

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NATHANIEL ALLEN LINDELL,

Plaintiff,

v.

MATTHEW J. FRANK, Secretary of the Wisconsin Department of Corrections, JON E. LITSCHER, former Secretary of the Wisconsin Department of Corrections; CINDY O'DONNELL, Deputy Secretary to Litscher; JOHN RAY, Corrections Complaint Examiner ("C.C.E."); GERALD BERGE, Warden at Supermax Correctional Institution; PETER HUIBREGTSE, Deputy Warden of Supermax; LIEUTENANT JULIE BIGGAR, a Lt. at Supermax; ELLEN RAY, I.C.E.; SGT. JANTZEN; C.O. WETTER; C.O. S. GRONDIN; C.O. MUELLER; C.O. CLARK, all guards at Supermax; JOHN SHARPE, Manager Foxtrot Unit at Supermax,

Defendants.

ORDER

02-C-21-C

Plaintiff Lindell has filed a second motion for an order finding defendants in contempt of this court's order of May 5, 2003, which granted plaintiff summary judgment on his claim that defendants were violating his First Amendment rights by enforcing a

“publishers only rule” that prohibited inmates from receiving any and all newspaper and magazine clippings and photocopies in the mail from any source other than a publisher or recognized commercial source. As was the case when plaintiff filed his first contempt motion, plaintiff does not base his argument for a contempt order on his own personal knowledge of actions that show defendants’ disregard for this court’s order. Instead, plaintiff has submitted the affidavit of inmate Berrell Freeman, who avers that he received a “Notice of Non-Delivery of Mail” on October 15, 2003 on which someone had written, “10 pages cut/alterd from another source not from commercial source per 309.05(2)a.”

As I have told plaintiff on previous occasions, this court’s order does not prevent defendants from drafting rules or regulations limiting the quantity of such materials that inmates may receive in incoming correspondence or from imposing any other regulation on photocopied or clipped material so long as there exists a legitimate penological reason for rejecting the material. It is not enough for plaintiff to show that another inmate was given notice of rejected photocopies or clippings or that a mail room employee wrote a reference to Wis. Adm. Code 309.05(2)a on a notice of non-delivery. Berrell Freeman can attest to the existence of a document he received, but his testimony about what the document said is hearsay. Even if Freeman had attached the original notice of rejection to his affidavit, evidence of a one-time rejection of mail by a mail room employee in October of 2003 for the stated reason that the material was not from a commercial source would be insufficient to

warrant an order finding that defendants are disregarding this court's May 5 order. Indeed, in the absence of admissible evidence to show that defendants are continuing on a regular basis to reject photocopies and clippings for no reason other than that they are photocopies or clippings, I cannot conclude that that defendants are failing to make a good faith effort to comply with this court's May 5, 2003 order.

ORDER

IT IS ORDERED that plaintiff Lindell's second motion to find defendants in contempt of this court's May 5, 2003, order is DENIED.

Entered this 2nd day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge