IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOSEPH D. KOUTNIK,

OPINION AND ORDER

Plaintiff,

04-C-580-C

v.

LEBBEUS BROWN, GERALD BERGE
and MATTHEW J. FRANK,

Defendants.

- -

In December 2002, Joseph Koutnik, an inmate at the Wisconsin Secure Program Facility, attempted to mail a letter and several drawings to a retail catalog. Defendant Lebbeus Brown denied delivery of the letter and drawings because they contained a swastika and a coded reference to the Ku Klux Klan. Plaintiff subsequently brought this civil rights action under 42 U.S.C. § 1983 that raises the question whether it is constitutional for prison officials to censor an inmate's outgoing mail in which he uses symbols associated with prison gangs or unsanctioned groups to express a political message. Jurisdiction is present. 28 U.S.C. § 1331.

This matter is before the court on cross motions for summary judgment filed by the

parties. Because defendants have shown that the censorship of plaintiff's letter and drawings was generally necessary to further the Secure Program Facility's substantial interest in plaintiff's rehabilitation, I will grant defendant's motion and deny plaintiff's motion. Because I conclude that no violation of plaintiff's First Amendment rights occurred, I will not address the parties' arguments regarding the personal involvement of defendant Frank.

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

UNDISPUTED FACTS

A. Parties

At all times relevant to this case, plaintiff Joseph Koutnik was incarcerated at the Wisconsin Secure Program Facility, a maximum security correctional institution located in Boscobel, Wisconsin. Plaintiff is a member of the Simon City Royals gang, a group that is not a white supremacist group and is not affiliated in any way with the Ku Klux Klan or Nazi groups. At all times relevant to this case, defendant Gerald Berge was warden of the facility. Defendant Matthew Frank is Secretary of the Wisconsin Department of Corrections.

Defendant Lebbeus Brown has been employed at the Secure Program Facility since July 2000. Currently, he is a captain at the facility; from April 2002 to December 2003, he

was a lieutenant at the facility. Defendant Brown has served as the facility's Disruptive Groups Coordinator since April 2003. In this capacity, defendant Brown is responsible for tracking disruptive groups and their members at the facility and documenting their activities, reviewing incoming and outgoing mail and inmate property for gang-related content, preparing reports regarding gang activity for the facility's security staff and Disruptive Groups Coordinators at other correctional institutions, instructing facility staff in the areas of gang identification and gang management strategies, meeting on a regular basis to exchange information with the facility's gang intelligence unit and with other Disruptive Groups Coordinators and assessing ongoing gang activity at the facility. Defendant Brown has received training regarding the identification and operation of prison and street gangs. He has the ability to recognize gang-related activities. Prior to the incident giving rise to this case, defendant Brown participated in a gang identification training session with the Milwaukee County Police Department, assisted in a gang identification program at the La Crosse County Juvenile Facility and received training in prison gang identification and gang activity at the Corrections Training Center.

Through his experience at the Secure Program Facility and his training, defendant Brown has become familiar with the facility's security policy and with white supremacy issues in the correctional system.

B. Gang Activity in Correctional Institutions

Disruptive groups, otherwise referred to as gangs, are groups of individuals that threaten, coerce or harass others and engage in or encourage group members and others to engage in illegal activities. Gangs operate within Wisconsin's correctional system and pose a threat to the security of correctional institutions because of the threat of gang violence and because gangs undermine prison authority by providing a support system for those who oppose prison administration. Gang affiliation is not in the best interest of an inmate's rehabilitation because gangs are antisocial and are frequently engage in criminal activity. Suppressing gang activity in correctional institutions is essential to maintaining a safe and secure environment for inmates, visitors and staff.

One reason inmates are transferred to the Secure Program Facility is to place them in an environment free from gang influences and other adverse factors that exist at other institutions so that they can concentrate on behavior modification and other coping strategies. The goal is to rehabilitate inmates and reintegrate them into the general populations at less restrictive institutions. Prison officials monitor and manage gang activity through educating corrections staff, conducting searches of inmate property and living areas, monitoring telephone conversations and screening incoming and outgoing mail. They permit inmates at the facility to correspond with anyone through the mail, although officials monitor inmates' non-legal mail closely. Non-legal mail is subject to the restrictions in Wis.

Admin. Code § DOC 309.04(4)(c), which allow officials to deny delivery of mail that, among other things, concerns an activity that would violate state law or the administrative rules of the Department of Corrections.

C. Plaintiff's Letter to Northern Sun

In the course of his duties on December 30, 2002, defendant Brown examined a letter written by plaintiff intended for delivery to Northern Sun Merchandising in Minneapolis, Minnesota. According to its website, http://www.northernsun.com, Northern Sun offers for sale "message-oriented tshirts, bumperstickers, buttons, posters, etc. covering a wide variety of issues/topics." In addition, the website includes a page that encourages visitors to submit ideas to be placed on products sold by Northern Sun:

> We reward you for being creative! If your idea would look good on a t-shirt, button or bumpersticker, send it to us and you could make extra money!
>
> Royalties for ideas that end up on t-shirts start at $0.50 per shirt sold. Ideas that become bumperstickers are usually reward [sic] with a lump sum of $25 (buttons) or $50 (bumperstickers). Occasionaly [sic], we will pay a royalty for each button or bumpersticker sold.

Plaintiff's mail to Northern Sun consisted of two sheets of paper. On one sheet of paper, plaintiff wrote a letter dated December 30, 2002, which reads as follows:

> TO WHOM IT MAY CONCERN:
>
> I received your Fall/Winter 02-03 catalog. I enjoyed looking at what y'all are making

> available to the masses. Being a prisoner of the state currently held captive in a Supermax penitentiary much of what is in your catalog I cannot possess. If you were to make 8" x 10" (or smaller) pictures of some of those posters, stickers etc. me and others similarly situated would at least be able to purchase items from you. Stickers are "Security threats" so they would not be allowed but the sayings would. I noticed that prison reform is not as well represented as is needed and am therefore including some of my ideas you should consider using. let me know what you think. Also if you could send me a list of revolutionary books (softcover) I would appreciate it. And I saw a poster with X; Marley & Gandhi where's the Mao, Lenin & Marx ones? It's will [sic] known the prisoner "class" is one of the most, if not the most, revolutionary and politically conscious "class" in America. It would therefore be beneficial for y'all to support us and become an outlet and provide allowable merchandise for us so we can support you! With that I will end this letter. A response would be greatly appreciated.
>
> In Struggle,
> Joseph D. Koutnik
> WSPF (#322794-A)
> POB 9900
> Boscobel, WI 53805

The other sheet of paper featured a drawing of a swastika. The phrase "The Department of Corruptions" was written above the swastika and the phrase "Keeping Kids in Kages" was written below it. The letter and drawings expressed plaintiff's political views and criticized the Department of Corrections and prison officials.

Defendant Brown denied delivery of plaintiff's letter and issued a "Notice of Non-Delivery of Mail" to plaintiff. On the form, defendant Brown indicated that the "drawing or swasitka [sic] violates DOC 30320 [sic] Warning issued." The warning issued to plaintiff consisted of the warning on the form and a verbal warning given to plaintiff by defendant

Brown. In addition, defendant Brown checked a box on the Notice of Non-Delivery of Mail form indicating that the reason for non-delivery was that the "Item concerns an activity, which, if completed, would violate the laws of Wisconsin, the United States or the Administrative Rules of the Department of Corrections."

The notation "DOC 30320"refers to Wis. Admin. Code § DOC 303.20, which provides in part that

> Any inmate who participates in any activity with an inmate gang, as defined in s. DOC 303.02(11), or possesses any gang literature, creed, symbols or symbolisms is guilty of an offense. An inmate's possession of gang literature, creed symbols or symbolisms is an act which shows that the inmate violates the rule. Institution staff may determine on a case by case basis what constitutes an unsanctioned group activity.

Although § DOC 303.02(11) defines "Inmate gang" as a group of inmates that is not sanctioned under Wis. Admin. Code § DOC 309.22, the rule's reference is a mistake. The proper reference concerning unsanctioned groups would be to § DOC 309.365. Under that section, the Ku Klux Klan, Nazi groups and other white supremacist groups are not sanctioned at the Secure Program Facility.

Through his training and experience, defendant Brown has learned that the swastika is a symbol associated with Nazism and Adolf Hitler as well as oppression and genocide of racial, ethnic and religious minorities. The swastika has become a symbol of Aryan pride and white supremacy as well as racial hatred, although it has religious meanings to other groups

such as Buddhists and Native Americans. Defendant Brown understands the term "gang symbols" to mean actions, objects or other things that represent gang or disruptive group identification, activity or beliefs, including hand signs, colors, stars, wine glasses, canes, swastikas, forks, tattoos, letters, numbers, etc. Defendant Brown understands the term "gang symbolism" to mean the practice of representing gang or disruptive group identification, activity or beliefs by means of symbols or of attributing symbolic meanings or significance to activities, objects or other things, including tattoos, clothing styles, stance, hand signs, drawings, writing style, etc.

Defendant Brown denied delivery of plaintiff's letter because the swastika is a symbol of white supremacy and because the phrase "Keeping Kids in Kages" was written below the swastika. The capitalization of the letter "k" in this phrase, along with the distinctive spelling of the word "Kages," led him to conclude that the phrase was intended to stand for the Ku Klux Klan, a white supremacist group. (In his training and experience with prison gang written materials, defendant Brown has learned that inmates attempt to convey gang-related messages by using the first letters of a sequence of words and that inmates who adhere to a white supremacist ideology identify with the Ku Klux Klan and Nazism.)

Defendant Brown concluded that plaintiff was identifying with white supremacist groups by drawing the swastika and writing "Keeping Kids in Kages." In addition, defendant Brown concluded that allowing plaintiff to engage in the business of merchandising this

material while incarcerated would imply that the Department of Corrections and the Secure Program Facility were associated with and condoned white supremacy activity within the institution, as well as the promotion and growth of such activity inside and outside the institution. He believed that a security concern would arise if inmates held this perception because it could cause unrest and racial tension among minority inmates who felt threatened and it could encourage white supremacist activity among certain inmates. (Race hatred and the violence associated with it are particular security concerns within the correctional system.)

Defendant Brown concluded also that allowing plaintiff to merchandise white supremacist sentiments from the prison was incompatible with the Secure Program Facility's duty to rehabilitate plaintiff. A goal of rehabilitation efforts at the facility is to encourage an inmate to live crime-free when he is released from custody. Other rehabilitation goals include development of an inmate's ability to resolve conflicts without resorting to violence and the recognition that successful reintegration into society requires respecting the rights of others. Permitting plaintiff to merchandise white supremacist material from prison is incompatible with these rehabilitation goals.

Defendant Brown checked a box on the Notice of Non-Delivery form indicating that plaintiff's mail was to be destroyed in light of the security and rehabilitation concerns. Plaintiff filed an inmate complaint on February 19, 2003, after several informal appeals to

defendant Berge prompted no response. The inmate complaint examiner recommended dismissal of plaintiff's complaint on March 24, 2003 and the deputy warden accepted this recommendation on April 1, 2003. On April 2, 2003, plaintiff appealed the disposition of his complaint to the corrections complaint examiner, who recommended dismissal of plaintiff's complaint on April 21, 2003. On April 27, 2003, plaintiff received a document entitled "OOS Report" indicating that the Secretary of the Department of Corrections accepted the recommendation of the corrections complaint examiner and that plaintiff's complaint was dismissed.

D. Library Materials at the Secure Program Facility

At least two books available to inmates at the Secure Program Facility have a swastika on the cover. One of these books is entitled The Rise and Fall of Adolf Hitler. It has a visible depiction of a swastika on its back cover. The book provides a history of Nazi Germany and does not promote Nazism or white supremacy. The other book in the library with a swastika on its cover is American Reich, which was written by Douglas Muir. It is a fictional work concerning a planned coup to end democracy in the United States that is engineered by high government officials and a coalition of militias, the Ku Klux Klan and American Nazis. The book does not promote Nazism, Nazi ideals or the white supremacist ideals of the Ku Klux Klan.

In addition, the facility's library contains a book written by Paul Gillette entitled Inside the Ku Klux Klan. Its cover depicts Klan members in robes standing around a burning cross. The book chronicles the history and activities of the Klan and exposes crimes and atrocities committed by the group, but it does not promote white supremacy. The library does not contain materials that promote racial hatred, white supremacy or Nazi ideals.

OPINION

At the outset, I note that defendant Brown's conclusion that the contents of plaintiff's drawings violated Wis. Admin. Code § 303.20(3) is entitled to deference in light of his position as the Disruptive Groups Coordinator at the Secure Program Facility and his training and experience in the field of gang identification. It is undisputed that the Ku Klux Klan, Nazi groups and other white supremacist groups are not sanctioned groups at the Secure Program Facility. Also entitled to deference is defendant Brown's conclusion that plaintiff was identifying with white supremacist groups by drawing the swastika and the "Keeping Kids in Kages" caption, which plaintiff agrees was intended as a coded reference to the Ku Klux Klan. Defendant Brown's conclusions regarding plaintiff's drawings were grounded on his knowledge and expertise in the area of prison gangs and would be entitled to deference even if I disagreed with them. Frasie v. Terhune, 283 F.3d 506, 515 (3d Cir. 2002) (judiciary should defer to prison officials' judgments "in establishing, interpreting and

applying prison regulations.").

Before addressing the merits of this case, I must decide the proper standard of review for analyzing plaintiff's First Amendment claim.

A. Standard of Review

In screening plaintiff's complaint, I noted that the "decision to censor an inmate's outgoing mail presents a different question from a decision to censor mail intended for another inmate," Order, dkt. #3, at 8, and stated that the proper standard for analyzing plaintiff's First Amendment claim was set out in Procunier v. Martinez, 416 U.S. 396 (1974). Under Martinez, 416 U.S. at 413, the question is whether the censorship furthers "one or more of the substantial governmental interests of security, order, and rehabilitation" and is "no greater than is necessary or essential to the protection of the particular governmental interest involved." Defendants argue that plaintiff's claim should be analyzed according to the more familiar standard applicable to prison inmate constitutional claims announced in Turner v. Safley, 482 U.S. 78 (1987). Under that standard, an infringement of an inmate's constitutional rights is permissible so long as the act in question is "reasonably related to legitimate penological interests." Id. at 89. (Although defendants do not make the point, I note that had plaintiff's letter and drawing been discovered and confiscated at any time before he placed them in the mail, it would be clear that the Turner

reasonableness applied).

Defendants contend first that the Turner standard governs this case because plaintiff's letter was part political speech and part commercial transaction. According to defendants, the "most reasonable way of viewing the plaintiff's mail is that he not only wished to turn a few bucks by selling his design, but also to send a message through proposed use of his design by Northern Sun." Dfts.'s Br., dkt. #12, at 14. Although defendants do not make the point explicitly, they appear to argue that the more exacting scrutiny required by Martinez is not appropriate because commercial speech is entitled to less protection than purely political speech under the First Amendment. Defendants' analogy to commercial speech does not help their argument. The test for evaluating limitations on commercial speech under the First Amendment is strikingly similar to the standard announced in Martinez. In Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980), the Supreme Court established a test for analyzing restrictions on commercial speech. Under that test, restrictions on constitutionally protected commercial speech are valid if the government can "assert a substantial interest to be achieved" by the restriction and if the restriction is "designed carefully to achieve the State's goal." Id. at 564. These requirements for restrictions on commercial speech mirror the standards for analyzing restrictions on outgoing mail set forth in Procunier.

As additional support for their argument that the Turner standard applies in this

case, defendants cite the Supreme Court's decision in Shaw v. Murphy, 532 U.S. 223 (2001). In Shaw, the Court considered the scope of an inmate's First Amendment right to provide legal assistance to another inmate. In discussing the deference owed to prison administrators in day-to-day decisionmaking, the Court referred to the Turner standard as a "unitary, deferential standard for reviewing prisoners' constitutional claims." Id. at 229. Defendants contend that this language mandates application of the Turner standard in this case. I disagree, for three reasons. First, Shaw did not involve a restriction on outgoing mail; it involved a restriction on inmate-to-inmate correspondence. Second, the Court mentioned Martinez in its opinion but did not expressly overrule it. Third, defendants have not cited a single case to support their argument. Indeed, no federal court has come to the conclusion advocated by defendants, presumably because of the well-settled principle that lower federal courts may not overrule or otherwise ignore Supreme Court precedent that the Court itself has not overruled. Scheiber v. Dolby Laboratories, Inc., 293 F.3d 1014, 1018 (7th Cir. 2002). Although one could argue that a separate standard for one narrow category of actions is unwise or unnecessary, the Court has not overruled Martinez with respect to outgoing mail and lower courts continue to apply it in this context. Nasir v. Morgan, 350 F.3d 366, 371 (3d Cir. 2003) (questioning continuing viability of Martinez in any context but applying it to regulation restricting outgoing mail). Therefore, I will analyze plaintiff's claim under the standard for outgoing mail set out in Martinez.

B. Analysis Under Martinez

Plaintiff admits that his purpose in drawing the swastika and writing "Keeping Kids in Kages" was to criticize the Department of Corrections and advocate prison reform. He notes correctly that prison officials may not censor inmate correspondence merely because it is critical of them or because it expresses unpopular or even inflammatory opinions. Martinez, 416 U.S. at 415-16; Loggins v. Delo, 999 F.2d 364, 366 (8th Cir. 1993). However, this case is not as simple as plaintiff contends. Defendant Brown censored plaintiff's mail not because the sentiments plaintiff expressed were critical of the department but because plaintiff incorporated symbols associated with unsanctioned groups or gangs in his criticism. Thus, the question presented is whether the limited First Amendment protections afforded to prison inmates allow them to incorporate gang-related symbols and phrases into outgoing correspondence intended only to criticize their captors.

With respect to the first prong of the Martinez test, defendants have identified institution security and inmate rehabilitation as the interests furthered by the censorship of plaintiff's letter and drawing. Both of these interests were identified as substantial interests by the Court in Martinez, see also Pell v. Procunier, 417 U.S. 817, 823 (1974) ("[a] paramount objective of the corrections system is the rehabilitation of those committed to its custody [and] . . . central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves"), and prison officials are

afforded substantial deference in making decisions about what actions and objects present a threat to prison security and inmate rehabilitation. Pell, 417 U.S. at 827. The threat to prison security posed by organized gang activity is well documented. E.g., Rios v. Lane, 812 F.2d 1032, 1037 (7th Cir. 1987) ("it is difficult to conceive of a single factor more detrimental to penological objectives than organized gang activity"). Suppressing gang activity is essential to maintaining secure conditions within prison walls because prison gangs pose a threat of physical violence and provide support for those who oppose prison officials. Curbing gang-related activity is also an essential part of the Secure Program Facility's effort to rehabilitate its inmates. It is undisputed that prison gangs and other unsanctioned groups impede efforts to rehabilitate inmates because they promote criminal activity and other antisocial behavior. Creation of a gang-free environment is one of the purposes of the Secure Program Facility, allowing inmates to focus on changing their behavior to avoid criminal activity, resolve conflicts without resort to violence and respect the rights of others after they are released.

In Martinez, 416 U.S. at 415, the Court invalidated prison regulations that allowed the censorship of complaints, grievances, and inflammatory political and racial views. The regulations did not survive scrutiny because the prison officials failed to show that they were "in any way" necessary to further the prison's interest in security, order or rehabilitation. Because the regulations were not tethered to any governmental interest, they invited mail

screeners to "apply their own personal prejudices and opinions as standards for prisoner mail censorship." Id. By contrast, the present case involves a piece of mail that was censored pursuant to a regulation that is grounded firmly in the interests of security and rehabilitation.

As in Rios, 812 F.2d at 1037, the difficult question in this case is not whether the censorship of plaintiff's letter and drawings was connected to substantial governmental interests but whether defendants' enforcement of Wis. Admin. Code § DOC 303.20 "was no greater an infringement on [plaintiff's] first amendment liberties than necessary to protect the state's interest[s]." Although the Martinez standard requires greater scrutiny of the actions of prison officials, it does not negate completely the deference accorded to prison officials in enforcing rules designed to preserve order and security. Indeed, the Court began its discussion in Martinez by highlighting the "hands-off attitude toward problems of prison administration" that federal courts must adopt when analyzing constitutional claims of prison inmates. Id. at 404. With respect to the specific task of reviewing inmate correspondence, the Court recognized that prison officials need not "show with certainty that adverse consequences would flow from the failure to censor a particular letter." Id. It recognized that a certain amount of discretion is necessary to the discharge of any prison official's duty and required only that a challenged decision be "generally necessary" to protect the governmental interest at issue. Id.

Although deference is owed to defendant Brown's judgment that plaintiff's letter was an attempt to encourage the growth of white supremacy groups, the "implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials." Thornburgh v. Abbott, 490 U.S. 401, 413 (1989); see also Martinez, 416 U.S. at 416 (prison security not threatened by outgoing letters that contain "inflammatory political, racial, religious or other views or beliefs"). Outgoing correspondence is likely to present a security risk when it contains information pertaining to escape plans or ongoing criminal activity. Thornburgh, 490 U.S. at 412; McNamara v. Moody, 606 F.2d 621, 624 (5th Cir. 1979). Defendants do not argue that plaintiff's letter contained information that falls into either of these categories. It is difficult to see how the security of the Secure Program Facility would be threatened by allowing plaintiff to send a letter containing a swastika and a reference to the Ku Klux Klan to a retail catalog. Accepting as true defendant Brown's conclusion that plaintiff's intent in using the symbols was to identify with and promote white supremacist groups, the connection between that promotion and the security of the Secure Program Facility is not readily apparent.

Defendants argue that plaintiff's letter threatened the facility's security because plaintiff wrote the letter in the hope that his drawing would be "reproduced by Northern Sun in a form which would be re-introduced into the prison systems and would circulate among inmates." Dfts.'s Br., dkt. #12, at 21. Censorship of plaintiff's letter was justified,

they contend, because prison officials have the authority to take preemptive action to prevent security issues from arising so long as their actions are predicated on legitimate security concerns. Hadi v. Horn, 830 F.2d 779, 785 (7th Cir. 1987); cf. Gaines v. Lane, 790 F.2d 1299, 1305 n.4 (7th Cir. 1986) (because prison may "exclude all packages in the interest of security, the prison must also have the ability to solve the problem before it starts by preventing the solicitation of packages"). Defendants contend further that censoring plaintiff's mail was necessary to preserve security because allowing plaintiff to send his mail would imply that the facility and the Department of Corrections "were associated with and condoned" the promotion and growth of white supremacist activity inside and outside the facility.

Assuming defendants are correct that plaintiff was trying to have his white supremacist views put into a form that would be available to other inmates, they have not explained how inmates would have access to the Northern Sun catalog or to merchandise featuring plaintiff's drawings. If Northern Sun decided to sell merchandise featuring plaintiff's drawings through its catalog, officials at the facility would be fully justified in refusing to deliver copies of the catalog or merchandise that featured plaintiff's drawings, either because they contained gang-related symbols or because plaintiff's message would encourage disrespect for prison staff. But defendants' argument appears to be premised on their inability to do just this. In other words, defendant Brown had to deny delivery of

plaintiff's letter and drawings when they were outgoing because he could not lawfully deny delivery of incoming Northern Sun catalogs or merchandise that featured the swastika or the "Keeping Kids in Kages" phrase. This position does not make sense because prison officials have greater authority to censor incoming mail that implicates security concerns in comparison to their authority to censor outgoing mail. Thornburgh, 490 U.S. at 413; Turner, 482 U.S. at 91-92 (correspondence between inmates at different institutions); cf. Young v. Lane, 922 F.2d 370, 376-77 (7th Cir. 1991) (upholding restrictions on wearing headgear in prison because of dangers related to gang affiliation).

Defendants argue that inmates at the facility could develop a perception that the facility condoned plaintiff's white supremacist views and that this perception could cause unrest and racial tension among minority inmates and could encourage white supremacist activity among inmates who ascribe to plaintiff's views. Again, however, defendants have not explained how other inmates at the facility would know that the facility had allowed plaintiff's letter and drawings to be delivered to Northern Sun. I know from other prison lawsuits brought before this court that many inmates at the Secure Program Facility have little to no contact with other prisoners. E.g., Jones 'El v. Berge, 164 F. Supp. 2d 1096 (W.D. Wis. 2001). Although Martinez does not call for a "strict scrutiny" test, Thornburgh, 490 U.S. at 411, it requires more than conclusory assertions. Defendants have not adduced specific facts showing that censorship of plaintiff's letter and drawings were generally

necessary to protect the facility's interest in security.

Although defendants' arguments with respect to security are not persuasive, they have asserted another ground to support the censorship of plaintiff's mail. Defendant Brown denied delivery of plaintiff's mail because he concluded that allowing plaintiff to merchandise political messages that contained symbols associated with white supremacist groups interfered with the facility's interest in rehabilitating plaintiff. It is undisputed that gang affiliation within prisons disrupts rehabilitation efforts because gangs often encourage criminal activity and resistance to prison authority. Therefore, prison officials have an interest in suppressing any and all gang-related activity within prison walls. In this case, defendant Brown concluded that it would be incompatible with the facility's attempts to rehabilitate plaintiff to allow plaintiff to merchandise his drawings, which incorporated symbols associated with racial hatred and white supremacist groups. This conclusion is entitled to deference from this court. Preventing an inmate from using gang-related symbols to express his opinions is generally necessary to effectuate the inmate's rehabilitation. Confiscation and destruction of the letter and drawing were not exaggerated responses; prison officials do not transgress the boundaries of the First Amendment by confiscating written material that contains gang-related symbols. (Had plaintiff's letter been discovered during a search of his cell, officials at the facility would have been fully justified in confiscating it.) Even if I accepted plaintiff's argument that his intent was solely to criticize

the Department of Corrections, defendant Brown would still have been justified in refusing to mail plaintiff's letter and drawings because of the presence of the swastika and the coded reference to the Ku Klux Klan.

Plaintiff remains free to express disagreement with his custodians or criticize them. Defendants may not censor his mail merely because he does so. There is no indication that defendant Brown has censored all communication between plaintiff and Northern Sun or anyone else. However, plaintiff should be aware that prison officials remain free to censor any of his mail that contain the symbols of gangs or other unsanctioned groups.

Plaintiff's arguments regarding the unconstitutionality of defendant Brown's actions are unpersuasive. First, he renews his attack on Wis. Admin. Code § DOC 303.20, arguing that the regulation is unconstitutionally overbroad and that defendants are using the regulation to suppress speech that is gang-related but that does not explicitly promote violence or criminal activity. In an earlier order in this case, I rejected plaintiff's argument that § DOC 303.20 is facially unconstitutional in light of the compelling interest prison officials have in suppressing any and all gang-related materials and activity. Order, dkt. #3, at 10. Plaintiff has presented nothing beyond his own opinion to show that this conclusion was erroneous. The fact that an inmate does not a gang-related symbol with the intent of promoting violent activity is not relevant to the analysis. Again, assuming that plaintiff had *no intent whatsoever* to promote gang activity in his letter, Wis. Admin. Code § DOC 303.20

would still be valid because "a regulation which generally advances a legitimate governmental interest of sufficient importance is not invalid simply because the government does not demonstrate that each and every application of that regulation necessarily furthers that interest." Gaines v. Lane, 790 F.2d at 1304.

Plaintiff notes that his incarceration has rendered him an "inactive" member of the Simon City Royals, a gang that he contends is not associated with any white supremacist groups and that does not use the swastika as one of its identifying symbols. Plaintiff's active or inactive status in the Simon City Royals is irrelevant to the analysis of defendant Brown's decision to censor his mail, as is the fact that the Simon City Royals does not use the swastika as a symbol. Prison officials have an interest in suppressing *all* gang-related activity and expression, not merely symbols that associate an inmate with one specific gang.

Finally, plaintiff argues that two books available to inmates at the Secure Program Facility feature swastikas on their covers, The Rise and Fall of Adolf Hitler by William Schirer and American Reich by Douglas Muir. Additionally, plaintiff notes that the facility's library contains a book written by Paul Gillette entitled Inside the Ku Klux Klan, which depicts Klan members standing around a burning cross on its cover. The Rise and Fall of Adolf Hitler is a historical account of Nazi Germany; American Reich is a fictional work about American Nazis and the Ku Klux Klan participating in a plot to overthrow the United States government; and Inside the Ku Klux Klan is a historical account of the criminal

activities and atrocities committed by Klan members. The fact that these books contain the same symbols as plaintiff's mail is insufficient to show that defendant Brown's decision to censor plaintiff's letter violated his First Amendment rights. As noted earlier, defendant Brown's conclusion that plaintiff was attempting to promote white supremacy in his mail is entitled to deference. It is undisputed that none of the books identified by plaintiff promote white supremacy; two are historical accounts and the other is a fictional work.

In conclusion, plaintiff "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the correctional system." Pell, 417 U.S. at 822. It is well established that rehabilitation is a legitimate penological objective of the penal system. Id. at 823. Allowing an inmate to express opinions using symbols associated with gangs and racial hatred is incompatible with a prison's interests in eliminating all traces of gang influence and rehabilitating its inmates. Therefore, defendants did not violate plaintiff's rights under the First Amendment by denying delivery of his letter and drawings.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Lebbeus Brown, Gerald Berge and Matthew Frank is GRANTED and the motion for summary judgment filed by plaintiff Joseph Koutnik is DENIED. The clerk of court is directed to

enter judgment for defendants and close this case.

Entered this 22nd day of June, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge