IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOSEPH D. KOUTNIK,

ORDER

Petitioner,

04-C-580-C

v.

LEBBEUS BROWN, GERALD BERGE,
and MATTHEW J. FRANK,

Respondents.

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This is a proposed civil action for declaratory, injunctive, and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. He alleges that respondents violated his First Amendment rights to free speech and freedom of expression and his Fourteenth Amendment right to substantive due process when they confiscated and destroyed a letter and several drawings he sent to a retail store. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has had three or more lawsuits or appeals dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

I conclude that petitioner's substantive due process claim must be dismissed, but that his allegations under the First Amendment state a claim upon which relief may be granted. Because respondents' decision concerns censorship of outgoing mail, respondents will have to show that their decision furthers a substantial governmental interest and that the decision was necessary to further that government interest.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner is an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Respondent Matthew Frank is Secretary of the Wisconsin Department of Corrections. Respondent Gerald Berge is the warden at the Wisconsin Secure Program Facility. Respondent Lebbeus Brown is a captain and the Disruptive Groups Coordinator at the facility.

On December 30, 2002, petitioner attempted to mail a letter and several ink drawings to Northern Sun Merchandising, a retail store in Minneapolis, Minnesota, which sells message-oriented t-shirts, posters and bumperstickers, etc. The letter and drawings expressed petitioner's political views and criticized the Wisconsin Department of Corrections. One of the drawings depicted a swastika with the phrase "The Department of Corruptions" written around it. Respondent Brown denied delivery of petitioner's mail and instructed that it be destroyed. He also issued a "notice of non-delivery of mail" to petitioner, stating that the letter and drawings concerned "an activity, which, if completed, would violate the laws of Wisconsin, the United States or the Administrative Rules of the Department of Corrections." Respondent Brown wrote that the drawing of a swastika violated Wis. Admin. Code § DOC 303.20. Respondent Brown also issued petitioner a warning.

Wis. Admin. Code § DOC 303.20 provides:

(1) Any inmate who participates in group activity which is not approved under s. DOC 309.365 or is contrary to provisions of this chapter is guilty of an offense.

(2) Any inmate who joins in or solicits another to join in any group petition or statement is guilty of an offense, except that the following activities are not prohibited:

(a) Group complaints in the inmate complaint review system.

(b) Group petitions to courts.

(c) Authorized activity by groups approved by the warden under s. DOC 309.365 or legitimate activities required to submit a request under s. DOC 309.365(3) or (4).

(d) Group petitions to government bodies, legislators, courts or newspapers.

(3) 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 symbolism is guilty of an offense. An inmate's possession of gang literature, creed symbols or symbolism is an act which shows the inmate violates the rule. Institution staff may determine on a case by case basis what constitutes an unsanctioned group activity.

(Although the conduct report does not specify which provisions petitioner violated, presumably he was disciplined under § DOC 303.20(3).)

On February 19, 2003, petitioner filed a complaint regarding the censoring of the Northern Sun mail. In his complaint, petitioner stated that he had already "filed multiple informal appeals over the interference and discipline of an outgoing letter . . . that Lt. Brown said violated 303.20 on 12[/]30[/]02 to the Warden and he has still not replied." On March 10, 2003, respondent Berge sent a letter to petitioner regarding an apparently unrelated

instance in which mail sent from the Church of Jesus Christ Christian to petitioner had been intercepted. On March 24, 2003, Inmate Complaint Examiner Kelly Coon referred to respondent Berge's March 10, 2003 letter, stating that "[t]he inmate's appeal was answered by the Warden's Office on 3/10/03." It appears that Coon thought respondent Berge's March 10 letter to petitioner concerned the Northern Sun mail when in fact it did not. Nevertheless, Coon recommended dismissing petitioner's complaint regarding the Northern Sun mail. On April 1, 2003, deputy warden Peter Huibregtse dismissed petitioner's complaint.

On April, 2, 2003, petitioner filed a "Request for Corrections Complaint Examiner Review." In this request plaintiff recreated what he drew in the Northern Sun mail (a swastika and the words "The Department of Corruptions"). The Corrections Complaint Examiner recommended dismissal of the complaint, stating

> According to the scanned letter and non-delivery notice, complainant was denied mailing a letter out of the institution. The appeal decision from the warden that is scanned in refers to incoming mail from the Church of Jesus Christ Christian. It has nothing to do with the non-delivery notice at issue. The ICE was contacted and indicated that was the wrong memo from the warden. She further indicated that complainant was issued a warning for his actions, and was not disciplined. As the ICE office has no memo from the warden regarding this issue, it would appear complainant did not appeal the denial of the mail to the warden, per institution policy. Complainant drew the same symbol on his appeal to show what he was attempting to send to another inmate. In his appeal, he refers to the institution as "Wisconsintration kamps" and around the swastika symbol he writes, "The Department of Corruptions." These writings, along with those scanned in from the correspondence that was denied, are quite racist in nature and also represent gang

affiliation. Based on this information, the correspondence was appropriately denied and it is thus recommended this complaint be dismissed.

Respondent Frank, the Secretary of the Department of Corrections, accepted this recommendation and dismissed petitioner's complaint.

DISCUSSION

I understand petitioner to allege (1) that respondents violated his First Amendment rights to free speech and freedom of expression, as well as his Fourteenth Amendment right to substantive due process when they censored his outgoing mail; (2) that Wis. Admin. Code § DOC 303.20 is "unconstitutionally vague and overbroad" and is being unconstitutionally applied; and (3) that the Wisconsin Secure Program Facility's policy prohibiting him from sealing his outgoing mail is unconstitutional on its face and as applied. Petitioner seeks an injunction requiring prison officials to allow petitioner to seal his outgoing mail and forbidding the Department of Corrections and prison officials from punishing him for "simply possessing, or mailing to non-prisoners, gang literature (creeds), symbols or symbolisms."

A. Petitioner's Substantive Due Process Claim

I start with petitioner's claim that respondents violated his substantive due process

rights under the Fourteenth Amendment when they censored his outgoing mail. Because it is difficult to place responsible limits on the concept of substantive due process, the Supreme Court has directed the lower courts to analyze claims under more specifically applicable constitutional provisions before moving on to a substantive due process inquiry. Albright v. Oliver, 510 U.S. 266, 273 (1994). "Where a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'" Id. (citing Graham v. Connor, 490 U.S. 386, 395 (1989)). In this case, petitioner alleges specifically that the actions of respondents violated his First Amendment rights to free speech and freedom of expression. Therefore, it is unnecessary to analyze petitioner's claim under substantive due process. Petitioner's substantive due process claim will be dismissed.

B. Petitioner's First Amendment Claim

Before discussing the standard of review that applies to petitioner's First Amendment claim, I note that although petitioner has alleged sufficient personal involvement of respondents Brown and Berge in the censoring of the Northern Sun mail, it is unclear whether respondent Frank was aware that the Northern Sun mail was outgoing mail and not mail intended for another inmate. As noted above, the Corrections Complaint Examiner's

report stated that "[c]omplainant drew the same symbol on his appeal to show what he was attempting to send *to another inmate*." (emphasis added). In fact, petitioner's mail was intended for Northern Sun Merchandising, not another inmate. It is not clear from the record what information respondent Frank had when he affirmed the Corrections Complaint Examiner's decision to dismiss petitioner's complaint. If respondent Frank had only the Corrections Complaint Examiner's Report, he may have been unaware that the Northern Sun mail was outgoing mail. A decision to censor an inmate's outgoing mail presents a different question from a decision to censor mail intended for another inmate. It is well established that liability under § 1983 must be based on a defendant's personal involvement in the constitutional violation. See Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). "A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary." Wolf-Lillie, 699 F.2d at 869. It is not necessary that a defendant participate directly in the deprivation; the official is sufficiently involved "if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985). Thus, it may be that petitioner will be unable to prove that respondent Frank failed to act with deliberate or

reckless disregard of petitioner's constitutional rights.

Petitioner's claim regarding censorship of outgoing mail is analyzed under the standard of Procunier v. Martinez, 416 U.S. 396 (1974), rather than Turner v. Safley, 482 U.S. 78 (1987). Generally, when an inmate contends that prison officials have violated his constitutional rights, the question is whether the officials' conduct is reasonably related to a legitimate penological interest. However, because the interest in prison security is diminished for outgoing mail, the Supreme Court has applied a heightened standard of review for censorship of outgoing mail. See Thornburgh v. Abbott, 490 U.S. 401, 413 (1989) ("The implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials."). Specifically, 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." Procunier, 416 U.S. at 413. I cannot conclude at this stage of the litigation that respondents were furthering a substantial government interest when they made their decision to confiscate petitioner's letter and drawings to Northern Sun Merchandising because the mail contained a drawing of a swastika and language critical of the Department of Corrections. Therefore, petitioner will be granted leave to proceed on this claim. Respondents will have an opportunity at trial or on a motion for summary judgment to demonstrate that their actions

complied with the First Amendment.

C. Petitioner's Challenge to Wis. Admin. Code § DOC 303.20

Petitioner seeks a declaration that Wis. Admin. Code § DOC 303.20 is unconstitutional because "[i]t requires no intent for a finding of violation of it, it is used to punish protected activity as noted in this case, the wording of this allows it to be applied to protected activity." Petitioner also seeks a declaration that "in this case application of the Rule (303.20) to [petitioner's] purely outgoing letter was unconstitutional." Finally, petitioner seeks an injunction "forbidding the [Department of Corrections] and [the Wisconsin Secure Program Facility] from punishing him for simply possessing, or mailing to non-prisoners, gang literature, creeds, symbols, or symbolism and forbidding [the Wisconsin Secure Program Facility] from enforcing DOC 303.20."

As noted above, DOC 303.20 prohibits participation in gang activity and possession of gang literature or symbols. Prison officials have a strong interest in suppressing gang activity to promote a safe and secure prison environment. Rios v. Lane, 812 F.2d 1032, 1037 (7th Cir. 1987). DOC 303.20 promotes that interest by allowing prison officials to discipline inmates who participate in gang activity. Petitioner fails to present any plausible reason why DOC 303.20 is facially invalid. Therefore, his claim must be dismissed as lacking legal merit.

D. Petitioner's Challenge to Wisconsin Secure Program Facility's Policy Requiring Outgoing Correspondence Be Left Unsealed

Petitioner seeks a declaration that the Wisconsin Secure Program Facility's "policy of requiring him not to seal his outgoing mail is unconstitutional as it chills free speech and is being unconstitutionally applied." Petitioner also requests an injunction "requiring [the Wisconsin Secure Program Facility] to allow him to seal his purely outgoing mail." In a previous lawsuit brought by petitioner in this court, petitioner requested a similar injunction "requiring [the Wisconsin Secure Program Facility] to allow prisoners to seal all purely outgoing mail." Koutnik v. Berge, No. 03-C-345-C (W.D. Wis. July 19, 2004) (quoting Plt.'s Cpt., dkt. #2, at ¶ 64). In that case, I dismissed petitioner's request for an injunction as without merit because it is clearly established that prison officials have authority to open and inspect non-privileged mail, Gaines v. Lane, 790 F.2d 1299, 1304 (7th Cir. 1986) and petitioner failed to "explain how any First Amendment interest is threatened by requiring him to leave his mail unsealed in lieu of requiring prison staff to open it." Koutnik v. Berge, No. 03-C-345-C (W.D. Wis. July 19, 2004). In the present case, petitioner has failed again to show that any First Amendment interest is threatened by the prison's policy. Therefore, his request for declaratory and injunctive relief will be denied with respect to the prison's policy.

ORDER

IT IS ORDERED that

1. Petitioner Joseph Koutnik's request for leave to proceed in forma pauperis is DENIED with respect to his claims that (1) respondents Lebbeus Brown, Gerald Berge and Matthew Frank violated his substantive due process rights by censoring his outgoing mail; (2) Wis. Admin. Code § DOC 303.20 is unconstitutional on its face; and (3) the Wisconsin Secure Program Facility's policy of requiring petitioner to leave his outgoing, non-privileged mail unsealed is unconstitutional.

2. Petitioner's request for leave to proceed in forma pauperis is GRANTED with respect to his claim that respondents Lebbeus Brown, Gerald Berge and Matthew Frank violated his First Amendment rights to free speech and freedom of expression by censoring his outgoing mail pursuant to Wis. Admin. Code § DOC 303.20.

3. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

4. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

5. The unpaid balance of petitioner's filing fee is $146.66; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

6. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants.

Entered this 17th day of September, 2004

BY THE COURT:

BARBARA B. CRABB
District Judge