VOLUME NO. 37 OPINION NO. 82

BOARD OF PARDONS - Responsibilities and powers of the Board of Pardons in administering prisoner furlough program;

DEPARTMENT OF INSTITUTIONS - Responsibilities and powers of the Board of Pardons and Department of Institutions in administering the prisoner furlough program; PRISONER FURLOUGHS - Responsibilities and powers of the Board of Pardons and Department of Institutions in administering the prisoner furlough program; REVISED CODES OF MONTANA, 1947 - Section 95-2219, et seq.

HELD: 1. The Board of Pardons must adopt rules defining its procedures for reviewing furlough applications, and may in its discretion adopt rules interpreting and further defining the statutory criteria for its decisions. In deciding whether to approve or deny furlough applications, the Board of Pardons is required to consider the prisoner's furlough plans, criminal history, and pertinent case material. The board may adopt interpretive rules further defining the factors encompassed by these categories, including a rule which permits consideration of the time remaining on an applicant's sentence where the time relates to the appropriateness of the proposed furlough plan.

2. Unless the Department of Institutions has adopted reasonable rules prohibiting application by certain prisoners until a certain state of incarceration, a prisoner may make application for furlough and have his application promptly considered at any time during his incarceration. No rule may prevent a prisoner from applying for furlough at any time after he has served one-half the time required to be considered for parole.

3. The Department of Institutions, not the board, may make periodic review and revision of furlough plans a condition of individual furlough agreements.

4. The Board of Pardons shall solicit information about pertinent case material from officials and individuals in the sentencing community before deciding whether to approve or deny a furlough application. It is the responsibility of the Department of Institutions to notify and to obtain approval of law enforcement agencies to which the furloughee is released.

17 October 1977

Henry E. Burgess
Board of Pardons
Carroll College
Helena, Montana 59601

Dear Mr. Burgess:

You have requested my opinion regarding the following questions:

1. Under the prisoner furlough program, what are the rule-making responsibilities and powers of the Board of Pardons? Specifically, is the board required to adopt rules governing its procedures for consideration of furlough applications? May it also adopt rules specifying the criteria the board will consider in deciding whether to approve or deny furlough applications? May such criteria take account of the time remaining on an applicant prisoner's sentence?

2. When may a prisoner make application to participate in the furlough program?

3. May the board require that individual furlough plans be periodically reviewed or revised?

4. What is the extent of the board's responsibility for informing criminal justice authorities and members of the sentencing community about an application for furlough? Are special notification procedures permitted or required when life sentences are involved?

I

The prisoner furlough program, more accurately labeled a work and educational release program, is established pursuant to sections 95-2217 and 95-2226.1, R.C.M. 1947. Responsibility for administration of the program is delegated to both the Department of Institutions and the Board of Pardons. The division of responsibility has created some confusion concerning the respective authority of the department and the board.

The Legislature has given the Department of Institutions general responsibility for the furlough program, including rule-making responsibility. Sections 95-2219 and 95-2223, R.C.M. 1947. Within the framework of the department's general authority over the furlough program, the Board of Pardons is given responsibility for approving or denying individual applications to participate in the program, sections 95-2221(1), R.C.M. 1947, and for adjudicating requests for furlough revocation, section 95-2226.1, R.C.M. 1947. These are quasi-judicial functions, as defined in section 82A-103(9), R.C.M. 1947:

> "Quasi-judicial function" means an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies. The term includes, but is not limited to, the functions of interpreting, applying, and enforcing existing rules and laws; granting or denying privileges, rights, or benefits; issuing, suspending, or revoking licenses, permits, and certificates; determining rights and interests of adverse parties; evaluating and passing on facts; awarding compensation; fixing prices; ordering action or abatement of action; adopting procedural rules; holding hearings; and any other act necessary to the performance of a quasi-judicial function. (Emphasis added.)

The foregoing definition expressly recognizes that procedural and interpretive rule-making powers are incident to "quasi-judicial" functions such as those given the board under the furlough program. The board may therefore adopt both procedural rules and rules which interpret provisions of the Furlough Act.

Adoption of procedural rules by the board is mandatory. Although the board is generally exempted from the rule-making requirements and procedures of the Montana Administrative Procedure Act (MAPA), it is expressly subject to those MAPA provisions which require state agencies and boards to adopt procedural rules. Section 82-4202(1)(a), R.C.M. 1947 (as amended by ch. 285, Laws of 1977). Section 82-4203, R.C.M. 1947, enumerates those rules, providing in relevant part:

> * * * each agency shall:
> * * *
> (b) adopt rules of practice, not inconsistent with statutory provisions, setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency.

Pursuant to this provision, the board is required to adopt rules governing all procedures and proceedings for the submission and review of furlough applications and describing all forms and instructions used by the board in connection therewith.

Several procedural rules are already prescribed for the board by statute. Section 95-2221(1), R.C.M. 1947, provides:

> At the meeting of the board following the signing of any prisoner's application the board shall approve or deny the application of each prisoner after careful study of the prisoner's furlough plans, criminal history, and all other pertinent case material. The following rules shall be observed when the board meets to consider an application:
> (a) each applicant may call two (2) witnesses from outside or inside the institution to testify as to the applicant's general attitude, participation in self-help activities, or his character or job references;
> (b) an applicant may remain present during the board proceedings on his application; however, the board may meet in executive session without the applicant for final decision on the application;
> (c) the board shall cause the applicant to be notified of its decision immediately and shall provide the applicant with a written decision including a thorough statement of the reasons for the decision within two (2) days following adjournment;
> (d) each applicant shall be viewed singly, and shall be recognized as an individual;
> (e) each applicant shall be allowed to discuss any specific problem areas with any member of the board.

The board cannot vary or disregard these statutory procedures and should incorporate them in any procedural rules it adopts. The board must adopt rules describing any further procedural requirements or safeguards and forms and instructions it intends to use for furlough applications.

The adoption of interpretive rules is discretionary rather than mandatory. Standards applicable to the review of furlough applications are provided by section 95-2221(1), R.C.M. 1947, which directs the board to approve or deny an application "after careful study of the prisoner's furlough plans, criminal history, and all other pertinent case material." The standards are general ones and the board may adopt rules which more precisely define each of the three factors it must consider in its decision process, such rules being "interpretive" ones, see section 82-4202(2), R.C.M. 1947.

Whether the board adopts interpretive rules or proceeds on an ad hoc decisional basis, the board must consider all of the statutory factors set forth in section 95-2221(1) and permit the introduction of relevant evidence bearing on them. Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 612, 94 L.Ed. 38, 70 S.Ct. 403 (1950). Since the statute mandates consideration of all three factors, the board cannot adopt any rule or make any decision based upon the consideration of any single factor or upon any criteria other than the statutory ones. It is axiomatic that "an administrative agency . . . has no power to create a rule or regulation that is out of harmony with the statutory grant of its authority." Ruiz v. Morton, 462 F.2d 818, 822 (9th Cir. 1972), aff'd, 415 U.S. 199, 39 L.Ed. 2d 270, 94 S.Ct. 1055 (1974). The board may not adopt any criterion permitting the denial of an application on account of a single factor, such as the nature of the particular crime for which the applicant was sentenced or the amount of time remaining on the applicant's sentence. The board may adopt or apply criteria which are related to and are encompassed within the three statutory factors which the board must consider under section 95-2221(1). For example, the board might adopt a rule further defining criminal history as including the applicant's prior criminal history, the nature of the crime for which he is currently incarcerated, and the circumstances which have led to his prior criminal acts.

In deciding what matters are encompassed within the category "other pertinent case material," the board must be guided by

the purpose of the furlough program and the nature of the board's responsibilities thereunder. The general purpose of the program is to rehabilitate, educate, train and gainfully employ prisoners, while increasing their responsibility to society, section 95-2217, R.C.M. 1947, without unduly endangering the public, see section 95-2226.1(2) & (3), R.C.M. 1947. The criteria adopted by the board must relate to matters concerning the applicant's background which bear upon whether the applicant will benefit from the furlough program without unduly endangering the public.

The final part of your first question asks whether in deciding to approve or disapprove furlough applications the board may adopt a specific criterion taking into account the remaining time on the applicant's sentence. I have already pointed out that the board may not base its decisions on any single factor but must weigh all three statutory standards. Furthermore, any denial of an application based solely on the time remaining on the applicant's sentence would violate an explicit legislative policy that after serving one-half of the time required for parole eligibility, a prisoner is eligible for participation in the furlough program, section 95-2220, R.C.M. 1947, and see infra, page 6.

However, time remaining on an applicant's sentence has direct relevance to determining whether a particular furlough plan is appropriate and should be approved. A short term plan may be unsuitable for an applicant who has a long term wait before reaching parole eligibility. The time remaining on the applicant's sentence taken together with the nature of his past crimes and past inability to adjust in free society may indicate that a particular long term program is inappropriate. The board may consider the length of sentence in this context. Finally, since the Board of Pardons is attached to the Department of Institutions "for administrative purposes only," section 82A-804, R.C.M. 1947, and must "exercise its quasi-judicial * * * functions independently of the department and without approval or control of the department," section 82A-108, R.C.M. 1947, it alone has the authority to promulgate rules governing procedures for the review of furlough applications. The board must exercise its independent judgment in approving and denying applications. The interpretation and application of the statutory standards of review are subject neither to the control nor direction of the department, although the board's decisions are ultimately reviewable by the department under sections 95-2219(4) and 95-2221(e)(7), R.C.M. 1947.

II

Your second question concerns the time at which a prisoner may apply for a furlough. That time is set forth in section 95-2220, R.C.M. 1947, which provides:

> Any prisoner confined in the state prison except a prisoner serving a sentence imposed under 95-2206(3) may make application to participate in the furlough program at least by the time the inmate has served one-half of the time required to be considered for parole. (Emphasis added.)

The present language was adopted in 1975 by section 4 of chapter 496, Laws of 1975, with the exception of the words, "except a prisoner serving a sentence imposed under 95-2206(3)," which were added by chapter 580, Laws of 1977.

Section 95-2220 has been construed and interpreted by a prior Attorney General's opinion found at 36 OP. ATT'Y GEN. NO. 19 (1975), which held that under section 95-2220:

> A prisoner may apply for participation in the work furlough program at any time but he is not eligible for release on work furlough until he has completed half of the time required by eligibility for parole. (Emphasis added.)

The District Court in Hawkins v. State, No. 40222, First Judicial District (1977) held that this interpretation was erroneous:

> 4. Section 95-2220, R.C.M. 1947, does not require that an inmate have served one-half of the time required to be served to be eligible for parole in order to have his application for work furlough submitted and considered by the Board of Pardons.
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> 5. In the event applicant inmate's application for work furlough is approved by the Board of Pardons in accordance with section 95-2221, applicant may be released on work furlough prior to having served one-half the time required for parole consideration.

Section 95-2220 expressly concerns the time at which a prisoner may apply for a furlough, that time being "at least by the time the inmate has served one-half (1/2) of the time

required to be considered for parole." The language of section 95-2220 must be construed in such a way that each of its components has some meaning, vitality and effect. Burritt v. City of Butte, 161 Mont. 530, 534, 508 P.2d 563 (1973). The words "at least" can be given vitality only by reading the section to mean that any application submitted before the designated half-way point may be accepted and considered, but any application submitted after that time must be accepted and considered upon its merits. There is no administrative discretion as to whether or not to accept application after the designated half-way point, but there is discretion to require prisoners to have served a minimum portion of their sentence, up to the half-way point, before they become eligible to apply for furlough. The authority to impose a minimum time requirement is with the department rather than the board. The board's role under the furlough program is limited to adjudications of the merits of applications for furlough or furlough revocation, while the department is given broad and comprehensive power, including rule-making authority, over all other aspects of the furlough program. Sections 95-2219 and 95-2223, R.C.M. 1947.

Determination of what time prior to the half-way point, if any, a prisoner may submit a furlough application is not susceptible to a case-by-case, quasi-judicial determination, but is legislative in nature. Any minimum time prerequisite to eligibility for furlough must be imposed, if at all, by rule. At the present time the department has no rule restricting the time by which application may be made and since section 95-2220 does not by itself prescribe a minimum time, any prisoner other than one sentenced under section 95-2206(3), may apply for a furlough. Hawkins v. State, supra.

If in the future the department decides to adopt a requirement that prisoners serve a minimum portion of their term before they may apply for furlough, it must do so upon some articulated rational basis relating to the objectives of the program. The Legislature could easily have written a blanket, minimum time requirement into the statute. By using words of discretion, the Legislature intended that the department should apply its practical experience in deciding the time at which prisoners should be considered for furlough. As an example of a permissible basis for a rule, the department's experience may indicate that the purposes of the furlough program are best served by requiring perpetrators of certain violent offenses to wait the full one-

half time to parole eligibility before they may apply for furlough. While experience with other classes of convicts may indicate that such prisoners would benefit from the program much earlier in their incarceration.

III

Your third question asks whether the board may require individual furlough plans to be periodically reviewed or revised.

The board's role under the Furlough Act is adjudicatory. See supra, page 2. Its function is to determine whether the applicant is a good candidate for furlough under the general plan or program he proposes. Once approval is given, the board's role ends and the department takes over. The department is given responsibility for finding a supervising agency for the furloughee, section 95-2221(3), R.C.M. 1947, and is responsible for fashioning the terms and conditions of release in a written agreement, section 95-2221(3), R.C.M. 1947. "Final authority in all matters pertaining to prisoner furloughs is in the department." Section 95-2221(5), R.C.M. 1947. These explicit provisions give the department authority and control over the particulars and details of furlough plans and indicate that the boards quasi-judicial function does not extend to conditioning its approval of any furlough plan upon the incorporation of any particular term or condition in the plan.

Although the board cannot require periodic review and revisions of a furlough plan, the foregoing recitation of the department's responsibilities and powers establishes that the department has the power to attach such terms and conditions to furlough plans. Section 95-2221(3), R.C.M. 1947, provides in relevant part:

> The supervising agency, the department, and the applicant shall enter into a written agreement setting out the conditions and purposes of the furlough and specifying the responsibility assumed by each of the parties.

The repositing of "final authority in all matters" with the department, section 95-2221(5), R.C.M. 1947, makes it the final judge of the terms agreements will contain. Although the Legislature has not specified what types of conditions may be attached to furlough agreements, in light of the

purpose of the furlough provisions, the department may include any conditions which further the purposes of the furlough program.

Periodic review, particularly of lengthy furloughs, is a reasonable and necessary response to the possibility of future changes which may affect the purpose and efficaciousness of the plan.

IV

Your final question concerns the responsibilities of the board to notify the community from which a prisoner was sentenced that the prisoner has applied for a furlough.

The only statutory requirement for notification is found in section 95-2221(6), R.C.M. 1947, which provides:

> When an inmate is to reside in the county or tribal jail, the consent of the sheriff or tribal chief of police in the receiving county or reservation is necessary. However, when the inmate is to reside in a community corrections center or some other supervised setting the sheriff or tribal chief of police of the receiving county or reservation shall be notified.

This notification is mandatory but concerns notification only of the law enforcement officials in the receiving community. It is not clear whether the duty to notify falls upon the board or the department. In view of the provisions in section 95-2221 and the department's overall responsibility in locating a supervisory agency and executing a furlough agreement, the duty is the department's. A supervising agency is located by the department only after the board approves the application, section 95-2221(2), R.C.M. 1947, and the board's functions end.

The department has adopted a rule which provides in part:

> The board shall have the responsibility to notify receiving county sheriff and sentencing judge of the release of the furloughee.

Montana Administrative Code, § 20-2.4(1)--S470. Although the rule does not seek to control the Board of Pardons in exercising its quasi-judicial or quasi-legislative functions, it does interfere with the board's autonomy and

improperly delegates the department's responsibility of notification under section 95-2221(b). It is my opinion that this rule is invalid.

The furlough program does not require notification to the community from which the applicant was sentenced either before or after approval of the application. However, individuals and officials in the sentencing community may possess information about the applicant's past activities which could be considered "pertinent case material" relevant to the furlough decision. In particular, the prosecuting attorney may possess such information. In fulfilling its duty to carefully study "pertinent case material," it is my opinion that the board should adopt a policy of notifying those individuals in the sentencing community who are likely to have information about a prisoner's past and may request them to furnish relevant information concerning the applicant. This policy is consistent with the statement of principal contained in section 95-2223(2), R.C.M. 1947:

> All state, county and local agencies shall be encouraged to co-operate in the administration of the furlough program.

If the board also concludes that certain classes of prisoners (e.g., those convicted of violent crimes, or those sentenced to life sentences), should have their case histories subjected to closer scrutiny than is necessary for other classes of applicants, it may adopt a policy of giving public notice through a local newspaper to the sentencing community that a prisoner has applied for a furlough. However, mere community "sentiment" concerning furlough of the prisoner is not "pertinent case material" and the board has no authority to solicit or consider such sentiment.

THEREFORE, IT IS MY OPINION:

1. The Board of Pardons must adopt rules defining its procedures for reviewing furlough applications, and may in its discretion adopt rules interpreting and further defining the statutory criteria for its decisions. In deciding whether to approve or deny furlough applications, the Board of Pardons is required to consider the prisoner's furlough plans, criminal history, and pertinent case material. The board may adopt interpretive rules further defining the factors encompassed by these categories, including a rule which permits

consideration of the time remaining on an applicant's sentence where the time relates to the appropriateness of the proposed furlough plan.

2. Unless the Department of Institutions has adopted reasonable rules prohibiting application by certain prisoners until a certain stage of incarceration, a prisoner may make application for furlough and have his application promptly considered at any time during his incarceration. No rule may prevent a prisoner from applying for furlough at any time after he has served one-half the time required to be considered for parole.

3. The Department of Institutions, not the board, may make periodic review and revision of furlough plans a condition of individual furlough agreements.

4. The Board of Pardons shall solicit information about pertinent case material from officials and individuals in the sentencing community before deciding whether to approve or deny a furlough application. It is the responsibility of the Department of Institutions to notify and to obtain approval of law enforcement agencies to which the furloughee is released.

Very truly yours,

MIKE GREELY
Attorney General