



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

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ATTORNEY GENERAL

June 19, 1975

OPINION LETTER NO. 127

Mr. Lawrence L. Graham, Director
Department of Social Services
Broadway State Office Building
Jefferson City, Missouri 65101

Dear Mr. Graham:

This is in reply to your request for an opinion of this office concerning the statutory construction of Section 216.224 (1), RSMo Supp. 1973. Section 216.224(1) reads as follows:

"The director of the department of corrections may extend the limits of the place of confinement of an inmate who, he has reasonable cause to believe, will honor his trust, by authorizing him, under prescribed conditions, to visit specifically designated places within the state for a period not to exceed thirty days per year and to return to the same or another designated institution. The authority herein conferred may be exercised to permit the inmate to visit a relative who is ill, to attend the funeral of a relative, to obtain medical services not otherwise available, to contact prospective employers and to participate in approved rehabilitation programs. If the inmate is enrolled in a work release program the thirty day per annum limitation shall not apply."

Your specific question in regard to the foregoing statute is whether the director of the Division of Corrections can delegate his authority to grant furloughs pursuant to Section 216.224 to the warden or superintendent of the various institutions within

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the division. Our research leads us to the conclusion that the director of the Division of Corrections may not delegate his authority to grant furloughs under the statute to the warden or superintendent of the institutions within the division.

The language of Section 216.224(1) states that the director of the Department of Corrections may extend the limits of the place of confinement of an inmate who he (the director) has reasonable cause to believe will honor his trust. An act which requires the exercise of judgment in its performance on the part of a state official or an act which a public officer may or may not do in the exercise of his official discretion is not ministerial but rather discretionary. In the case of State on inf. Gentry v. Toliver, 287 S.W. 312 (Mo. Banc 1926), the Missouri Supreme Court specifically held:

" . . . An act which an officer may do or may not do, in the exercise of his official discretion; cannot be considered a ministerial act." Id. at 316

See State ex rel. Folkers v. Welsch, 124 S.W.2d 636 (St.L.Ct.App. 1939); State ex rel. Funk v. Turner, 42 S.W.2d 594 (Mo. 1931). In other words, if the public officer has an alternative (to do the act or not to do it) or a choice in the matter, then the act is a discretionary one. There is no doubt that under the provisions of Section 216.224(1) the director of the Division of Corrections is given the discretion to furlough inmates if he desires to do so. In this light there can be no question but that the authority of the director to furlough inmates is a discretionary matter.

Once having established that the furlough of inmates is a discretionary action of the director under the statute, the question becomes one of whether or not the director may delegate his authority pursuant to Section 216.224 to the warden or superintendent of the institutions under his control. It is well-settled law that state officers may not delegate the exercise of their discretion. Discretion that is within the power granted to a particular state official cannot be controlled by other state officers. See State ex rel. Thrash v. Lamb, 141 S.W. 665 (Mo. Banc 1911). In the case of State ex rel. Skrainka Const. Co. v. Reber, 126 S.W. 397 (Mo. Banc 1910), the Missouri Supreme Court specifically held:

" . . . An officer to whom a discretion is intrusted by law cannot delegate to another the exercise of that discretion, . . ."
Id. at 399

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See State ex rel. Griffin v. Smith, 258 S.W.2d 590 (Mo. Banc 1953); Powers v. Kansas City, 224 Mo.App. 70, 18 S.W.2d 545 (K.C.Mo.App. 1929); Sheehan v. Gleeson, 46 Mo. 100 (1870). In light of the controlling case law in this state, it is clear that the director of the Division of Corrections may not delegate to the warden or superintendent of the institutions under his control the discretion vested in him by the statute to determine whether or not an inmate should be granted a furlough. Of course, the director may seek the advise and counsel of the warden and superintendents in determining which inmates should be granted furloughs, but the ultimate decision under the statute rests with the director and cannot be delegated to his subordinates.

In light of the above conclusion, I do not believe that it is necessary to specifically answer the additional question presented in your request concerning the use of the director's name stamp at each institution.

Very truly yours,



JOHN C. DANFORTH
Attorney General