GOVERNOR:

DEPARTMENT OF CORRECTIONS:

Governor of State has no authority to create position of Administrator of Safety and Fire Prevention in absence of statutory or constitutional authority to do so.

January 20, 1956

Honorable Phil M. Donnelly
Governor, State of Missouri
Jefferson City, Missouri

Dear Governor Donnelly:

This will acknowledge receipt of your request inquiring if the Governor of this state is vested with authority to set up the position of Administrator of Safety and Fire Protection who will be responsible to the Director of Corrections and who will have supervision over safety and fire prevention and will also recommend a plan and program. Also may available appropriated funds be used for this purpose without an enabling act by the Legislature.

We have found very little authority in this state relative to the authority of the Governor to create such position.

Section 1, Article IV of the Constitution of Missouri vests in the Governor of the state the supreme executive power.

The Department of Corrections is a part of the Executive Department of the State of Missouri. Section 12, Article IV, Constitution of Missouri provides that the Executive Department shall consist of all state elected and appointive officials and employees, except those in the legislative and judicial departments. In addition thereto it further provides for other elective officials specifically naming certain departments of the state and concludes by permitting such additional departments, not exceeding five in number, as may hereinabove be established by law.

Section 2 of Article IV of the Constitution prescribes the duties of the Governor of this state, that he shall take care that the laws are distributed and faithfully executed and shall be the conservator of peace throughout the state.

Article III of the Constituion of Missouri provides for three distinct departments of government: judicial, executive

and legislative. Furthermore, that the powers properly belonging to any one of them shall not be exercised by the other departments.

Section 19, Article IV of the Constitution provides for the selection and removal of personnel in the departments of the government; that the head of each department may select and remove all employees of the department except as otherwise provided by law. It specifically provides that all employees of penal institutions shall be selected on a basis of merit.

Section 27, Vol. 67, C.J.S., page 156, reads, in part, as follows:

> "In the absence of constitutional provisions, the method of filling offices is to be determined by the legislature. An office created by the legislature is wholly within that body's power, and it may prescribe the mode of filling the office, and, if the statute creating the office provides how it shall be filled, it must be filled in that manner."

Volume 81, C.J.S., Section 60, page 982, reads, in part, as follows:

> "The governor has no prerogative powers, but possesses only such powers and duties as are vested in him by constitutional or statutory grant. The extent and exercise of the governor's powers under statute will depend on the particular provisions thereof. * * * * * *"

In Tucker vs. State, 35 N.E. 2d. 270, l.c. 291 and 292, we find the following declaration as to the powers of the Governor:

> "Governors are almost always vested with the executive powers of the state. That the executive power is the power to execute the laws, to carry them into effect as distinguished from the power to make the laws and the power to judge them, and that the power to appoint the subordinate officers and employees through whom the laws are executed

> is a necessary incident to the power to execute the laws, * * * * * *
>
> "* * * *The creation of the offices is a legislative function. The appointment of officers is an executive function. * * * * * *"

In State ex rel. Rosenthal v. Smiley, 263 S.W. 825, 304 Mo. 549, the court held only the Legislature has power to create a public office, other than a constitutional office, as an instrumentality of government.

In re Opinion of the Justice, 32 So.(2d) 539, 249 Ala. 637, it was held the Governor could not appoint members to an interim committee in the absence of statutory authority.

Chapter 36, RSMo 1949, relates to the merit system in the State of Missouri. Section 36.030, Subsection 2 thereof, makes the provisions of said chapter applicable to all officials, positions and employees, of the State Department of Public Health and Welfare and the State Department of Corrections. Sections 36.100, 36.110, and 36.120, RSMo 1949, provides that the Director of the Division of Personnel shall allocate each position and classify same. Section 36.240, RSMo 1949, provides that the appointing authorities shall choose from the three highest ranking, available, eligibles certified to him by the Director. The present method of selection and appointment of officers and employees is entirely different from former methods.

Chapter 216 and 217, RSMo 1949, provides for the appointment of chief administrative officers of the Department of Corrections by the Director thereof and in some instances such authority is vested in other officials, not the Governor, however, except that the Governor does appoint the Director of the Department by and with the advice and consent of the Senate.

It is apparent that the general and accepted rule that a public official has only such authority as may be specifically granted by the statute and Constitution of this state, applies, likewise, to the Governor of the State.

The General Assembly in passing enabling legislation creating the Department of Corrections specifically provided

for the appointment of certain officials and prescribed their official duties. Evidently that body was of the opinion it was the duty and obligation of the General Assembly to do so. Furthermore, if the Governor of this State could at any time create an office or position and prescribe its official duties pertaining to same, it can be seen, there is a probability that in so doing, there might be a conflict of duties and responsibilities.

CONCLUSION

Therefore, it is the opinion of this department that the Governor of this state is not vested with such authority to create the position of Administrator of Safety and Fire Protection within the Department of Corrections in the absence of any statutory or constitutional authority to do so. In view of this conclusion we deem it unnecessary to discuss the question relating to the use of available appropriations for this purpose.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Aubrey R. Hammett, Jr.

Very truly yours,

John M. Dalton
Attorney General

ARH:mw:hw