IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GERALD L. PEARSON,

Plaintiff,

v.

GERALD BERGE and CRAIG LOSKOT[1],

Defendants.

OPINION AND ORDER

01-C-0364-C

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This is a civil action for declaratory, monetary and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff Gerald L. Pearson, who is presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, contends that defendants Gerald Berge and Craig Loskot violated his First Amendment rights and various Department of Corrections regulations by withholding a photocopied publication mailed to him at Supermax from a religious organization.

Presently before the court is defendants' motion for summary judgment. Because I find that the Department of Corrections' publishers-only rule is reasonably related to

[1]Defendant's name has been corrected in conformance with the information in defendant's affidavit.

legitimate penological interests, that defendants did not violate DOC § 309.61(5) and that defendants applied the publishers-only rule appropriately, I will grant defendants' motion. Because I conclude that plaintiff's constitutional rights are not violated by the publishers-only rule, it is not necessary to consider defendants' arguments that they are entitled to qualified immunity.

From the parties' proposed findings of fact, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

Plaintiff is an inmate at the Supermax Correctional Institution in Boscobel, Wisconsin. Defendant Berge is the Warden at Supermax and defendant Loskot is a mailroom sergeant at Supermax, where he directs the day-to-day operation of the mailroom in which all inmate mail is processed.

Supermax inmates are allowed to receive publications in the mail, but the publications must be sent directly from a recognized commercial source or publisher and must be accompanied by a receipt. This rule is pursuant to DOC § 309.05(2)(a), also known as the publishers-only rule, which states that "[i]nmates may only receive publications directly from the publisher or other recognized commercial sources in their packages." Publications include books, magazines, newspapers, pamphlets and more than one sheet of paper bound

with staples, stitching or glue, except for instructional booklets that come with electric appliances. Photocopies of publications are not allowed through the institution mail system. Inmates may not receive hardcover books in the mail, even if they are sent from a publisher or commercial source. A recognized commercial source is a retail outlet or publisher from which an inmate may purchase a book, publication or magazine and have that item shipped to the inmate at the institution. An inmate must submit a disbursement request form when purchasing items from publishers or commercial sources outside of the institution.

Inmate mail will not be delivered if it contains contraband such as photocopies or internet materials. These materials are not permitted because they may contain personal information about Supermax staff, family members of Supermax staff or the victims of inmates. Personnel in the mailroom inspect all incoming documents to determine whether any other documents are hidden within the pages of the mailed document. These hidden documents may include gang-related materials, prison escape materials and internet materials. The personnel remove any items that may pose a security risk.

If inmates were to be allowed to receive photocopies or internet materials from anyone other than a publisher or recognized commercial source, it would be necessary to expend greater personnel resources to screen the material for contraband. Without the publishers-only rule, every piece of material not received directly from a publisher or recognized commercial source would have to be more closely inspected to insure that it did

not pose a security risk. Materials sent from publishers or recognized commercial sources are less likely to contain contraband harmful to the security of the institution.

Inmates are not allowed to receive free or donated religious material from a publisher or recognized commercial source without a receipt stating the cost to be $0.00 or "free." If the religious material does not have a receipt, it will be routed through the mailroom and the inmate will be sent a notice of non-delivery form. Mailroom staff then give the inmate the option of (a) destroying the material; (b) sending the material out with the inmate's visitors; (c) mailing out the material at the inmate's expense; (d) donating the material to the institution chapel; or (e) storing the material pending the findings of the institution complaint examiner. If the material is donated to the chapel and the chaplain finds it appropriate, the religious material will be placed in the chapel library and made available for loan to all inmates.

Inmates may choose books from an approved reading list and borrow them from the Supermax library. Inmates may request a book each week as long as they do not exceed the number of allowed books for their level. Inmates may check out books from the Supermax library and the religious library for a period of two weeks. Inmates may renew their books once for a period of two weeks. If the Supermax library does not contain a particular book, an inmate may request that the book be placed in the library.

Religious books concerning Muslim beliefs and practices can also be obtained from

the Supermax religious library, which contains a significant number of books pertaining to Islam. Very few of these books pertain to the Islamic Shafi'i school of "jurisprudence," which is the school under which plaintiff studies. If the Supermax religious library does not have a particular book, an inmate may request that the religious book be placed in the library. Because of current budget concerns, the state of Wisconsin is not purchasing new books. The Supermax chaplain is in touch with an Islamic leader who will purchase Islamic materials for Supermax and donate them if an inmate makes a specific request. As inmates progress through the security levels at Supermax, they are allowed to possess more personal property, including more religious material.

On January 8, 2001, plaintiff received photocopied pages from the book, "Root Islamic Education," from the Muslim Students Association. Because this book excerpt was not received directly from the publisher or another recognized commercial source and because the pages were photocopied, defendant Loskot did not deliver this item to plaintiff. That same day, defendant Loskot issued plaintiff a notice of non-delivery of mail indicating that the photocopies sent to him contained contraband and that the item concerned an activity that, if completed, would violate the laws of Wisconsin, the United States or the administrative rules of the Department of Corrections. Defendant Berge and defendant Loskot's supervisor did not override defendant Loskot's decision to issue this notice.

The Supermax business office has not processed a disbursement request form from

plaintiff's inmate account to purchase books from any commercial sources or publishers.

OPINION

In Turner v. Safley, 482 U.S. 78 (1987) the Supreme Court articulated the test to determine the validity of prison regulations that allegedly impinge upon the exercise of constitutionally protected rights. Under Turner, a prison regulation does not infringe impermissibly upon rights protected by the First Amendment so long as the regulation is "reasonably related to legitimate penological interests." Id. at 89; Thornburgh v. Abbott, 490 U.S. 401, 409 (1989).

To decide whether a challenged regulation is reasonably related to legitimate penological interests, courts apply a four-part test. (Several courts have acknowledged that the four parts are unequal and tend to blend into one another. See, e.g., Waterman v. Farmer, 183 F.3d 208, 213-14 (3d Cir. 1999); Amatel v. Reno, 332 U.S. App. D.C. 191, 156 F.3d 192, 196 (D.C. Cir. 1998).) First, the court examines the scope of the challenged regulation or statute, its purported content-neutral objective and the fit between the two, that is, whether there is any "valid, rational connection between the policy and the legitimate governmental interest put forward to justify it." Mauro v. Arpaio, 188 F.3d 1054, 1059 (9th Cir. 1999). An objective is "content-neutral" so long as its ultimate purpose is not the suppression of speech. See id. (quoting Thornburgh, 490 U.S. at 415).

If there is any rational connection between the challenged regulation and the administrator's content-neutral objective, the court then determines whether there are alternative means of exercising the right, whether accommodating the asserted right will have a significant negative impact upon others within the prison and whether the regulation is an "exaggerated response" to the state's legitimate concerns (that is, whether there are easy, obvious alternatives to the regulation that would be less restrictive but still accomplish its goals). See Amatel, 156 F.3d at 196-197.

This is a very deferential standard; courts do not second-guess prison administrators readily about their perception of the need for 'content- neutral' regulations. See Mauro at 1059. In particular, in determining whether there is a rational connection between the challenged regulation and its legitimate objectives, the court does not inquire whether there is such a connection in fact, but considers whether the regulation's enacters could have rationally concluded there is one. Scientific or expert evidence need not be unanimous in support of the connection, see Amatel, 156 F.3d at 201 ("For judges seeking only a reasonable connection between legislative goals and actions, scientific indeterminacy is determinative"), and in the absence of such evidence, common sense may provide the connection. See id. at 199 (common sense may be sufficient evidence of rational link between legitimate objectives and regulation).

Several United States Courts of Appeals have held that prisoners' access to

publications may be restricted by a publishers-only rule without violating the First Amendment because such restrictions are related rationally to the legitimate penological interest of security. See Ward v. Washtenaw County Sheriff's Dept., 881 F.2d 325 (6th Cir. 1989); Hurd v. Williams, 755 F.2d 306 (3d Cir. 1985); Kines v. John Day, 754 F.2d 28 (1st Cir. 1985); Cotton v. Lockhart, 620 F.2d 670 (8th Cir. 1980). Only the Court of Appeals for the Sixth Circuit applied the Turner test in its analysis. However, all four courts applied the determinative factors set out in Bell v. Wolfish, 441 U.S. 520 (1971), which held that the publishers-only rule was reasonable as to time, place and manner and that it was necessary to further significant governmental interests. Bell, 441 U.S. at 552. This holding pertained to hardcover publications only. In reaching its conclusion, the court considered the security risks associated with hardcover books, the content-neutral operation of the publishers-only rule and the availability of other sources for first amendment materials. Id.

In Ward, 881 F.2d 325, the Court of Appeals for the Sixth Circuit applied the Turner test and Bell to find that a publishers-only rule was related reasonably to legitimate penological interests. Id. at 330. In that case county jail officials submitted affidavits to the effect that the publishers-only rule was necessary to prevent the smuggling of contraband in various publications sent to inmates from unidentified sources. The officials maintained that a proper inspection of all publications from non-publisher sources would result in a "drastic drain" on staff resources and would be unduly expensive. Id. at 329. For these reasons, the

court found that the publishers-only rule was necessary to insure jail security.

The Court of Appeals for the Third Circuit also found that these arguments adequately justified the publishers-only rule. Hurd, 755 F.2d at 308. Moreover, the court found that because the plaintiff failed to show a genuine issue of material fact as to the existence of a security threat, the defendants were entitled to summary judgment. Id. at 308. The court found that:

> "it is apparent from [Bell] that legitimate security concerns in prisons may override First Amendment considerations. If the state meets its burden of producing evidence that there is a potential danger to security posed by the prohibited materials," the courts must defer to the expert judgment of the prison officials unless the prisoner proves by "substantial evidence . . . that the officials have exaggerated their response" to security considerations or that their beliefs are unreasonable.

Id. (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974); Jones v. North Carolina Prisoner's Labor Union, 433 U.S. 119, 128 (1977); St. Claire v. Cuyler, 634 F.2d 109, 115 (3d Cir.), reh'g denied by an equally divided court, 643 F.2d 103 (1980)).

The Court of Appeals for the Seventh Circuit has not ruled on the precise issue whether a broad ban on all publications not mailed from a publisher should survive a First Amendment challenge. However, defendants provide legitimate penological reasons for enforcing this rule and plaintiff has failed to supply evidence to refute them. Therefore, the first part of the Turner test has been satisfied. As in Ward, 881 F.2d 325, defendants have shown that the publishers-only rule is necessary for prison security. Defendants demonstrate

that without the publishers-only rule, it would be easier for inmates to obtain contraband or hidden documents such as gang-related materials, prison escape materials, photocopies or personal information about Supermax staff, relatives of Supermax staff or the victims of inmates through the mail. Thus, defendants have proven that the publishers-only rule is reasonably related to the legitimate penological interests of security.

The last three factors of the Turner test also support the finding of a need for the publishers-only rule. First, plaintiff has an alternative means of exercising his right to read and communicate. If a particular book is not available in the Supermax library, plaintiff can request that the book be placed in the library. Plaintiff does not contend that he has tried to request the book "Root Islamic Education" and been turned down. Additionally, plaintiff could obtain this book from a publisher or commercial source. Plaintiff does not argue that he has no means of obtaining this book from a publisher or commercial source. Therefore, no evidence exists that the publishers-only rule prevents plaintiff from exercising his First Amendment rights.

Second, the facts show that elimination of the publishers-only rule would create a significant drain on resources because more personnel would be needed to inspect mail from non-publishers.

Third, Turner instructs the courts to consider whether a regulation is an exaggerated response to the state's legitimate concerns. Plaintiff has essentially adduced no evidence that

the publishers-only rule is unfounded. In Hurd, the court left "open the possibility that the record in another case may arise sufficient question that the security risk in such materials has been exaggerated as to require a plenary trial on the issue." Hurd, 755 F.2d at 309. The same possibility exists here. A future case may reveal that the Department of Corrections has exaggerated the security risk posed by non-publisher material or that inmates have no alternative means of obtaining certain publications. However, the present record does not suggest that the publishers-only rule is an unnecessary and exaggerated response to prison security.

Because I have found that DOC § 309.05(2)(a) does not violate the First Amendment of the Constitution of the United States, it is not necessary to address the question whether defendants are entitled to qualified immunity. However, the question whether defendants' actions violate state statutes or regulations is a matter of state law. Because I am granting summary judgment to defendants on plaintiff's federal law claim, I decline to exercise supplemental jurisdiction over his state law claims. Wentzka v. Gellman, 991 F.2d 423, 425 (7th Cir. 1993) (only in "extraordinary circumstances" should trial court exercise pendent [now supplemental] jurisdiction over state law claim when federal claims are dismissed before trial). No extraordinary circumstances warrant retention of these state law claims. Plaintiff is free to raise them in state court.

ORDER

IT IS ORDERED that

1. The motion for summary judgment of defendants Gerald Berge and Craig Loskot is GRANTED;

2. I decline to exercise supplemental jurisdiction over plaintiff's state law claims; and

3. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 27th day of August, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge