

Freedom of Religion in the Booking Process

Description

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With the DLG First Amendment Summit around the corner how about a look at some issues covered under the Freedom of Religion. Over the past several years, multiple police departments, sheriff's offices, and detention facilities have been sued for civil rights violations for forcing Muslim women to remove their hijab during the booking process. Below, we will discuss a few of these lawsuits as well as what each of our agencies must do to protect ourselves, our agencies, and the religious freedoms of the individuals that we arrest.

The hijab is a headscarf which covers the head and neck, but leaves the face clear. In addition to Muslim women, women and men from other religions may wear the headscarf as a practice of modesty. [1] While the cases below were all directed at the wearing of a hijab, the standards we will discuss should apply to a hijab, burqa, khimar, chador, niqab, yarmulke, turban, bonnet or other head covering worn by members of any religion. We must address the safety needs of our officers as well as our needs to complete the booking process while at the same time balance the religious freedoms of those in our custody.

In 2017, Long Beach, California police paid \$85,000 to settle a lawsuit from a Muslim woman who had her hijab forcefully removed by booking officers.[2] In 2015, Dearborn Heights, Michigan settled a lawsuit with a Muslim woman who was forced to remove her hijab after an arrest. The settlement contained no punitive damages but resulted in a new department policy which was negotiated between the department and the local Muslim Imams.[3] In February 2018, NYPD settled a federal lawsuit with three Muslim women, each of whom was forced to remove their hijab as part of the booking process. The City of New York paid \$180,000, \$60,000 to each woman.[4]

This represents just a few of the federal lawsuits on point. One of the important takeaways from these situations and others, is that such violations of arrestees' religious freedoms have been the subject of federal lawsuits dating back to 2010, and yet, many departments have not taken any steps to address this issue in their own policies.

Two of the issues that need to be considered are both regarding the search of the arrestee prior to booking as well as the photographing and processing of the arrestee. Additionally, another issue for consideration is the use of the booking photograph(s) in the future.

Searching the Religious Head wear as Part of the Booking Process

As with most situations, the first step in this process would be to ask for consent. Ask the individual to remove the head covering **if** such is required under your booking process. You may allow for head coverings to remain on during the process. Organizations such as the New York Department of Motor Vehicles and the Connecticut Department of Motor Vehicles, along with at least forty other states,[5] allows headscarves to be worn for driver's license photographs and the U.S. Department of State has no requirement that religious head wear must be removed for passport photographs as long as the

individual signs an attestation that the covering “is part of traditional religious attire worn continuously in public.”^[6]

If you require that all head wear must be removed, be sure to have specific guidelines as to specifically what the standard will be; the standards **cannot** be based upon a protected category, i.e. sex, religion, ethnicity, etc., but rather, must be based upon an articulable standard such as the need to see the full face and hair, etc. of the individual. You must be able to articulate the *compelling state interest* in the need to have the individual remove the head wear.

If consent is given by the arrestee, that consent may come with conditions, such as that the removal must be done out of the public eye, or away from others in the booking area, and/or it must be done in the presence of an officer of the same gender only.

The removal of religious head coverings for any religion is a significant event. As the arresting/booking officer, you must work with the individual during this process. Some issues you want to consider would be:

- The use of metal detecting wand to determine if the head covering should be/needs to be removed;
- The location and/or presence of others when the head covering is removed;
- Whether or not their religion will allow you to touch / search the head covering; and
- How you will search the head covering once it is removed to ensure that does not contain any weapons or contraband.

Photographing and Use of Photographs

The next issue for consideration is photographing the arrestee as part of the booking process. How will you photograph an individual who, based on their religious practice, cannot be “uncovered” in front of others? Do you have a space in your booking facility where you can accommodate this need, and is there a camera(s) that you can use for this purpose? As part of NYPD’s policy in 2018, it allowed officers to advise arrestees that if they want to be photographed without religious head wear, in this case the hijab, they could be taken to One Police Plaza and photographed without the head wear, by an officer of the same gender. ^[7] Critics have argued that this current practice by NYPD can be construed as a threat rather than an accommodation when the officers advise the arrestee that this procedure could lengthen the booking process.^[8]

Additionally, what happens to the photographs following the booking process? Regarding the NYPD case above, the photographs are stored in a database that is repeatedly reviewed which according to the plaintiffs in their lawsuit causes “multiple iterations of the trauma.” Are your booking photos released to the public? Are they stored internally? Are they sent to court for others to view? If so, would it be reasonable to take two sets of photographs, one with the individuals covered and one set uncovered? What is the court’s requirement for booking photographs?

Overall, we must ensure that we have a policy regarding our booking procedures and our policy needs to address these issues. We need to be sure that we are protecting the rights of those that we arrest and have procedures in place to accommodate the religious needs of those in our booking facility. Finally, we need to consider our duty to these individuals does not end when they leave our booking facility and that the manner in which we use the booking photographs could be the source of liability.

1. *Women > Veiling > What is the Hijab and Why do Women Wear It?*, Arabs in America, at <https://arabsinamerica.unc.edu/identity/veiling/hijab/> ?
2. Veronica Rocha, *Muslim woman awarded \$85,000 after her hijab was forcibly removed by Long Beach Police Officer*, Los Angeles Times (August 10, 2017), at <https://www.latimes.com/local/lanow/la-me-ln-muslim-woman-hijab-removed-settlement-20170810-story.html> ?
3. *Dearborn Heights police settle Muslim woman's hijab lawsuit*, Fox 2 Detroit, (July 9, 2015), at <http://www.fox2detroit.com/news/lawsuit-filed-against-dearborn-heights-police-for-forcing-woman-to-remove-hijab> ?
4. Christine Hauser, *Women Forced to Remove Hijabs for Mug Shots Settle With New York City*, The New York Times (February 28, 2018), at <https://www.nytimes.com/2018/02/28/nyregion/muslim-hijab-nypd.html> ?
5. CAIR (Council on American-Islamic Relations Research Center), *Religious Accommodations in Driver's License Photographs: A review of codes, policies and practices in the 50 states*, at <https://moritzlaw.osu.edu/electionlaw/litigation/documents/LWVJ.pdf> ?
6. <https://travel.state.gov/content/travel/en/passports/requirements/photos.html> ?
7. Al Baker, *Hijab Removal by New York Police Prompts Lawsuit*, New York Times (March 16, 2018), at <https://www.nytimes.com/2018/03/16/nyregion/hijab-police-lawsuit-new-york.html> ?
8. Ibid ?

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