

February 12, 1996

Ms. Olivia Craven
Executive Director
Commission of Pardons and Parole
STATEHOUSE MAIL

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Request Regarding Voting by the Executive Director

Dear Ms. Craven:

This is in response to your questions regarding the ability of the Executive Director for the Commission of Pardons and Parole (the Commission) to vote on matters brought before the Commission. You state that during a July 1995 meeting of the Board of Corrections (the Board), the Board granted the executive director the authority to vote with the Commission under the following circumstances:

1. When a majority of the Commission (three) cannot be present at a hearing session.
2. When there are three members present, but they cannot reach a consensus or when one member present has to disqualify himself.

Your concern is that, absent an ability by the executive director to vote in these situations, hearings will have to be continued, the Commission's workload will increase and certain prisoner releases will be delayed. With this understanding of the facts, we make the following comments.

Under Idaho Code § 20-210, the members of the Commission are appointed by the Board, subject to the advice and consent of the Idaho State Senate. This statute further provides that the Commission will be comprised of five (5) members, no more than three (3) of whom shall be of the same political party. In selecting members of the Commission, the legislature required that the Board give due consideration to "their experience, knowledge and interest in sociology, psychology, rehabilitative services and similar pertinent disciplines." In accordance with Idaho Code § 20-210, the Commission was given all rights, powers and authority of the board of pardons under art. 4, sec. 7 of the Idaho Constitution and was also charged with acting as the advisory commission to the Board on issues of adult probation and parole.

Prior to 1994, Idaho Code § 20-210 provided that each year the members of the Commission were to select a chairman and a vice-chairman. However, in that year the

legislature amended the statute to delete any references to a chairman or vice-chairman and to add language expressly recognizing the office of executive director for the Commission. 1994 Idaho Sess. Laws 382. As amended, Idaho Code § 20-210 specified that the executive director would be appointed by the Board, be a full-time employee and would report to, and serve at the pleasure of, the Board. The executive director was designated the official representative of the Commission and was given the authority and responsibility of managing and administering the daily activity of the Commission and scheduling Commission hearings. The statute empowered the executive director to designate any Commission member as the presiding officer for any given Commission hearing. In addition, as amended, Idaho Code § 20-210 allowed the executive director to have such other duties and responsibilities as the board chose to assign to the office.

You indicate in your letter that at some prior point in time the office of executive director was titled executive secretary and that the person occupying the office was a member (presumably a voting member) of the Commission. Apparently, such a situation existed under a Board rule or informal arrangement since, in researching the legislative history of applicable provisions of title 20, chapter 2, Idaho Code, I was unable to locate any statutory reference to an executive secretary or the scenario you mention. Of course, if such a situation had been established by legislation, the legislature's 1994 amendment of Idaho Code § 20-210 to provide for the position of executive director without expressly making such person a member of the Commission would be strong evidence that the legislature did not intend for the executive director to be a member of the Commission or be entitled to exercise any right to vote as a commissioner.

In granting the executive director the authority to vote at Commission hearings under the circumstances you specify in your letter, the Board presumably relied upon the language of section 20-210 which states that: "The executive director shall also have such other duties and responsibilities as the board shall assign." While the Board may have broad discretion in utilizing this language to empower the executive director with wide latitude in carrying out various Commission matters, the language cannot be used to usurp the authority of the Commission or to ignore clear statutory provisions and justify the appointment of the executive director to what amounts to being a de facto member of the Commission. *See Mellinger v. Idaho Dept. of Corrections*, 114 Idaho 494, 500, 757 P.2d 1213, 1219 (Ct. App. 1988) (executive director not a member of Commission but is Commission's spokesperson and may be delegated authority to approve, on behalf of Commission, Board-recommended parole conditions).

While members of the Commission are appointed by the Board, by law each appointment is subject to the advice and consent of the senate. Furthermore, the legislature has clearly provided that there are to be exactly five (5) members of the Commission, no more than three (3) of whom can be from any one political party. Finally, each member must possess certain experience, knowledge or interests as specified in Idaho Code § 20-210. If the Board is allowed to, in effect, appoint a sixth

member to the Commission in the form of the executive director, who could vote as a tie-breaker or in situations where a quorum is lacking or a disqualification has occurred, these statutory requirements would be thwarted. There would be no senate oversight on the selection of this sixth Commission “member” nor would there be any guarantee that the statutory limitation on party affiliation was complied with or that the executive director met the other qualifications for commissioners imposed by Idaho Code § 20-210.

The executive director’s proper function is in facilitating Commission hearings and other business and in implementing decisions of the Commission. In this capacity, the executive director acts solely in an administrative role. While the executive director may, and should, attend meetings and hearings of the Commission (Idaho Code § 20-213A(4)), only Commission members duly appointed and confirmed pursuant to section 20-210 have the lawful authority to vote on matters brought before the Commission.

While we understand that allowing the executive director the power to vote under the circumstances outlined in your letter would perhaps expedite and facilitate Commission hearings, the current statutory scheme does not permit such an arrangement. If such an arrangement would be beneficial, legislation should be requested authorizing it.

Very truly yours,

ROGER L. GABEL
Deputy Attorney General
Civil Litigation Division