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ATTORNEY GENERAL OPINION NO. 87- 5

Director A. I. Murphy  
Department of Corrections

STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Does the board of correction have the authority to do an outright early release of incarcerated prisoners?
2. Does the board of correction have the authority to release inmates through long-term furloughs, pursuant to Idaho Code § 20-242?

CONCLUSIONS:

1. The board of correction has no authority to do an outright early discharge of prisoners. The power to release prisoners is vested in the commission of pardons and parole, which may release prisoners on parole, or pardon or commute their sentences.
2. Because a furlough is not actually a release, but simply an alternate form of continued confinement, the board of correction can furlough a prisoner at any time, provided the statutory directions of Idaho Code § 20-242 are followed.

ANALYSIS:

Question 1.

Unlike some states, Idaho has no statutory provision for early release of prisoners once penitentiaries reach maximum capacity. Florida statutes, by contrast, provide that once the prisons reach 98% capacity, the Department of Corrections shall declare a state of emergency, and shall release prisoners until the prison population is reduced to 97% of capacity. Fla.Stat. § 944.598 (1985). See also, Wash. Rev. Code Ann. 9.94A.160 (Supp. 1987); Texas Civil Stat. art. 6184o (1986). Other jurisdictions, when faced with overcrowded prisons, have declared that the powers of pardon and parole should be used to bring prison populations within constitutional limits. See, State v. Scott, 352 S.E.2d 741 (W.Va. 1987).

In Idaho, however, the board of correction has no power to pardon prisoners. The power to pardon and commute sentences was originally vested by art. 4, § 7, of the Idaho Constitution, in a board of pardons, and is now vested by statute in the state commission of pardons and parole. Idaho Code § 20-210. Although the commission members are appointed by the board of correction, the board has no authority to direct the commission to pardon or commute a prisoner's sentence. The powers of pardon and commutation are granted to the commission as the successor to the board of pardons, and cannot be directly interfered with by the board of correction.

The board of correction also has no power to parole prisoners. Early Idaho cases implied that the power to parole was derived from the power to pardon or commute sentences, and thus was vested in the board of pardons. In re Prout, 12 Idaho 494, 86 P. 275 (1906). However, the Idaho Supreme Court later clarified the source of the parole power: it is derived from the legislative authority to establish suitable punishment for various crimes. Standlee v. State, 96 Idaho 849, 538 P.2d 778 (1975). The power to release prisoners on parole is vested exclusively in the commission of pardons and parole:

Subject to section 19-2513, Idaho Code, the commission [of pardons and parole] shall have the power to establish rules, regulations, policies or procedures in compliance with chapter 52, title 67, Idaho

Code, under which any prisoner, excepting under sentence of death, may be allowed to go upon parole but to remain while on parole in the legal custody and under the control of the board and subject to be taken back into confinement at the direction of the commission.

Idaho Code § 20-223 (Supp. 1986).

The Idaho Constitution does give the board of correction some authority over the parole power:

The state legislature shall establish a nonpartisan board to be known as the state board of correction, ... This board shall have the control, direction and management of the penitentiaries of the state, their employees and properties, and of adult probation and parole, with such compensation, powers, and duties as may be prescribed by law.

Idaho Const., art. 10, § 5. The court has found, however, that art. 10, § 5 does not give the board of correction unfettered control, direction, and management of the penitentiaries or adult probation or parole. The board is simply charged with the power to implement those laws enacted by the legislature regarding those functions. State v. Rawson, 100 Idaho 308, 597 P.2d 31 (1979). Accordingly, the board's parole power has been statutorily limited to the supervision of all persons released from the state penitentiary on parole. Idaho Code § 20-219 (Supp. 1986).

In conclusion, the board of correction has no power to release prisoners outright. The power to release prisoners is vested in the commission of pardons and parole, which can either parole prisoners under § 20-223, or pardon or commute the prisoner's sentence under art. 4, § 7 of the state constitution.

#### Question 2.

The question presented is whether the board of correction has the authority to release inmates through long-term furloughs

It should be noted in passing that although an incarcerated prisoner can be released "to secure employment for himself," there is no parallel provision granting furlough to start an educational program. A familiar rule of statutory construction dictates that inclusion of one term implies the deliberate exclusion of all others. Poston v. Hollar, 64 Idaho 322, 132 P.2d 142 (1943). Therefore, we must conclude that educational furloughs are authorized only if the prisoner is already engaged in an ongoing educational program at the time of incarceration.

It is our opinion that the time spent on work furlough is applied toward fulfillment of the prisoner's sentence. This is not explicit in § 20-242, but is implied in paragraph (5), which provides:

If the prisoner violates the conditions established for his conduct, custody or employment, the board may order the balance of the prisoner's sentence to be spent in actual confinement. (Emphasis added).

The use of the term "balance of the prisoner's sentence" implies that time spent on work furlough is applied toward the required period of incarceration. This interpretation is in accord with other jurisdictions, which agree that a prisoner on work furlough is technically in confinement. See, Green v. Superior Ct., 132 Ariz. 468, 647 P.2d 166 (1982). Because the prisoner is still technically in confinement, the restrictions on the granting of parole found in § 20-223 should not apply to work furloughs. Also, time spent on work furloughs should be applied toward the fulfillment of fixed sentences required by Idaho Code §§ 19-2513A, 19-2514 and other statutes.

Additional guidance regarding the board's power to grant furloughs is derived from paragraph 3 of § 20-242, which states:

Whenever the prisoner is not employed and between the hours or periods of employment, work project, or schooling, he shall be domiciled in a jail, facility, or residence as directed by the board of correction.

This provision was amended in 1984 to allow prisoners on work furlough to be domiciled in residences in addition to jails or facilities. 1984 Sess. Laws, ch. 58. It can be inferred

from prisons. The long-term furlough of prisoners is controlled by Idaho Code § 20-242(1) and (2):

1. When a person is committed to the custody of the state board of correction, the board may ... direct that the person be permitted to continue in his regular employment, work project, or educational program ... or may authorize the person to secure employment for himself.

2. If the board directs that the prisoner be permitted to continue in his regular employment or education, the board shall arrange for a continuation of the employment or education without interruption. If the prisoner does not have regular employment, and the board has authorized the prisoner to secure employment for himself, the prisoner may do so, and the board may assist him in doing so.

These sections are somewhat ambiguous as to whether they allow presently incarcerated prisoners to be released on work furloughs, or whether they only allow newly-sentenced prisoners to continue or secure employment. Where the meaning of a statute is unclear, resort may be had to the statutory heading as an aid in ascertaining legislative intent. Walker v. Nationwide Finance Corp. of Idaho, 102 Idaho 266, 629 P.2d 662 (1981). The statutory heading to § 20-242 provides that the section relates "to furlough, by providing that a person committed to the custody of the board of correction may be released on furlough." 1970 Idaho Sess. Laws, ch.143 (emphasis added). This statement implies that the legislature intended for the board of correction to have authority to release on work furlough all persons committed to the board's custody, both those newly sentenced and those already incarcerated. Such a reading is more consistent with the last sentence of Idaho Code § 20-242(2) quoted above. That sentence appears to apply directly to those who are already incarcerated and who therefore lack "regular employment." It demonstrates a legislative intent to give flexibility to the board to determine which prisoners may qualify for furlough and may seek or be assisted in seeking meaningful employment.

that by adding the word "residence," the legislature intended to expand the ability of the board of correction to place prisoners on work furlough. Before the statute was amended, furloughed prisoners had to be domiciled in a "jail or facility" when not at work. Space in such facilities is limited. The amendment, which allows prisoners to be domiciled in private residences, greatly expands the number of prisoners that can be released on work furlough.

In conclusion, the board of correction has the authority to release a prisoner on long-term furloughs at any time during his or her sentence, either to work, seek work, or engage in a continuing educational program, subject to the conditions required by § 20-242, and such additional conditions as the board may set. Idaho Code § 20-242(1).

AUTHORITIES CONSIDERED:

Idaho Constitution

Idaho Const. art. 4, § 7

Idaho Const. art. 10, § 5

Idaho Statutes

Idaho Code § 19-2513A

Idaho Code § 2514

Idaho Code § 20-210

Idaho Code § 20-219 (Supp. 1986)

Idaho Code § 20-223

Idaho Code § 20-242, (1), (2), (3)

1970 Idaho Sess.Laws, ch. 143

1984 Idaho Sess. Laws, ch. 58

Idaho Cases

In re Prout, 12 Idaho 494, 86 P. 275 (1906)

Standlee v. State, 96 Idaho 849, 852, 538 P.2d 778, 781  
(1975)

State v. Rawson, 100 Idaho 308, 312-13, 597 P.2d 31, 36  
(1979)

Walker v. Nationwide Financial Corp. of Idaho, 102 Idaho  
266, 629 P.2d 662 (1981)

Poston v. Hollar, 64 Idaho 322, 132 P.2d 142 (1943)

Cases From Other Jurisdictions

State v. Scott, 352 S.E.2d 741 (W.Va. 1987)

Green v. Superior Ct., 132 Ariz. 468, 647 P.2d 166 (1982)

Other Authorities

Fla.Stat. § 944.598 (1985)

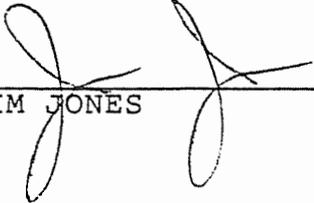
Texas Civil Stat., art. 6184o (1986)

Wash.Stat. § 9.94A.160 (Supp. 1987)

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DATED this 16<sup>TH</sup> day of July, 1987.

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