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Reply to: Florida

October 25, 2017

Via Facsimile

M. Travis Bragg, Warden
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RE: Chaplain request for religious accommodation and exemption from carrying OC weapons

Dear Warden Bragg:

By way of brief introduction, Liberty Counsel is a national non-profit litigation, education, and public policy organization with an emphasis on First Amendment liberties. With offices in Florida, Virginia, and Washington, D.C., and affiliate attorneys across the nation, Liberty Counsel provides *pro-bono* legal assistance to individuals, organizations, and government entities on a variety of issues regarding constitutional rights. The free exercise of religious belief in the public sector is at the core of Liberty Counsel's advocacy mission.

I write to request that you reconsider and rescind the recent directive at Federal Correctional Institution ("FCI") Bennettsville, requiring Chaplains M. Guncheon, L. Malcolm, R. Apollo, and other chaplains of like faith to carry oleoresin capsicum ("OC") spray. These chaplains face a conflict between their sincerely-held (and heretofore accommodated) religious beliefs about not carrying weapons while on duty and engaged in ministry, and recent actions by FCI Bennettsville administration in response to the "Eric Williams Correctional Officer Protection Act of 2015," 18 U.S.C.A. § 4049 ("the Act").

Threatened adverse employment action and termination should be withdrawn, and a local waiver reinstated. At a minimum, the Bureau of Prisons ("BOP") must provide a reasonable accommodation from compliance with the requirement and either waive the requirement altogether, as applied against the chaplains, or transfer the chaplains to a minimum or low security location.

Chaplain Program In General

I understand that BOP's central office Correctional Programs Division oversees religious services through its Religious Services Branch (RSB), which is charged with accommodating the free exercise of religion for inmates. The RSB must provide "pastoral care to all Federal inmates" and facilitate "opportunities to pursue individual religious beliefs and practices in accordance with law, Federal regulations, and Bureau of Prisons policy." Moreover, the RSB's mission charges the chaplain with the responsibility to provide "religious worship, education, counseling, spiritual direction, support and crisis intervention to accommodate the diverse religious needs of inmates." In carrying out their duties, chaplains must evaluate the religious needs of the inmates in light of "the security, safety, and good order of the institution."¹

Many BOP chaplains, including our clients, as a part of their own religious faith, feel called by God to minister among the inmate population without physical weapons of defense.² Prior to the Act, the "security, safety, and good order" of institutional management has never been held to require chaplains to carry offensive or defensive weapons. Prison chaplains have been analogous to military chaplains, in being explicitly *prohibited* from carrying weapons, or even taking weapons training.

Thus, in the armed forces, "chaplains do not bear arms in combat or in unit combat skills training." Chaplains function as "protected personnel under the Geneva Convention and are noncombatants as a matter of policy." Chaplain activities in religious support operations are "not to compromise the noncombatant status." See, e.g., Army Regulation 165-1, Army Chaplain Corps Activities, pg. 11. See *also* *Katcoff v. Marsh*, 755 F.2d 223, 226 (2d Cir. 1985) (chaplain "not required to bear arms or receive training in weapons" and is "accorded a non-combatant status").

In the prison context, BOP Technical Reference T5360.02, "Ministry of BOP Chaplains," provides that a chaplain's role is "primarily a pastoral one"; that "chaplains are expected to be present and available to inmates and to staff wherever needed;" chaplains "will not participate in firearms training"; that in "the event of an actual disturbance the professional skills of a chaplain will be applied in another way"; and that the "pastoral aspect of the chaplains' availability will be emphasized above all else." See T5360.02, p. 26.

Moreover, chaplain hiring procedures in BOP Program Statement CPD 3939.07, "Chaplains' Employment, Responsibilities, and Endorsements" provides that chaplains "are exempt from the [firearms training] requirement and will not participate in firearms training" during introductory training, but "in lieu of firearms training, applicants will complete the

¹ Enforcing Religious Freedom in Prison, UNITED STATES COMMISSION ON CIVIL RIGHTS, SEPTEMBER 2008, Pg. 82, available at <http://www.usccr.gov/pubs/STAT2008ERFIP.pdf>

² 2 Corinthians 10:4-5 – "(For the weapons of our warfare are not carnal, but mighty through God to the pulling down of strong holds;) Casting down imaginations, and every high thing that exalteth itself against the knowledge of God, and bringing into captivity every thought to the obedience of Christ"

cross development series on chaplaincy or an equivalent study course.” See BOP CPD 3939.07, “Hiring Procedures for Initial Appointment to Chaplaincy,” pg. 5. In CPD 3939.07, the pastoral role is paramount, with over twelve instances of the words “pastoral” and “ministerial.” “At a minimum, Chaplains in institutions are required as a function of their ministry to . . . be assigned posts which are consistent with their pastoral role.” CPD 3939.07, pg. 13, Duties and Schedules of Staff Chaplains, at 12(d).

Indeed, the response of a chaplain to an emergency, in the chaplain’s pastoral role, has often resulted in the avoidance of violence, because prisoners trust unarmed chaplains as neutral advocates acting in a spiritual, not coercive, capacity. Chaplains hold a reputation among the inmate population as “men of God” and “people of faith,” and it is almost unheard of for chaplains to be subjected to assault by inmates. For instance, in 2009, there was a riot in the recreation yard, and the inmates protected a chaplain by posting up around the chapel – Muslim, Christian, and Buddhist inmates together.

In our client chaplains’ experience, they have never engaged in physical violence with prisoners, but have at all times acted consistent with their pastoral and ministerial role, in their response to emergencies. BOP has recognized these facts in past policy and procedure. Chaplains are not expected to go “hands-on” with, or even escort, prisoners as part of their work environment duties.

Interpretation of the Act

On its face, the Act simply does not require every BOP employee to carry OC spray, and certainly not chaplains. The Act’s title itself states that “officers and employees of the Bureau of Prisons” are “**authorized** to carry oleoresin capsicum spray.” (Emphasis added). The “authorization” (not “mandatory requirement”) of the title is carried into the operative language of the Act: “**In general**” the “Director of the Bureau of Prisons shall issue, **on a routine basis**, oleoresin capsicum spray to” “(1) any officer or employee of the Bureau of Prisons who (A) is employed in a prison that is not a minimum or low security prison; and (B) **may respond to an emergency situation in such a prison**; and “(2) **to such employees of prisons as the Director determines appropriate**, in accordance with this section.” Chaplains are just “such employees” which are not appropriate for weapons carry and training, if their faith tradition and conscience do not allow it. Certainly not everyone working “beyond the grille” is required to carry OC spray, and in fact contractors do not, either.

In parsing the language of the Act, consistent with the role of chaplains within the BOP system, it is clear that the Act does not require chaplains to carry OC spray. The Act’s language relating to “authorization,” “in general” and “routine basis” implies that while the general rule is that OC spray be made available, it is not always required, and there are exceptions to the general rule. As set forth above, chaplains have long been the exception recognized by the BOP, and BOP has never required chaplains to carry offensive or defensive weapons in the past as part of their duties, nor to take part in active weapons training, but merely to observe it. Finally, chaplains do not “respond” to emergency situations with the use of force, but rather *in their pastoral role*, in the provision of counsel,

and relational, trust-based persuasion, as ministers to the spiritual needs of prisoners. Prisoners have great respect for chaplains operating in this capacity, and chaplains have found that they do not need offensive or defensive weapons.

Further, on information and belief, the following other prisons within the BOP system have not required chaplains to carry OC: MDC Brooklyn, New York (high security prison where the pilot program for OC spray started in the BOP); FMC Devens, Massachusetts (high security); FCC Phoenix, Arizona (high security); FCI Talladega, Alabama (medium security); FCI Memphis, Tennessee (medium security), and possibly others.

Chronology of Events

Turning from this context, I understand the following factual chronology to be true regarding the OC spray requirement and objecting chaplains at FCI Bennettsville:

1. The OC spray pilot program began in 2015 at high security prison MDC Brooklyn, N.Y., but chaplains were exempted.
2. Washington, D.C., BOP Central Office January 2016 Chaplaincy Services Bulletin stated as follows:

OC Spray Guidance: The Central Office Chaplaincy Services Branch expects all chaplains to adhere to the mandatory wearing of the vests at high security institutions, detention centers, and facilities with jail units. **We also appreciate and support the fact that Chapels/Chaplains were not designated as posts required for OC Spray and understanding why many chaplains feel that carrying OC Spray could diminish their pastoral identity within the institution.** While chaplains are correctional workers first, **the pastoral identity of chaplains is a sacred trust and we should be careful to not engage in any activity that might compromise that trust.** The safety and security in institutions is first and foremost to the Branch. (Emphasis added).

3. Eric Williams Correctional Officer Protection Act of 2015 becomes effective March 9, 2016.
4. BOP issues OC spray policy dated February 6, 2017, but it contains no specific exemption for chaplains.
5. Local exemption memo signed by Warden Bragg dated March 22, 2017 authorizes chaplains not to carry OC at FCI Bennettsville, S.C., but this local exemption is rescinded a week later.
6. Chaplains Apollo, Guncheon and Malcolm submit waiver requests dated March 30, 2017.

7. Religious accommodation request is denied June 22, 2017, but not issued to chaplains until July 2017. No attempt is made at FCI Bennettsville for a reasonable religious accommodation.
8. Marshall Project prints article on September 24, 2017, regarding BOP chaplains not being given an exemption from carrying OC spray, available at <https://www.themarshallproject.org/tag/chaplains>.
9. Attorney General Sessions, on October 6, 2017, issues two memos regarding President Trump's instruction that DOJ give guidance and interpretation on religious rights in the federal workplace.
10. The above chaplains asked BOP/FCI Bennettsville to reconsider their religious accommodation request, in light of the Attorney General's memo and guidance.
11. On October 11, 2017, the chaplains were told by FCI Bennettsville that they would not be accommodated, that "you are correctional workers first, and it's the law" that they carry OC spray. The chaplains were told that "If you do not carry the weapon by October 25, 2017, you will be sent home on leave without pay, and eventually terminated."

The guidance of Attorney General Jeff Sessions issued **October 6, 2017**, should not be ignored by BOP. As Attorney General Sessions stated regarding "Implementation of Memorandum on Federal Law Protections for Religious Liberty,"

- All Department components . . . shall, effective immediately, incorporate the interpretative guidance in . . . all . . . aspects of the Department's work, keeping in mind the President's declaration that "[i]t shall be the policy of the executive branch to vigorously enforce Federal law's robust protections for religious freedom." Exec. Order 13798, § 1 (May 4, 2017).
. . . .
- To aid in the consistent application of the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb et seq., and other federal-law protections for religious liberty, the Office of Legal Policy shall coordinate with the Civil Rights Division to **review every Department rulemaking and every agency action submitted by the Office of Management and Budget for review by this Department for consistency with the interpretive guidance.** In particular, the Office of Legal Policy, in consultation with the Civil Rights Division, **shall consider whether such rules might impose a substantial burden on the exercise of religion and whether the imposition of that burden would be consistent with the requirements of RFRA.** The Department shall not concur in the issuance of any rule that appears to conflict with federal laws governing religious liberty, as set forth in the interpretive guidance. (Emphasis added).

The twenty-point "Memorandum on Federal Law Protections for Religious Liberty" states that

Religious liberty is not merely a right to personal religious beliefs or even to worship in a sacred place. It also encompasses religious observance and practice. Except in the narrowest circumstances, no one should be forced to choose between living out his or her faith and complying with the law. Therefore, to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity, including employment, contracting, and programming. (Page 1).

Moreover, the Free Exercise Clause protects against “indirect coercion or penalties on the free exercise of religion” just as surely as it protects against “outright prohibitions” on religious exercise. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. __, __ (2017) (slip op. at 11) (internal quotation marks omitted). “It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.” *Id.* (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

Government bears a heavy burden to justify a substantial burden on the exercise of religion. “[O]nly those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.” *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 718 (1981) (quoting *Yoder*, 406 U.S. at 215).

Even if the government can identify a compelling interest, the government must also show that denial of an accommodation is the least restrictive means of serving that compelling governmental interest. This standard is “exceptionally demanding.” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2752, 2780 (2014). It requires the government to show that it cannot accommodate the religious adherent while achieving its interest through a viable alternative, which may include, in certain circumstances, expenditure of additional funds, modification of existing exemptions, or creation of a new program. *Id.* at 2781. Indeed, the existence of exemptions for other individuals or entities that could be expanded to accommodate the claimant, while still serving the government’s stated interests, will generally defeat a RFRA defense, as the government bears the burden to establish that no accommodation is viable. See *id.* at 2781-82.

Title VII’s reasonable accommodation requirement is also meaningful. As an initial matter, it requires an employer to consider what adjustment or modification to its policies would effectively address the employee’s concern, for “[a]n ineffective modification or adjustment will not accommodate” a person’s religious observance or practice, within the ordinary meaning of that word. See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002) (considering the ordinary meaning in the context of an ADA claim).

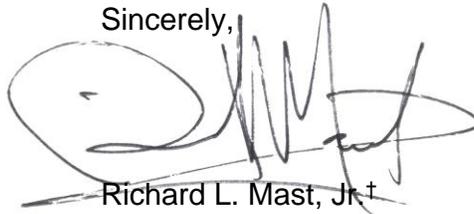
Although there is no obligation to provide an employee with his or her preferred reasonable accommodation, see *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986), an employer may justify a refusal to accommodate only by showing that “an undue hardship [on its business] would in fact result **from each available alternative method** of accommodation.” 29 C.F.R. § 1605.2(c)(l) (emphasis added). “A mere assumption that

many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.” *Id.* Likewise, the fact that an accommodation may grant the religious employee a preference is not evidence of undue hardship as, “[b]y definition, any special ‘accommodation’ requires the employer to treat an employee . . . differently, i.e., preferentially.” *US. Airways*, 535 U.S. at 397; see also *E.E. O. C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034 (2015) (“Title VII does not demand mere neutrality with regard to religious practices – that they may be treated no worse than other practices. Rather, it gives them favored treatment.”).

Therefore, in light of the history and mission of the BOP chaplaincy program; a plain reading of the Act; the above chronology; the long history of unarmed BOP chaplain pastoral care and ministry without the use of weapons – lethal, less-than-lethal, or non-lethal; the March 22, 2017, local exemption memo issued by FCI Bennettsville; the practice of other prisons; the Attorney General’s memoranda; the Supreme Court’s treatment of religious free exercise issues; and Title VII, the BOP cannot now claim “undue hardship” and fail to accommodate conscientious objector chaplains’ sincerely-held religious beliefs about OC spray.

For these reasons, please respond to Liberty Counsel in writing by October 31, 2017, that directives to chaplains have been withdrawn, and that they will no longer be required to carry OC in violation of their conscience and their unique pastoral role. If I do not receive this response, Liberty Counsel is prepared to take additional action to prevent irreparable harm to the rights of chaplains employed by the BOP and at FCI Bennettsville.

Sincerely,



Richard L. Mast, Jr. †

CC:

Via U.S. Mail/Facsimile

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