prisoners after they are released. This includes veterans, Medicaid, and Supplemental Security Income (SSI) benefits.<sup>45</sup> Note that the Department has a “Memorandum of Understanding” with the Social Security Administration covering pre-release SSI application procedures.<sup>46</sup>
- *Conditions* - The terms and conditions of Conditional Release are set by the Board and are similar to the general conditions of parole.<sup>47</sup> However, the Board can impose additional special conditions it feels are appropriate.<sup>48</sup>

## V. POST-DECISION

**Denials and Appeal Rights** - A prisoner who is qualified to submit a *Petition for Geriatric Conditional Release* but is denied may re-submit a petition annually<sup>49</sup> “unless deferred by the Virginia Parole Board for a period of two or three years.”<sup>50</sup>

**Effect of Conditional Release Request on Other Release Eligibility** - Prisoners may receive only one “consideration for release” (either discretionary parole or conditional release) in any 12-month period.<sup>51</sup>

**Supervision** - The Board establishes the period of supervision for the former prisoner. The Department’s Division of Community Corrections provides community supervision.<sup>52</sup>

**Revocation/Termination** - If a former prisoner violates one or more terms of the Conditional Release the Board may order his or her arrest and re-incarceration.<sup>53</sup>

## VI. REPORTING/STATISTICS

The Board is not required to report on how many Geriatric Conditional Releases it has granted. However, news reports have provided some data:

- In April 2017, it was reported that out of the 1,417 requests for Geriatric Conditional Release the Board considered between January 2014 and March 2017, only 68 prisoners were released - “a grant rate of 4.7 percent.”<sup>54</sup>
- An editorial published the same day said that of the 580 cases the Board considered in 2016, only 33 prisoners were released<sup>55</sup> and that it was time for Virginia’s General Assembly to take a “fresh look” at geriatric conditional release to see if it was being administered the way intended.

## NOTES

<sup>1</sup> Va. Code Ann. § 53.1-229 and 53.1-231; Virginia Department of Corrections Operating Procedure (DOC-OP) 820.2, § VI (2017).

<sup>2</sup> Va. Code Ann. § 53.1-40.01; DOC-OP 820.2, § VI; Virginia Parole Board Administrative Procedure (Board Procedure) 1.226.

<sup>3</sup> Va. Code Ann. § 53.1-229; DOC-OP 820.2, § VI.B.

<sup>4</sup> DOC-OP 820.2, § VI.B.1.

<sup>5</sup> Id. at § III-Definitions. Note that this determination must be based on the “independent opinion of at least two physicians.”

<sup>6</sup> Id.

<sup>7</sup> DOC-OP 820.2, § VI.B.1.a.

<sup>8</sup> DOC-OP 820.2, § VI.B.1.b.

<sup>9</sup> Id. at § VI.B.2. The request should be addressed to Pardons Department, Office of the Secretary of the Commonwealth, P.O. Box 2454, Richmond VA 23218-2454. Id.

<sup>10</sup> Id. at § VI.B.4.

<sup>11</sup> Id.

<sup>12</sup> Id. at §§ VI.B.3.a - c.

<sup>13</sup> DOC-OP 820.1, §§ V.A.2 -3, C.2 (2011).

<sup>14</sup> DOC-OP 820.2 at § VI.C.

<sup>15</sup> Id. at § VII.

<sup>16</sup> Secretary of the Commonwealth Kelly Thomasson website at <https://www.commonwealth.virginia.gov/judicial-system/pardons/conditional-pardons/>.

<sup>17</sup> Va. Code Ann. § 53.1-229; DOC-OP 820.2, § VI.B.

<sup>18</sup> Va. Code Ann. § 53.1-231.

<sup>19</sup> DOC-OP 820.2, § VII.C.1. Details of “release notifications” for medical clemency “will be uploaded by Community Release Unit staff and available as external documents on the VACORIS [Virginia Corrections Information System] in Offender Pages/Facility Notes.” Id.

<sup>20</sup> Id. at § VI.B.6.

<sup>21</sup> Id. at § VII.A.

<sup>22</sup> Id. at § VII.A.3.

<sup>23</sup> Id. at §§ VII.H.1 - 10.

<sup>24</sup> Id. at §§ VII.H.1 - 10. See also DOC-OP 820.2, §§ V.D.1 - 6.

<sup>25</sup> Id. at § VII.H.5.

<sup>26</sup> Id. at § VI.B.5.

<sup>27</sup> Id. at § VI.B.6, referencing DOC-OP 050.3.

<sup>28</sup> Va. Code Ann. § 53.1-40.01; DOC-OP 820.2, §§ VI.A.1.a - b; Board Procedure 1.226.

<sup>29</sup> These are the most serious crimes, including those punishable by death or life imprisonment. See Va. Code Ann. § 18.2-9.

<sup>30</sup> Va. Code Ann. § 53.1-40.01; DOC-OP 820.2, § IV.A.1; Board Procedure 1.226.

<sup>31</sup> DOC-OP 820.2, § IV.A.2.a. Note that Board Procedure 1.226 does not reference automatic consideration for geriatric conditional release.

<sup>32</sup> Id. at § IV.A.2.b; Board Procedure 1.226. The Petition for Geriatric Conditional Release form is available at <https://vpb.virginia.gov/files/1093/vpb-pb27-petition-for-geriatric-release.pdf>.

<sup>33</sup> Board Procedure 1.226.

<sup>34</sup> Id. See also VA Code 53.1-155 and Board Procedure 1.225.

<sup>35</sup> Board Procedure 1.226. Comments can be provided in writing or by phone. Id.

<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup> DOC-OP 820.2, § V.D. SSI provides income benefits for low income individuals who are disabled and/or age 65 or older. Note that SSI applications for age-based claims may not be submitted more than 30 days prior to release. Id. at § V.D.3.b.

<sup>46</sup> Id. at § V.D.2.

<sup>47</sup> See Virginia Parole Board Policy Manual, § IV.A for general conditions of parole, <https://vpb.virginia.gov/files/1107/vpb-policy-manual.pdf>.

<sup>48</sup> Board Procedure 1.226.

<sup>49</sup> OP 820.2, § IV.A.2.c.

<sup>50</sup> Board Procedure 1.226.

<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Id.

<sup>54</sup> Peter Dujuardin, “Virginia questions whether to release older prisoners,” The Daily Press, Apr. 24, 2017, <https://www.usnews.com/news/best-states/virginia/articles/2017-04-24/virginia-questions-whether-to-release-older-prisoners>.

<sup>55</sup> Editorial, “Forging a key for release,” The Daily Press, Apr. 24, 2017, <http://www.dailypress.com/news/opinion/editorials/dp-edt-geriatric-release-0426-20170425-story.html>.