

Testimony on HB 2260
to
The House Judiciary Committee

By Ray Roberts
Secretary
Kansas Department of Corrections
February 14, 2011

The Department of Corrections appreciates the role that religion holds in the life of persons in the department's custody and seeks to accommodate the diverse religious beliefs and practices of inmates and paroled offenders within the parameters of the department's responsibility to protect the safety and security of incarcerated persons, staff, and visitors; and maintain good order and discipline within correctional facilities and protect public safety through the supervision of released offenders. The department, however, has a concern regarding HB 2260. A proposed balloon amendment addressing that concern is attached.

HB 2260 provides for a two part test regarding whether a governmental entity's action that burdens a religious practice would be lawful under HB 2260. First, the action must be related to a "compelling governmental interest" and secondly, the government's action must achieve that interest in the "least restrictive manner". While HB 2260 defines rules pertaining to correctional institutions as constituting a "compelling governmental interest", HB 2260 does not include the supervision of released offenders as per se constituting a compelling governmental interest. Most troubling to the department however, is that even though HB 2260 designates matters involving correctional institutions as compelling interest, the bill nonetheless subjects the department and its operational rules to a "least restrictive manner" test.

Unfortunately, it is the "least restrictive manner" prong of the test that gives rise to litigation and the substitution of judicial opinions for those of correctional officials. The least restrictive manner test has resulted in differing opinions being issued by federal district courts, federal courts of appeal and ultimately the United States Supreme Court as to whether a correctional official's action was the least restrictive method to accomplish a compelling interest. As pointed out in the department's testimony on this bill last session, the United States Supreme Court reject the "least restrictive manner" test for analyzing the relationship between religious practices and correctional operations due to its being unworkable. See *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) which is discussed in the testimony of last session.

The Department urges that HB 2260 be amended to provide an exception for the operation and management of correctional facilities and persons under release supervision from the least restrictive manner test.

HOUSE BILL No. 2260

By Committee on Judiciary

2-9

1 AN ACT concerning civil procedure; relating to exercise of religion.

2
3 *Be it enacted by the Legislature of the State of Kansas:*

4 Section 1. As used in the Kansas preservation of religious freedom
5 act:

6 (a) "Burden" means any government action that directly or
7 indirectly constrains, inhibits, curtails or denies the exercise of religion by
8 any person or compels any action contrary to a person's exercise of
9 religion, and includes, but is not limited to, withholding benefits,
10 assessing criminal, civil or administrative penalties, or exclusion from
11 government programs or access to government facilities.

12 (b) (1) "Compelling governmental interest" includes, but is not
13 limited to:

14 ~~✓ (A) Any penological rules and regulations which are established by~~
15 ~~a jail or correctional institution to protect the safety and security of~~
16 ~~incarcerated persons, staff or visitors or to maintain good order and~~
17 ~~discipline in any jail or correctional institution; and~~

Delete

18 ~~(B) protecting the welfare of a child from all forms of cruelty,~~
19 ~~neglect, degradation and inhumanity.~~

20 (2) "Compelling governmental interest" shall not include prohibition
21 of a practice or policy of discrimination against individuals in
22 employment relations, in access to free and public accommodations or in
23 housing, except as set forth in K.S.A. 44-1001 et seq., and amendments
24 thereto, and the laws and constitution of the United States.

25 (c) "Exercise of religion" means the practice or observance of
26 religion under section 7 of the bill of rights of the constitution of the state
27 of Kansas and the first amendment to the constitution of the United States
28 and includes the right to act or refuse to act in a manner substantially
29 motivated by a sincerely-held religious tenant or belief, whether or not
30 the exercise is compulsory or a central part or requirement of the person's
31 religious tenants or beliefs.

32 (d) "Fraudulent claim" means a claim that is dishonest in fact or that
33 is made principally for a patently improper purpose, such as to harass the
34 opposing party.

35 (e) "Government" includes the executive, legislative and judicial
36 branches and any and all agencies, boards, commissions, departments,

1 districts, authorities or other entities, subdivision or parts whatsoever of
2 state and local government as well as any person acting under color of
3 law.

4 (f) "Person" means any legal person or entity under the laws of the
5 state of Kansas and the laws of the United States.

6 Sec. 2. (a) Government shall not substantially burden a person's
7 exercise of religion even if the burden results from a rule of general
8 applicability, unless such government demonstrates, by clear and
9 convincing evidence, that application of the burden to the person:

10 (1) Is in furtherance of a compelling governmental interest; and

11 (2) is the least restrictive means of furthering that compelling
12 governmental interest.

13 (b) A person whose exercise of religion has been burdened, or is
14 substantially likely to be burdened, in violation of this act, may assert
15 such violation as a claim or defense in a judicial proceeding. A court may
16 grant appropriate relief as may be necessary including:

17 (1) Injunctive relief;

18 (2) protective order;

19 (3) writ of mandamus or prohibition;

20 (4) declaratory relief;

21 (5) actual damages; or

22 (6) costs and attorney fees determined by the court.

23 (c) Any person found by a court of competent jurisdiction to have
24 abused the protection of this act by making a fraudulent claim may be
25 enjoined from filing further claims under this act without leave of court.

26 Sec. 3. (a) Nothing in this act shall be construed to:

27 (1) Impair the fundamental right of every parent to control the care
28 and custody of such parent's minor children, including, but not limited to,
29 control over education, discipline, religious and moral instruction, health,
30 medical care, welfare, place of habitation, counseling and psychological
31 and emotional well-being of such minor children;

32 (2) authorize any relationship, marital or otherwise, that would
33 violate section 15 of article 15 of the constitution of the state of Kansas;

34 (3) authorize the application or enforcement, in the courts of the
35 state of Kansas, of any law, rule, code or legal system other than the laws
36 of the state of Kansas and of the United States;

37 (4) limit any religious organization from receiving any funding or
38 other assistance from a government, or of any person to receive
39 government funding for a religious activity to the extent permitted by the
40 laws and constitution of the state of Kansas and of the United States; or

41 (5) protect actions or decisions to end the life of any child, born or
42 unborn.

43 (b) This act applies to all government action including, but not

1 limited to, all state and local laws, ordinances, rules, regulations and
2 policies and to their implementation, whether enacted or adopted before,
3 on or after the effective date of this act. ✓

4 Sec. 4. Sections 1 through 3, and amendments thereto, shall be
5 known as and may be cited as the Kansas preservation of religious
6 freedom act.

7 Sec. 5. This act shall take effect and be in force from and after its
8 publication in the statute book.

Provided, however, this act shall not apply to government action including but not limited to penological rules, regulations, conditions or policies which are established by a jail, correctional institution, juvenile detention facility or an entity supervising offenders in the community that are reasonably related to the safety and security of incarcerated persons, staff, visitors, supervised offenders or the public; or to maintain good order and discipline in any jail, correctional institution or juvenile detention facility.