



STATE OF KANSAS

*Office of the Attorney General*

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Subject State Boards  
Corrections  
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Administration

VERN MILLER  
Attorney General

November 8, 1974

Opinion No. 74-355

Mr. Lowell Long  
State Director of Personnel  
Division of Personnel  
801 Harrison Street  
Topeka, Kansas 66612

Dear Mr. Long:

You inquire whether the Division of Personnel

"may restrict the certification of eligibles on the eligible list for the class of Correctional Officer I to those candidates of the same sex as the inmate population of the appropriate penal institution where such correctional officer positions include within their established duties control or supervision over inmates in the inmates' living quarters, showers and toilet facilities singly or in combination, or where correctional officers have to have access to such facilities when circumstances warrant, and when such job access is real, not merely theoretical."

You inquire, secondly, whether

"similar sex restrictions [may] be placed on positions where a job duty requirement exists to conduct intimate searches of the body surface and cavities of inmates or inmate visitors."

You advise that the class of Correctional Officer I is an entry level position in the various correctional facilities operated by the State of Kansas. Candidates are certified to the respective institutions based upon results of competitive examinations given by the Division of Personnel, or provisional hiring authority is granted to the institutions where such eligible lists do not exist pending the scheduling of new

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examinations.

You advise that the correctional authorities identify a number of operational difficulties attendant to the presence of women correctional officers in institutions housing male inmates, and similar difficulties arising from the presence of male correctional officers in institutions housing female inmates. You point out that a few positions exist at each correctional institution, the job duties of which do not require direct and intimate contact with the inmates of the institution. By mutual agreement, these positions, which you state to be quite few in number, are being staffed by members of either sex.

You enclose the official class specification, describing the work which the position entails, examples of work performed, and required knowledge, abilities and skills. The position involves "routine work in maintaining order and supervising inmates, responsibility for maintaining security... by supervising the movement, conduct, work, discipline, recreation, and training of inmates." Kinds of work performed include standing guard in towers, patrolling yards, grounds, cellhouses, corridors, dormitories and work areas, assisting in searches and the return of fugitives, escorting inmates individually or in groups to work assignments and otherwise, maintaining order and discipline in work shops, during bathing, meals and recreation, and maintaining counts of inmates. In addition, a correctional officer acts as turnkey, or as guard on gates, on guard hall duty, or in visiting rooms or the armory. The officers search inmates, cells, cellhouses and work locations for contraband.

The principal concern which has been stressed in support of sexual classification of officers according to inmate population is the necessity of maintaining, to the extent possible, respect for inmates' privacy consistent with the circumstances of confinement. Thus, it is urged that the presence of correctional officers of one sex in the living quarters, dormitories and shower and toilet areas used by inmates of the opposite sex constitutes an intolerable affront to most inmates' sense of privacy and personal dignity. It is pointed out that correctional officers' duties may from time to time entail participation in and observation of searches of inmates' persons, including body cavities, such as rectal searches. In addition, officers are required to oversee inmates in shower

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and toilet areas, and in dormitory and cell living quarters.

It is not urged, as we understand the issues here, that members of either sex are less capable than those of the other, physically, psychologically, emotionally, or in any other regard, to perform any of the required duties of correctional officers. It is not urged that the use of other-sex officers would constitute an unacceptable threat to institutional security, or that any presently foreseeable inmate response would pose security problems. It is urged that because of the direct and often intimate contact between officers and inmates of one sex comprising the entire population of an institution, that to subject inmates in their living and working conditions to daily, regular direct and intimate supervision by other-sex officers would be so offensive to most inmates' sense of personal dignity and privacy that it ought not be permitted.

Security, of course, is a potent consideration, to which great deference must be given. It must not, however, be allowed to become a shibboleth invoked to support unreasonable or arbitrary actions. Although considerations of security are rarely far removed from most aspects of governance of correctional institutions, representations to this office do not suggest that threats to physical institutional security do not underlie the concern of the Secretary of Corrections. The concern has been premised, as indicated above, on a concern for preserving some minimal privacy and personal dignity to inmates in a confinement setting in which these values are, perhaps necessarily but unfortunately, all too often at a premium. Opposite-sex correctional officers are not a threat to these values because of any stereotypical characterization of abilities of officers of either sex. Rather, it is deemed per se offensive routinely to subject inmates to, e.g., a personal search of his or her person, including intimate bodily areas, by an officer of the opposite sex, or, e.g., to subject inmates of one sex routinely and conventionally in shower areas while bathing, or in toilet areas, to supervision and control of members of the opposite sex, or to require inmates to dress and undress in living areas attended by an officer of the opposite sex.

Title VII of the Civil Rights Act of 1964, at 42 U.S.C. § 2000-2(a)(b) and (c) prohibit discrimination in employment on the basis of sex. Subsection (e) provides that

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"it shall not be an unlawful employment practice for an employer to hire and employ employees....on the basis of....sex....in those certain instances where.... sex....is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise...."

For the purposes of this opinion, as stated above, we assume the absence of any claim that members of either sex are inherently better qualified in any physical, psychological, emotional, temperamental or other respect to perform the duties and responsibilities of a correctional officer in a correctional institution with an opposite-sex population. Thus, no claim of administrative or business necessity is advanced, in the sense that the physical management, operation and security of an institution would be imperiled by opposite-sex correctional officers. It is judged to be a necessity, if that be the correct term, to preserve the inmate population from what are believed to be fundamentally offensive and insulting invasions of privacy on a day-to-day routine basis.

This is, we think, a laudable and creditable object and purpose of the Secretary of Corrections. The assignment of correctional officers to duties in correctional institutions which avoid subjecting inmates of one sex to direct and intimate contact with correctional officers of another sex is reasonably related to this objective. Those persons eligible for employment as Correctional Officer I are not thus restricted entirely to members of one sex. Those certified for eligible lists for certain positions, however, those with the kind of inmate contact described above, may reasonably, we believe, be restricted to those candidates of the same sex as the inmate population.

There remains one question which deserves mention, whether the finding of a reasonable relationship is sufficient. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Court accepted the argument that

"classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny."

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Since this decision, and the later decision in *Kahn v. Shevin*, U.S., 42 L.W. 4591 (1974), the upholding of a Florida statutory \$500 tax exemption for widowers only, there has been some question whether the test to be applied to sexually discriminatory provisions is the "rational relation to a legitimate governmental interest" test or the test usually applied to an "inherently suspect" classification, which the Court held sexual classifications to be, whether the classification serves a "compelling state interest." When the State by statute or administrative policy establishes sex as a classification for the basis of employment, the question becomes whether that classification is "inherently suspect," and the classification required to be found to serve a "compelling state interest," or whether it remains sufficient that the classification be found reasonably necessary to the normal management and operation of state institutions, as in this case. In *Edwards v. Schlesinger*, 377 F.Supp. 1091, (Dist.Col. 1974), the court discussed this general question at some length, and after reviewing in some detail recent decision on the question, determined that the "rational relationship" test remained applicable. It would unnecessarily lengthen this opinion to belabor this difficult legal question. Following that able decision, we conclude that it is necessarily only to determine whether the classification in question is based upon a factor, here, sex, which is a bona fide occupational qualification which is "reasonable necessary," and not merely convenient, to the "normal operation" of the particular business or enterprise in question.

In our opinion, the classification based upon sex for certification of eligible persons for the positions described in the questions you pose is based on a bona fide occupational qualification, that inmates ought not be subjected to.

Accordingly, it is our opinion that the Division of Personnel may restrict the certification of persons on the eligible list for the class of Correctional Officer I to those candidates of the same sex as the inmates of the inmate population, where such correctional officer position includes within its established duties direct and intimate contact with inmates entailed in control and supervision over inmates in the inmates' living quarters, showers and toilet facilities, singly or in combination and when such job access is real and not merely theoretical. Such a restriction is not justified, in our opinion, when the position is such that such job access would occur only in the

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exigent and extraordinary circumstances, such as during riot or other emergency conditions when security considerations would reasonably override other considerations, and when the intrusions would necessarily be thus restricted. We further believe that the considerations articulated above permit such a restriction to apply to positions where a job duty requirement exists to conduct intimate searched of body surfaces and cavities of inmates and inmate visitors.

Yours very truly,



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Attorney General

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