IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHNSON W. GREYBUFFALO #229871,

OPINION AND ORDER

Plaintiff,

03-C-559-C

v.

DANIEL BERTRAND,

Defendant.

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This is a civil action for declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc-5. Plaintiff Johnson W. Greybuffalo contends that defendant Daniel Bertrand denied his proposal for a religious group for Native American inmates in violation of the free exercise clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act. Jurisdiction is present under 28 U.S.C. §§ 1331 and 1343(a)(3).

This matter is before the court on defendant's motion for summary judgment. For

the reasons stated below, defendant's motion will be granted. In brief, plaintiff's failure to insure that all of the essential elements of his claim were presented to the court in factual propositions and supporting evidence dooms his effort to survive summary judgment. Specifically, the Religious Land Use and Institutionalized Persons Act requires plaintiff to bear the burden of persuasion on whether defendant's decision substantially burdens plaintiff's exercise of religion. Plaintiff has not presented any facts establishing what his religious beliefs are and why the group he wishes to establish is an exercise of those religious beliefs.

Setting aside for the moment plaintiff's failure to propose any facts of his own, I note that most of plaintiff's responses to defendant's proposed findings of fact do not comply with this court's summary judgment procedures. For example, at several points plaintiff failed to state facts that dispute defendant's facts. Procedure II(D)(2) requires a party that wishes to dispute a proposed fact to "state your version of the fact and refer to evidence that supports that version." Plaintiff's responses to defendant's facts ¶¶ 78-82, 119-23 are conclusory objections that do not contain any facts that dispute defendant's proposed facts. Therefore, I have disregarded these responses. Also, plaintiff failed to support several of his responses to defendant's proposed facts with admissible evidence. Procedure II(E)(2) states that the court will not consider "any factual propositions made in response to the movant's proposed facts that are not supported properly and sufficiently by admissible evidence."

Plaintiff's responses to defendant's proposed facts ¶¶ 41-42, 113 and 118 cite to declarations given by plaintiff and inmate Lawrence Palubecki. Neither plaintiff's nor Palubecki's declaration indicates that the information contained therein is based on personal knowledge. See Procedure I(C)(1)(e) (affidavits constitute admissible evidence when they "show that the person making the affidavit is in a position to testify about those facts."). Accordingly, plaintiff's responses to defendant's proposed facts ¶¶ 41-42, 113 and 118 have been disregarded. The bulk of defendant's proposed findings of fact must be considered undisputed.

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

UNDISPUTED FACTS

A. Parties

Plaintiff is a Native American inmate at Green Bay Correctional Institution. He has been incarcerated there since January 2000. Defendant is the warden at the Green Bay Correctional Institution.

B. Plaintiff's Letter to Defendant

In March 2003, plaintiff wrote a letter to defendant requesting permission to revive

an "inmate activity group" at the Green Bay Correctional Institution known as the Seven Fires Indian Council. This group and two other cultural groups (a Hispanic cultural group and an African-American cultural group) had existed at the institution in the past but were disbanded several years before plaintiff's letter. These groups were designed to assist inmates of minority cultures in learning and sharing experiences about their culture. Institution officials dissolved these groups because of (1) concerns about gang activity at group meetings; (2) the disparity between large enrollment requests and limited capacity; and (3) limited physical space. Moreover, the institution did not have the capacity to maintain a group for each culture represented in the inmate population. (Currently, inmates from all ethnic backgrounds may participate in a "Multi-Cultural Group" but all culturally-specific groups have been dissolved.) Plaintiff's letter was the latest in a series of efforts by Native American inmates to revive the Seven Fires Indian Council.

In his letter, plaintiff stated that membership in the council would be open to "any inmate of the general population that shows an earnest interest in Walking the Red Road, as well as the Native American population of the institution." Dft. PFOF, dkt. #29, at ¶ 12. Plaintiff proposed that council meetings be held once a week for at least 90 minutes. Id. at ¶ 11. In addition, plaintiff's letter contained the proposed constitution and by-laws that would govern the Seven Fires Indian Council. The bylaws stated that the council would consist of a governing board and general membership. The governing board would consist

of seven positions (chairman, vice-chairman, secretary, treasurer, sergeant–at–arms, drumkeeper and pipekeeper), each to be filled by an inmate. The bylaws explained the duties of each position; for example, as chairman, plaintiff would "[c]arry out the duties of chairing any meeting or gathering, invite and introduce guests, . . . [and] always portray leadership abilities." Id. at ¶ 17. Regarding membership, the bylaws stated that "inmates of direct and/or ancestral Native American heritage . . . shall be eligible for membership" and "membership may be granted to individuals who have expressed and actively shown an earnest desire to live the ways of the Red Road or have extended an act of generosity or assistance that has furthered the cause and efforts of this Council." Id. at ¶ 14. Plaintiff stated that the Seven Fires Indian Council's purpose would be to "provide each General Member the greatest possible opportunities available for participation, learning and understanding . . . the Native American Way of Life, by way of Religious and Traditional Ceremonies" and other activities. Id. at ¶ 10.

The bylaws set forth detailed disciplinary procedures. First, council members could be impeached for "dereliction of duty, or conduct unbecoming and detrimental to the welfare of the General Council." Id. at ¶ 19. A member of the council who violated the constitution or bylaws, acted "in a manner detrimental to the welfare of SFIC and it's [sic] causes" or "attempt[ed] to supercede the authority of the Governing Board" was subject to a "For-Cause review before the General Membership of the Body of SFIC and it's [sic] Council."

Id. at ¶ 20. Second, the bylaws established three tiers of punishment. For isolated incidents, a warning could be issued along with a reminder about the purpose of the group. "Repeat" occurrences or a "compilation of violations" could be met with "a temporary suspension of privileges . . . along with a warning that an open suspension may be issued." Id. Members coming before the group for multiple "For-Cause reviews" would be counseled by another group member and subject to "open suspension" as a last recourse. Finally, the bylaws required a disciplined member to "issue and read a written apology to the entire General Membership Body of the Seven Fires Indian Council for his unacceptable and improper behavior." Id.

C. Defendant's Response to Plaintiff's Letter

Several officials at Green Bay Correctional Institution expressed concern regarding plaintiff's proposal. Michael Donovan, a chaplain at the institution, wrote a memo to then social services director Robert Novitski raising several concerns about plaintiff's proposal. First, Donovan stated that the council's bylaws would establish titled positions for seven inmates in violation of Wis. Admin. Code § DOC 303.31 and a Department of Corrections Internal Management Procedure (DOC 309-IMP #6). Second, Donovan highlighted the membership provisions and expressed concern about inmates controlling the group's membership. Third, Donovan stated that the disciplinary procedures appeared to give

inmates authority over other inmates in violation of a Department of Corrections Internal Management Procedure (DOC 309–IMP #6). Donovan stated that having inmates serve in leadership positions "has been shown to be a major safety risk in the past and, therefore, the reason behind eliminating inmate leadership positions." Dft. PFOF, dkt. #29, at ¶ 21.

Defendant denied plaintiff's request in writing on March 27, 2003, explaining that

> The institution continues to face uncertain times in regards to the budget process and what the final staffing will be for this institution. Given that uncertainty, I do not believe that we have sufficient resources to properly supervise and support this request. In addition I believe that the programs currently offered via our Chapel, Hobby Crafts and the expanding use of Channel 8 for inmates, adequately meet the needs of the Native American population at GBCI.

Id. at ¶ 23.

D. Services Offered to Native American Inmates at Green Bay Correctional Institution

Native American inmates at Green Bay Correctional Institution are allowed to practice their religion in several ways. Native American inmates are allowed to pray in their cells, although they may not purchase the medicines needed to make a smudge because the facility is a non-smoking institution. Inmates are allowed to possess one braid of sweet grass, a medicine bag measuring three inches or less, small amounts of sage and cedar and a one eagle or hawk feather to facilitate their prayer. Inmates can correspond and visit personally with Native American spiritual leaders. The facility allows Native American inmates to

possess up to twenty-five religious texts and work on Native American crafts in their cells. In addition, Native American inmates may participate in an hour long Pipe and Drum ceremony each Friday. Once a month, a Sweat Lodge Ceremony is held at the institution, during which Native American inmates may engage in group smudging and smoke tobacco.

Until September 2003, a Native American study group met for one hour each week. Officials at the facility discontinued the study group after the Native American volunteer who led the group resigned because members of the Native American religious group at the facility had been pressuring non-Native American inmates to relinquish their spots in the study group to Native American inmates. (Wisconsin Department of Corrections procedure requires a qualified person of a particular religious group (Protestant, Islam, Native American, Buddhist etc.) to lead that religious group's services and study groups and prohibits inmates from leading study groups or religious services.) To this date, officials at Green Bay Correctional Institution have not located another volunteer trained in Native American religion to lead the study group.

E. Wisconsin Department of Corrections Receipt of Federal Financial Assistance

Although neither party proposed as a fact that either Green Bay Correctional Institution or the Wisconsin Department of Corrections receives federal financial assistance, I take judicial notice from the state's public records that the Department of Corrections

receives grant money from the federal government for state prison substance abuse treatment programs. See Wisconsin Legislative Fiscal Bureau Paper #192, Joint Committee on Finance, "Federal Byrne Anti-Drug Grant and Associated Penalty Assessment Match Funding," p. 3, June 5, 2001.

DISCUSSION

A party moving for summary judgment will prevail if it demonstrates that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anetsberger v. Metropolitan Life Ins. Co., 14 F.3d 1226, 1230 (7th Cir. 1994). When the moving party succeeds in showing the absence of a genuine issue as to any material fact, the opposing party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Whetstine v. Gates Rubber Co., 895 F.2d 388, 392 (7th Cir. 1988). If the nonmovant fails to make a showing sufficient to establish the existence of an essential element on which that party will bear the burden of proof at trial, summary judgment for the moving party is proper. Celotex, 477 U.S. at 322.

The Religious Land Use and Institutionalized Persons Act prohibits governmental imposition of a "substantial burden on the religious exercise" of an inmate, unless the

defendant can show that the burden (1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000cc-1. By contrast, a prison regulation challenged on First Amendment grounds will be upheld if it is reasonably related to a legitimate penological interest. Lindell v. Frank, 377 F.3d 655, 657 (7th Cir. 2004). Because defendant has a heavier burden under the act, I will consider plaintiff's statutory claim first. If defendant meets his burden under the act, he will meet the less stringent burden of showing that his conduct was reasonably related to a legitimate penological interest under the First Amendment.

Before addressing the merits of plaintiff's statutory claim, I note that the protections afforded by the Religious Land Use and Institutionalized Persons Act apply where

> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
> (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. § 2000cc-1(b). Because the department receives and uses federal grant money for substance abuse treatment programs in its state prison facilities, the requirements of the Religious Land Use and Institutionalized Persons Act apply to it.

Under the act (and the First Amendment), plaintiff must first establish that the defendant's refusal to sanction the Seven Fires Indian Council creates a substantial burden

on the exercise of his religious beliefs. 42 U.S.C. § 2000cc–2(b); Hernandez v. Commissioner, 490 U.S. 680, 699 (1989). If plaintiff makes this showing, the burden under the statute shifts to defendant, who must demonstrate that his decision was the least restrictive means of furthering a compelling government interest. See Murphy v. Zoning Comm'n of the Town of Milford, 148 F. Supp. 2d 173, 187 (D. Conn. 2001). Although the act does not define the term "substantial burden," the Court of Appeals for the Seventh Circuit has held that a substantial burden is "one that necessarily bears a direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003). A "religious exercise" under the statute is "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

Plaintiff has not proposed any facts supported by admissible evidence demonstrating that defendant's refusal to revive the Seven Fires Indian Council constitutes a substantial burden on the exercise of plaintiff's religion. In fact, plaintiff did not propose any findings of fact; his response to defendant's proposed findings of fact was limited to responding to defendant's proposed facts. When a defendant moves for summary judgment, the plaintiff must do more than respond to the defendants' proposed facts. Plaintiff bears the burden of insuring that all of the essential elements of his claim have been presented to the court in factual propositions supported by admissible evidence. In this way summary judgment

functions as "'the put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events." Johnson v. Cambridge Industries, Inc., 325 F.3d 892, 901 (7th Cir. 2003) (quoting Schacht v. Wisconsin Dept. of Corrections, 175 F.3d 497, 504 (7th Cir. 1999)). Because plaintiff failed to propose facts regarding his religious beliefs and why the existence of the council is an exercise of those beliefs, I cannot find that defendant's decision not to allow the Seven Fires Indian Council substantially burdens plaintiff's religious exercise. There are no facts in the record establishing plaintiff's religious beliefs. There are no facts in the record that establish how the council would facilitate an exercise of those religious beliefs. At most, the undisputed facts show that (1) plaintiff is of Native American heritage; (2) plaintiff wrote a letter to defendant requesting permission to reorganize the Seven Fires Indian Council; and (3) the bylaws of this group indicate that the Seven Fires Indian Council would attempt to provide opportunities to learn about the "Native American Way of Life" by engaging in religious and traditional ceremonies. Dft.'s PFOF, dkt. #29, at ¶ 10.

In a November 4, 2003 order, I allowed plaintiff to pursue his statutory and constitutional claims against defendant. In doing so, I noted that

> The rejection of the group proposal is a close[] call. Although plaintiff alleges that defendant Bertrand prevented him from forming a religious group, plaintiff also alleges that he was already involved in a Native American "study group." If plaintiff wanted to do nothing more than form a second study group that performed the same

> function as the first, defendant Bertrand's denial of this request would not be a substantial burden on plaintiff's ability to exercise his religion. However, plaintiff has not alleged enough facts to allow me to determine whether this is the case. Therefore, I will assume at this stage that the existing study group and plaintiff's proposed new group would engage in distinct "religious exercise[s]" as that term is used in § 2000cc-5(7).

Order, dkt. #2, at 16-17. Plaintiff was on notice that he needed to present specific facts about the activities in which members of the Seven Fires Indian Council would engage. He has not done so. At the summary judgment stage I cannot continue to assume that the Seven Fires Indian Council would engage in distinct "religious exercises."

In conclusion, I note that even were I to assume that the ceremonies or other activities that may occur at Seven Fires Indian Council meetings constitute a distinct exercise of plaintiff's religious beliefs, there are no facts in the record tending to show that defendant's refusal to allow the group to meet "bears a direct, primary and fundamental responsibility for rendering religious exercise effectively impracticable." Civil Liberties for Urban Believers, 342 F.3d at 761. Specifically, there are no facts in the record suggesting that the activities that would take place at council meetings do not already occur at other times and places. Defendant has noted that Native American inmates are allowed to pray in their cells, possess religious texts, correspond with Native American spiritual leaders, participate in a weekly Pipe and Drum ceremony and a monthly Sweat Lodge ceremony. Plaintiff has not presented any facts tending to show that the activities that would occur at

council meetings would be different from those activities already available to Native American inmates. It was plaintiff's responsibility to insure that these facts were brought to the court's attention. He has not met his burden. Therefore, defendant's motion for summary judgment must be granted.

ORDER

IT IS ORDERED that defendant Daniel Bertrand's motion for summary judgment is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 1st day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge