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Bill Analysis
Legislative Service Commission

H.B. 62

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(As Introduced)

Reps. Coughlin, Tiberi, Hood, Evans

BILL SUMMARY

- Requires the mail office of a state correctional institution to review a prisoner's mail to determine whether that mail is a "prohibited inflammatory material" or a "prohibited obscene or other sexually oriented material" and to withhold material of that nature from delivery.
- Authorizes a state correctional institution to dispose of withheld prohibited inflammatory material and prohibited obscene or other sexually oriented material in specified manners.
- Provides a procedure by which the prisoner who is the intended recipient of withheld prohibited inflammatory material or withheld prohibited obscene or other sexually oriented material may have the mail office's withholding determination reviewed by the head of the state correctional institution or the head's designee and provides a procedure by which the prisoner may appeal the determination of the head or the head's designee to the Director of Rehabilitation and Correction.
- Requires the Director of Rehabilitation and Correction to create a publication screening committee to provide advisory opinions to the Director of Rehabilitation and Correction, the head of a state correctional institution, or the head's designee regarding whether material is prohibited inflammatory material and prohibited obscene or other sexually oriented material.
- Contains a statement of legislative intent.

CONTENT AND OPERATION

Overview

The bill authorizes the mail office of a state correctional institution to review a prisoner's mail to determine whether that mail is a "prohibited inflammatory material" or a "prohibited obscene or other sexually oriented material" (see "Definitions," below). The bill authorizes the mail office of the state correctional institution to withhold that type of mail from delivery. The bill provides an appeal procedure by which that decision may be reviewed. If the material is determined to be a prohibited inflammatory material or a prohibited obscene or other sexually oriented material, the bill also specifies methods by which that material may be disposed.

Adoption of rules that govern the types and maximum amount of materials sent to the prisoner

The bill authorizes the head of a state correctional institution to adopt regulations that govern the types and maximum amount of materials that each prisoner confined in the institution is permitted to receive and retain. Those regulations must be consistent with the provisions proposed by the bill and the rules that the Director of Rehabilitation and Correction (Director of DRC) adopts to implement the bill.

The head of a state correctional institution must forward proposed regulations of that nature to the Director for the Director's review and approval prior to the implementation of the regulations. The Director promptly must review and approve or disapprove of the proposed regulations. If the Director approves the proposed regulations, the head of the institution must post the regulations in appropriate locations throughout the institution and implement them. (Sec. 5120.426.)

Security inspection procedure

Under the bill, each prisoner confined in a state correctional institution may receive a reasonable number of materials directly from the publishers or other distributors of those materials. With the prior approval of the head of the state correctional institution in which a prisoner is confined or the head's designee, each prisoner also may receive a reasonable number of materials from members of the prisoner's family, the prisoner's friends, or other approved sources.

A prisoner's receipt and retention of materials is subject to the security inspection procedure described in the following paragraph, the review and appeal

procedures described below, and the regulations adopted, reviewed, and approved that govern the types and maximum amount of materials that each prisoner confined in the institution is permitted to receive and retain. Subject to a contrary decision with respect to a material's nature by the head of the involved state correctional institution, the head's designee, or the Director of DRC following a review or appeal under the review and appeal procedures, a prisoner is not entitled to receive or retain any material that the mail office of the state correctional institution determines during the course of the security inspection procedure to be a prohibited inflammatory material or a prohibited obscene or other sexually oriented material (prohibited materials). (Sec. 5120.427(A).)

The bill requires each state correctional institution to inspect through its mail office each incoming material to determine whether the material is prohibited material, or another type of material. The mail office is prohibited from determining a material to be a prohibited inflammatory material solely on the basis of its appeal to a particular ethnic, racial, or religious audience. (Sec. 5120.427(B)(1).)

If the mail office determines that an incoming material is not prohibited material, the mail office must cause the material to be promptly forwarded to the involved prisoner. If the mail office has reasonable cause to believe that an incoming material is prohibited material, it must withhold the material and promptly provide the involved prisoner with a written notice containing all of the following: (1) a general description of the withheld material, (2) the reason why the material has not been forwarded to the prisoner, and (3) a statement of the prisoner's right to have the head of the state correctional institution or the head's designee review the mail office's withholding decision (sec. 5120.427(B)(2)).

Request for review and disposal of materials

Within five working days after a prisoner's receipt of the mail office's written notice, the prisoner may submit to the head of the state correctional institution a written request for a review of the mail office's withholding decision. A prisoner's failure to submit a timely written request for a review constitutes the prisoner's acceptance of the mail office's withholding decision, and the head of the institution or the head's designee must cause the material to be disposed of in whichever of the following manners is considered to be most appropriate: (1) if the prisoner so requests, the material may be destroyed, (2) if the prisoner so requests and pays any associated expense, the material may be forwarded or delivered to an individual who is an approved visitor of the prisoner at the state correctional institution, (3) the material may be returned to the U.S. Postal Service or to the publisher, distributor, or other person who mailed or otherwise attempted delivery of the material, (4) the material may be held as evidence of a violation of

law or of rules of the Director of DRC, or (5) the material may be disposed of in accordance with any rule of the Director of DRC that pertains to contraband within a state correctional institution. (Sec. 5120.427(B)(3).)

Review of mail office's determination

If a prisoner submits a timely written review request, the head of the state correctional institution or the head's designee must cause the institution's mailing office to promptly forward the withheld material to the head of the institution or the head's designee. The head's designee may be either one individual or a panel of three or more individuals, no more than one of whom may be a member of the institution's custody staff.

As soon as is practicable after receipt of the withheld material from the institution's mail office or, if possible, within five working days after that receipt, the institution's head or the designee must review the material to determine whether it is prohibited material or another type of material. In making that determination, the institution's head or the designee may conduct a hearing and may permit the prisoner who requested the review to be present at the hearing. The institution's head or the designee must not determine a material to be prohibited inflammatory material solely on the basis of its appeal to a particular ethnic, racial, or religious audience.

If the institution's head or the designee determines that the withheld material is not prohibited material, the institution's head or the designee must cause the withheld material to be promptly forwarded to the involved prisoner.

If the institution's head or the designee determines that the withheld material is prohibited material, the institution's head or the designee must continue to withhold the material and must promptly provide the involved prisoner with a written notice of the following: (1) a general description of the material, (2) a statement that the material will continue to be withheld from the prisoner, (3) the reason for the continued withholding, and (4) a statement of the prisoner's right to appeal the continued withholding determination to the publication screening committee and the Director of DRC. The institution's head or the designee must retain a copy of the written notice in the records of the institution for at least two years from the date of the continued withholding determination. (Sec. 5120.428(A).)

Appeal of the determination of the head of the institution or the head's designee

Within five working days after a prisoner's receipt of the written notice of the continued withholding determination, the prisoner may submit to the Director

of DRC a written appeal of the determination. The prisoner's appeal must be made in the form that the Director prescribes by rule, must request the Director to receive an advisory opinion from the publication screening committee and then render a final determination with respect to the nature of the withheld material, and may include any objections that the prisoner has to the continued withholding determination. The prisoner's failure to submit a timely written appeal constitutes the prisoner's acceptance of the continued withholding determination, and the institution's head or the designee must cause the material to be disposed of in whichever of the manners described in "Request for review and disposal of materials," above, is considered to be most appropriate under the circumstances. (Sec. 5120.428(B)(1).)

Procedure on appeal

If a prisoner confined in a state correctional institution submits a timely appeal, the Director of DRC must cause the institution's head or the designee to promptly forward the withheld material and the relevant continued withholding determination to the publication screening committee (see "Publication screening committee," below). Within 20 working days after receipt of the material and determination, the committee must review the material and determination and must prepare and file with the Director a written advisory opinion as to whether the material is prohibited material or another type of material. The committee must consider the reason underlying the determination and, if any, the prisoner's written objections to that determination set forth in the written appeal. The committee may not determine a material to be prohibited inflammatory material solely on the basis of its appeal to a particular ethnic, racial, or religious audience. (Sec. 5120.428(B)(3).)

As soon as is practicable after receipt of the publication screening committee's advisory opinion, the Director must review the withheld material, must consider the advisory opinion, the reason underlying the continued withholding determination, and, if any, the prisoner's written objections to that determination set forth in the written appeal. The Director must render a final determination as to whether the material is prohibited material or another type of material. The Director must not determine the material to be a prohibited inflammatory material solely on the basis of its appeal to a particular ethnic, racial, or religious audience. If the Director's final determination is that the withheld material is not prohibited material, the Director must cause the withheld material to be returned to the institution's head or the designee together with a written copy of the Director's final determination and an instruction that the institution's head or the designee promptly deliver the withheld material to the involved prisoner. (Sec. 5120.428(B)(4) and (5).)

If the Director's final determination is that the withheld material is prohibited material, the Director must cause a written copy of the final determination to be delivered to the institution's head or the designee and to the involved prisoner. The final determination must include a general description of the material, a statement that the material will not be delivered to the prisoner, and the reason for that nondelivery. The Director must cause the material to be disposed of in whichever of the manners described in "*Request for review and disposal of materials*," above, the Director considers to be most appropriate under the circumstances. The Director must retain a copy of the final determination in DRC records and also must cause a copy of the final determination to be delivered to the heads of other state correctional institutions to be used as precedent in making future determinations. (Sec. 5120.428(B)(6).)

Publication screening committee

For purposes of the provisions proposed by the bill, the Director of DRC must appoint a publication screening committee that is an advisory body composed of five individuals chosen in the Director's discretion. At least one member of the committee must be an attorney who is licensed and registered to practice law in Ohio. At least three members of the committee must participate in each advisory review of a material that is conducted. (Sec. 5120.428(B)(2).)

In addition to its duties relating to prisoner appeals described above under "*Procedure on appeal*," within 20 working days after receiving a request from the Director of DRC, the head of a state correctional institution, or a head's designee, the publication screening committee must do all of the following (sec. 5120.429(A)):

- (1) Review any material that the Director, institution head, or designee submits;
- (2) Prepare a written advisory opinion as to whether the material is prohibited material or another type of material. The committee may not determine a material to be a prohibited inflammatory material solely on the basis of its appeal to a particular ethnic, racial, or religious audience.
- (3) Submit the written advisory opinion to the Director.

As soon as is practicable after receipt of the publication screening committee's advisory opinion, the Director must review the material, consider the advisory opinion, and render a written determination as to whether the material is prohibited material or another type of material. The Director may not determine the material to be a prohibited inflammatory material solely on the basis of its

appeal to a particular ethnic, racial, or religious audience. The Director must cause a copy of the written determination to be delivered to the heads of all state correctional institutions to be used as precedent in making future determinations. (Sec. 5120.429(B).)

Statement of legislative intent

The bill contains a statement of legislative intent stating that it is the intent of the General Assembly in defining a "prohibited obscene or other sexually oriented material" (see "**Definitions**," below), to reflect the standards enunciated by the United States Supreme Court in *Pope v. Illinois* (1987), 481 U.S. 497, *Miller v. California* (1973), 413 U.S. 15, and *Roth v. United States* (1957), 354 U.S. 476, that state courts must follow in determining whether a particular material is an obscene material and to recognize the holdings in *Urbana ex rel. Newlin, v. Downing* (1989), 43 Ohio St.3d 109, *State v. Burgun* (1978), 56 Ohio St.2d 354, *State v. Keaton* (1996), 113 Ohio App.3d 696, 703, *State v. Caudill* (1991), 75 Ohio App.3d 322, *State v. Wolfe* (1987), 41 Ohio App.3d 119, and other Ohio Supreme Court and courts of appeals decisions that have authoritatively construed this state's obscenity statutes to reflect the standards enunciated in the listed United States Supreme Court decisions. (Section 2.)

Definitions

"**Advertising mail**" means promotional offers, drawings, sweepstakes, lotteries, and other promotional campaigns that propose a commercial transaction and that, taken as a whole, are not personal communications uniquely composed for a specific individual (sec. 5120.425(A)).

"**Deadly weapon**" means any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon (sec. 5120.425(B) by reference to sec. 2923.11(A)--not in the bill).

"**Head of a state correctional institution**" or "head of the institution" means the resident head of the institution and the person immediately in charge of the institution, whether designated warden, superintendent, or any other name by which the head is known (sec. 5120.425(C) by reference to sec. 2967.01(F)--not in the bill).

"**Head's designee**" means a person or, for purposes of section 5120.428(A), a panel of persons designated by the head of a state correctional institution to perform a responsibility that section 5120.425 to 5120.429 generally otherwise imposes upon that individual (sec. 5120.425(D)).

"Incoming material" means either of the following (sec. 5120.425(E)):

(1) A material that is mailed directly to a specific prisoner from the material's publisher or other distributor;

(2) A material that a specific prisoner may be eligible to receive through the U.S. mail or in another manner from a member of the prisoner's family, a friend of the prisoner, or another source with the prior approval of the head of a state correctional institution or the head's designee.

"Material" means, except as provided in the following sentence, a prerecorded magnetic audio tape, book, drawing, magazine, newspaper, pamphlet, poster, print, photograph, or other similar printed, written, recorded, or otherwise produced item. "Material" does not include advertising mail or mail that is in the form of a first class letter addressed to a specific prisoner and that the prisoner may be entitled to receive after any inspection that may be required by rules that the Director of DRC adopts pursuant to the DRC laws. (Sec. 5120.425(F).)

"Other conduct" means bestiality, masturbation, human bodily functions of elimination, or sadomasochism that involves the infliction of death, pain, or suffering (sec. 5120.425(G)).

"Prisoner" means a person who is in actual confinement in a state correctional institution (sec. 5120.425(C) by reference to sec. 2967.01(H)--not in the bill).

"Prohibited inflammatory material" means a material that, in the determination of the head of a state correctional institution or the head's designee, satisfies any of the following (sec. 5120.425(H)):

(1) The material may incite, aid, or abet criminal activity within or on the grounds of the institution, including, but not limited to, aggravated riot, riot, or unlawful trafficking in, possession of, or use of a drug of abuse.

(2) The material may incite, aid, or abet physical violence against individuals within or on the grounds of the institution, including, but not limited to, a material that provides instruction with respect to the making, use, or conversion of deadly weapons or other weapons.

(3) The material may incite, aid, or abet escape from the institution, including, but not limited to, a material that provides instruction with respect to the picking of locks or the digging of tunnels.

(4) The material appears to be written in cipher or code.

(5) Any material that is not described in the preceding four paragraphs, that is not a prohibited obscene or other sexually oriented material, and that by its nature or content may pose a threat to security, good order, or discipline within or on the grounds of the institution.

"Prohibited obscene or other sexually oriented material" means a material that, in the determination of the head of a state correctional institution or the head's designee, shows, represents, displays, depicts, or describes sexual activity, sexual excitement, or other conduct and satisfies all of the following (sec. 5120.425(I)):

(1) The material, taken as a whole by the average person applying contemporary community standards, appeals to the prurient interest.

(2) The material, taken as a whole by the average person applying contemporary community standards, portrays sexual activity, sexual excitement, or other conduct in a patently offensive way.

(3) The material, taken as a whole by a reasonable person, lacks serious literary, artistic, political, or scientific value.

"Publication screening committee" means the committee created by the Director of DRC pursuant to section 5120.428(B)(2) (sec. 5120.425(J)).

"Sexual activity" means sexual conduct or sexual contact, or both.

"Sexual conduct" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

"Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person. (Sec. 5120.425(K) by reference to sec. 2907.01(A), (B), and (C)--not in the bill.)

"State correctional institution" includes any institution or facility that is operated by the DRC and that is used for the custody, care, or treatment of criminal, delinquent, or psychologically or psychiatrically disturbed offenders (sec. 5120.425(C) by reference to sec. 2967.01(A)--not in the bill).

"Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal and also includes covered male

genitals in a discernibly turgid state (sec. 5120.415(L) by reference to sec. 2907.01(G)--not in the bill).

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-20-99	p. 95

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