IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM F. WEST,

ORDER

Petitioner,

05-C-37-C

v.

GERALD A. BERGE, JUDITH HUIBREGTSE,
MATTHEW J. FRANK and JANE GAMBLE,

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. 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).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner William F. West has been incarcerated at the Wisconsin Secure Program Facility since September 24, 2002. From June 2002 to September 23, 2002, petitioner was incarcerated at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin. Respondent Gerald Berge is Warden of the Wisconsin Secure Program Facility; he reviews inmate complaints and supervises the inmate complaint review system. Respondent Judith

Huibregtse is a mail screener at the facility. Respondent Matthew Frank is Secretary of the Wisconsin Department of Corrections; he is charged with ensuring that each prison has lawful policies and practices pertaining to prisoners and is the final decisionmaker in the inmate complaint review system. Respondent Jane Gamble is Warden of the Kettle Moraine Correctional Institution; her job duties include making policy for the institution and reviewing inmate complaints.

B. June 25, 2002 Altercation

On June 25, 2002, a fight broke out between two inmates at Kettle Moraine. Petitioner attempted to break up the fight after seeing one of the inmates, Sengkhemme, was injured severely. As he intervened, the uninjured inmate, Feldner, turned on petitioner and began fighting him. On July 22, petitioner was given an adult conduct report for fighting with Feldner. On July 26, petitioner had a disciplinary hearing at which he was found guilty of fighting. As punishment, he was given three days' adjustment segregation, thirty days' program segregation and assessed up to $200 for medical expenses. Neither Feldner nor petitioner had any medical expenses arising from the altercation. Respondent Gamble upheld the hearing officer's decision. On July 30, $127.60 was taken from petitioner's prison account and he received a statement indicating that he still owed $72.40. He filed a complaint on August 6 protesting the deduction from his prison account, which respondent

Frank dismissed.

C. F.F.U.P. Newsletter

On September 24, 2003, the Wisconsin Secure Program Facility received the F.F.U.P. (Forum for Understanding Prisons) newsletter via U.S. mail addressed to petitioner. The newsletter is published by Peggy Swan, a resident of Blue River, Wisconsin. Respondent Huibregtse issued petitioner a notice of non-delivery, citing Wis. Admin. Code § DOC 309.04, but did not include a statement of reasons for the denial. Section 309.04 has fifty-one subsections and covers a wide variety of issues concerning inmate mail. Inmates at the Wisconsin Secure Program Facility are not allowed to view non-delivered mail except if necessary for an ongoing lawsuit. Petitioner appealed the non-delivery on October 21, 2003, but respondent Berge affirmed respondent Huibregtse's decision on November 26, 2003. Respondent Berge cited Wis. Admin. Code § DOC 309.04(4)(c)(8), (9) and (12) but did not say why the newsletter violated those provisions. Petitioner filed an inmate complaint concerning the non-delivery that was dismissed ultimately by respondent Frank.

On March 11, 2004, petitioner received another notice of non-delivery regarding another issue of the F.F.U.P. newsletter. In the notice, respondent Huibregtse stated that the newsletter violated Wis. Admin. Code § DOC 309.04(4)(c)(12). Respondent Berge prohibited distribution of the newsletter because he dislikes the publisher. Petitioner filed

an inmate complaint regarding the non-delivery that was dismissed by respondent Frank.

D. ESPN the Magazine

On April 4, 2004, petitioner was sent an edition of "ESPN the Magazine." Respondent Huibregtse refused delivery and issued a notice of non-delivery, stating that the magazine contained a photo of individuals using signs or symbols consistent with a known disruptive group. He did not provide the name of the disruptive group. That day, petitioner wrote to respondent Huibregtse asking what disruptive group was involved. Respondent Huibregtse told petitioner to consult Capt. Gilberg or Capt. Brown, the facility's disruptive groups coordinator. On April 5, petitioner wrote to Capt. Gilberg and received the following response: "There is an appeal process that is to be used to address your concern." Petitioner filed an inmate complaint on April 6, which was dismissed by respondent Frank.

E. Spin Magazine

On April 21, 2004, petitioner was sent an edition of Spin magazine. Respondent Huibregtse issued a notice of non-delivery for the magazine which stated that "pages 97 and 101 have pictures that have individuals using signs or symbols that are consistent with a known disruptive group." Petitioner wrote to respondent Huibregtse asking what disruptive group was involved and was told that he needed to contact Capt. Gilberg or Capt. Brown.

Petitioner wrote to Capt. Gilberg and was told to contact Capt. Brown, who did not respond to his questions. Petitioner filed an inmate complaint on April 21, which was dismissed.

F. Tailgate magazine

On July 14, 2004, petitioner was sent an edition of Tailgate magazine. Respondent Huibregtse refused delivery of the magazine and issued petitioner a notice of non-delivery which stated that several pages contained signs or symbols that were consistent with a known disruptive group. Petitioner filed an inmate complaint on or about July 14, which was dismissed.

G. Notice of Non-delivery Forms

Respondent Huibregtse did not inform petitioner why he refused to allow petitioner to receive his magazines. Respondents Huibregtse, Berge and Frank never told petitioner how they concluded that his magazines violated Department of Corrections regulations. The notice of non-delivery form contains sixteen boxes, each having a different quote from the Wisconsin Adminstrative Code that can be checked as the reason a piece of mail is not delivered. Petitioner was unable to formulate meaningful objections to the denials of his mail because he was never given specific reasons for them.

H. Wisconsin Administrative Code Regulations

Wis. Admin. Code § DOC 309.04(4)(c)(6) allows the department to refuse to deliver incoming or outgoing mail that "is in code." This section is vague and overbroad because the code does not define what "in code" means. Petitioner cannot distinguish between lawful and unlawful conduct.

Wis. Admin. Code § DOC 309.04(4)(c)(10) states that the department may not deliver incoming or outgoing mail that "teaches or advocates illegal activity, disruption, or behavior consistent with a gang or a violent ritualistic group." This section is vague and overbroad because the code does not define the terms "gang" and "violent ritualistic group." The language of the section prevents petitioner from distinguishing between lawful and unlawful conduct.

Wis. Admin. Code § DOC 309.04(4)(c)(12) states that the department may not deliver incoming or outgoing mail that "is determined by the warden, for reasons other than those listed in [§ DOC 309.04(4)(c)], to be inappropriate for distribution throughout the institution." This section is vague and overbroad because its language does not distinguish lawful from unlawful conduct.

DISCUSSION

A. Restitution

I understand petitioner to allege that respondent Gamble violated his rights under the due process clause of the Fourteenth Amendment because she upheld the hearing officer's decision that required petitioner to pay $200 in restitution even though the June 25, 2002 altercation resulted in no property damage or medical expenses. Wis. Admin. Code § DOC 303.72(5) authorizes the imposition of restitution as a minor penalty "for the replacement or repair of stolen, destroyed or damaged property or for medical bills. Restitution may include escape expenses or any other expenses caused by the inmate's actions." Petitioner argues that the hearing officer's decision to impose restitution was arbitrary because neither he nor inmate Feldner had any medical expenses and no other damages resulted from the altercation.

The Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Before petitioner is entitled to Fourteenth Amendment due process protections, he must first have a protected liberty or property interest at stake. Averhart v. Tutsie, 618 F.2d 479, 480 (7th Cir. 1980). In this case, petitioner has a property interest in the funds on deposit in his prison account. Campbell v. Miller, 787 F.2d 217, 222 (7th Cir. 1986). However, as long as state remedies are available for the loss of property, neither intentional nor negligent deprivation of property gives rise to a constitutional violation. Daniels v. Williams, 474 U. S. 327 (1986); Hudson v. Palmer, 468 U.S. 517 (1984). In Hudson, the Supreme Court held that an

inmate has no due process claim for the intentional deprivation of property if the state has made available to him a suitable post-deprivation remedy. In Daniels, the Court concluded that a due process claim does not arise from a state official's negligent act that causes unintended loss of property or injury to property. The state of Wisconsin provides several post-deprivation procedures for challenging the taking of property. According to Article I, §9 of the Wisconsin Constitution,

> Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without delay, conformably to the laws.

Moreover, Wis. Stat. §§ 810 and 893 provide petitioner with replevin and tort remedies. Section 810.01 provides a remedy for the retrieval of wrongfully taken or detained property. Section 893 contains provisions concerning tort actions to recover damages for wrongfully taken or detained personal property and for the recovery of the property. Because petitioner has post-deprivation procedures available to him, he will be denied leave to proceed on his due process claim and respondent Gamble will be dismissed from this case.

B. Explanations for Non-Delivery

I understand petitioner to allege that respondents Huibregtse, Berge and Frank violated his rights under the due process clause of the Fourteenth Amendment because they

did not inform petitioner of the explicit reasons why his magazines were censored. Petitioner alleges that the notice of non-delivery forms contain sixteen boxes that can be checked, with each box corresponding to a reason for non-delivery. He contends that respondents' practice of checking one of the boxes on the form and citing to the Department of Corrections regulation that justifies non-delivery does not provide him with enough information to formulate a meaningful defense or objection to each non-delivery.

As noted above, petitioner must first have a protected liberty or property interest at stake before he is entitled to Fourteenth Amendment due process protections. Simply stated, petitioner does not have a liberty or property interest in a more thorough explanation of the reasons why his magazines were not delivered. His argument that respondents' practice violates due process is grounded on the assumption that he has a constitutionally protected interest in receiving a detailed written explanation of how the content of a piece of mail violates the department's regulations concerning inmate mail. He has no such interest under the Constitution. Therefore, he will be denied leave to proceed on this claim.

C. Department of Corrections Regulations

I understand petitioner to allege that the regulations on which respondent Huibregtse relied in refusing to deliver his magazines are unconstitutionally vague and overbroad. The regulations at issue are Wis. Admin. Code § DOC 304.04(4)(c)(6), which prohibits delivery

of mail that "is in code"; Wis. Admin. Code § DOC 309.04(4)(c)(10), which prohibits delivery of mail that "teaches or advocates illegal activity, disruption, or behavior consistent with a gang or a violent ritualistic group"; and Wis. Admin. Code § DOC 309.04(4)(c)(12), which prohibits delivery of mail that "is determined by the warden, for reasons other than those listed in [§ DOC 309.04(4)(c)], to be inappropriate for distribution throughout the institution." Petitioner alleges that the regulations are vague because the phrases "in code," "gang," and "violent ritualistic group" are not defined and the "reasons" cited by the warden for finding a piece of mail "inappropriate for distribution throughout the institution" under § DOC 309.04(4)(c)(12) are not set out in the regulation. As a result, petitioner is unable to determine what types of materials are prohibited and what standards prison officials use in examining inmate mail.

Petitioner argues that his vagueness claim should be analyzed as a procedural due process claim. He alleges that he cannot "steer between lawful and unlawful" conduct because the regulations are not written with enough specificity. Although due process requires that laws and regulations be written with enough specificity so that individuals can distinguish lawful from unlawful conduct and conform their conduct accordingly, Grayned v. City of Rockford, 408 U.S. 104, 108 (1971), this is not a case in which petitioner is being disciplined for conduct he did not know was prohibited by a prison regulation. Compare Rios v. Lane, 812 F.2d 1032 (7th Cir. 1987) (considering inmate's due process challenge to

imposition of sanctions for violation of prison regulation prohibiting gang activity); Aiello v. Litscher, 104 F. Supp. 2d 1068 (W.D. Wis. 2000). Petitioner does not allege that he has been disciplined in any way because respondent Huibregtse determined that his magazines violated § DOC 309.04.

Instead, this is a case in which a prison official's application of a prison regulation resulted in the denial of mail. Therefore, petitioner's allegation that Wis. Admin. Code §§ DOC 309.04(4)(c)(6), (10) and (12) are unconstitutionally vague and overbroad is properly construed as a facial challenge to the regulations under the First Amendment. Gaines v. Lane, 790 F.2d 1299 (7th Cir. 1986). A facial challenge to a prison regulation is governed by the standard set forth in Turner v. Safely, 482 U.S. 78 (1987), that regulations are valid on their face if reasonably related to legitimate penological interests. Thornburgh v. Abbott, 490 U.S. 401, 404 (1989). In Thornburgh, the Court considered a facial challenge to regulations promulgated by the Federal Bureau of Prisons that authorized prison officials to refuse delivery of publications found to be detrimental to institutional security. The regulations at issue allowed officials to reject publications that were written in code or depicted, described or encouraged "activities which may lead to the use of physical violence or group disruption." Id. at 405 n.5. The Court held that the regulations were valid on their face because they were rationally related to the valid and substantial government interest in prison security. In addition, the Court approved of the broad discretion given to the officials

responsible for screening incoming mail, stating that "where the regulations at issue concern the entry of materials into the prison, . . . a regulation which gives prison authorities broad discretion is appropriate." Id. at 416. The regulations at issue in this case are similar to those in Thornburgh. Wis. Admin. Code §§ DOC 309.04(4)(c)(6) and (8) prohibit delivery of mail that "is in code" or "teaches or advocates illegal activity, disruption, or behavior consistent with a gang or violent ritualistic group." Section DOC 309.04(4)(c)(12) gives the warden discretion to refuse delivery of mail that does not violate a specific prohibition but is "inappropriate for distribution." Given the unquestioned interest prison officials have in maintaining security, nothing would be gained by allowing petitioner to proceed past the pleadings stage on this claim. Gaines, 790 F.2d at 1304-05 (approving dismissal of challenge to prison regulations regarding censorship of inmate mail at pleading stage). Therefore, I conclude that petitioner's facial challenge to Wis. Admin. Code §§ DOC 309.04(4)(c)(6), (10) and (12) is foreclosed by Thornburgh and I will deny petitioner leave to proceed on this claim.

D. Denial of Magazines

Finally, I understand petitioner to allege that respondents Huibregtse and Berge violated his First Amendment rights by refusing delivery of several magazines, namely the F.F.U.P. Newsletter on September 24, 2003 and March 11, 2004; ESPN the Magazine on

April 4, 2004; Spin magazine on April 21, 2004; and Tailgate magazine on July 14, 2004. I construe his allegation as a challenge to the application of the cited Department of Corrections regulations to his mail. Thus, the critical question is whether respondents' application of the regulations to the publications at issue was reasonably related to a legitimate penological interest. Turner, 482 U.S. at 89. This standard comports with the judiciary's obligation to give considerable deference to prison officials. Because a court is "ill equipped" to deal with the "inordinately difficult undertaking" that is prison management, it may not substitute its judgment for that of prison officials who regulate the relations between inmates and the outside world. Thornburgh, 490 U.S. at 407-08; Aiello, 104 F. Supp. 2d at 1075.

According to petitioner's complaint, respondent Huibregtse denied delivery of the magazines because they violated Department of Corrections regulations regarding inmate mail. However, petitioner alleges also that none of the magazines censored by respondent Huibregtse contained content that justified non-delivery. As for this contention, petitioner does not allege how it is that he has come to believe that respondents do not have a legitimate penological interest in refusing delivery of the magazines at issue. He must have obtained some factual information beyond pure speculation before bringing suit in order to satisfy the requirements of Fed. R. Civ. P. 11 that "to the best of his belief, formed after an inquiry reasonable under the circumstances . . . the allegations and other factual contentions

have evidentiary support or . . . are likely to have evidentiary support after a reasonable opportunity for further investigation . . . ." Nevertheless, at this stage of the litigation, I must accept his allegations as sufficient to state a claim under the First Amendment. Sizemore v. Williford, 829 F.2d 608, 610 (7th Cir. 1987). Therefore, he will be granted leave to proceed on this claim. However, if it turns out that there was no basis for petitioner's allegations that the non-delivery of the particular items at issue violate his constitutional rights, then I will record a strike against petitioner under 28 U.S.C. § 1915(g) for his having brought a legally frivolous lawsuit.

Although I am granting petitioner leave to proceed on his First Amendment claim that respondents have no legitimate penological interest in withholding the magazines and periodicals he references in his complaint, I conclude that nothing is to be gained by administering this lawsuit in the same way that I administer other lawsuits. Petitioner's claim can be disposed of more swiftly than other types of constitutional challenges because his claim will succeed or fail based solely on the content of the publications and respondents' reasons for denying them.

In another case litigated in this court, Lindell v. McCaughtry, 01-C-209-C, plaintiff Lindell challenged defendants' refusal to give him a copy of a publication he claimed had been wrongfully withheld under the First Amendment. He then attempted to obtain the publication in discovery so that he could confirm his suspicion that the defendants either

had no legitimate penological interest in withholding the publication or that they had exaggerated their response to a legitimate interest. The magistrate judge ruled that plaintiff could not obtain the publication through litigation, because such a ruling would render the institution's review system superfluous and would encourage inmates to file lawsuits as a way to circumvent the institution's security procedures. I concurred in the magistrate judge's ruling and this decision was ultimately upheld by the Court of Appeals for the Seventh Circuit in an unpublished decision.

In summary, there is no need for petitioner to conduct formal discovery in an attempt to learn what was in the withheld publications that respondents found objectionable in the prison setting. This court's role in a suit of this nature is more akin to performing a simple appellate review of defendants' decision, where defendants will be accorded deference and the decision will be upheld so long as the record reveals a reasonable basis for the decision. Therefore, resolution of this case can be streamlined as follows.

Rather than file an answer to petitioner's complaint, respondents are requested to move for summary judgment, and support the motion by submitting (1) the publications at issue in this action for *in camera* examination; (2) a statement identifying each page of the publications that contain objectionable content, and (3) a description of the objectionable content. In addition, respondents should support their motion with a sworn statement explaining the basis for their belief that the particular passages or content identified pose a

threat to a legitimate penological interest and what that legitimate penological interest is. Respondents are not to file a brief or proposed findings of fact with their submissions.

Petitioner will then have 30 days from the date respondents file their motion in which to file a response. In his response, petitioner may attempt to show that there is no reasonable basis for respondents' decisions. Turner, 482 U.S. at 90-91. Petitioner is not to file a brief or proposed findings of fact with his response.

Upon receipt of petitioner's response, the court will take the matter under advisement. There will be no preliminary pretrial conference, motions deadlines or scheduling of a trial date. The parties are not to engage in discovery unless I determine from the parties' submissions in connection with the motion for summary judgment that discovery is necessary to reach a fair resolution of the issue.

ORDER

IT IS ORDERED that

- Petitioner William West's request for leave to proceed in forma pauperis is DENIED on his claim that respondent Jane Gamble's decision to require him to pay restitution violated his rights under the Fourteenth Amendment. In addition, petitioner is DENIED leave to proceed in forma pauperis on his claim that respondents Huibregtse, Gerald Berge and Matthew Frank violated his rights under the due process clause of the

Fourteenth Amendment because they did not inform petitioner of the reasons why his magazines were censored and on his claim that Wis. Admin. Code § DOC 309.04(4)(c)(6), (10) and (12) are unconstitutional on their face. Respondents Gamble and Frank are DISMISSED from this case;

• Petitioner's request for leave to proceed in forma pauperis is GRANTED on his claim that respondents Berge and Judith Huibregtse refused delivery of the F.F.U.P. Newsletter on September 24, 2003 and March 11, 2004; ESPN the Magazine on April 4, 2004; Spin magazine on April 21, 2004; and Tailgate magazine on July 14, 2004, in violation of his rights under the First Amendment.

• FURTHER, IT IS ORDERED that respondents Huibregtse and Berge have 45 days from the date they are served with petitioner's complaint in which to file in lieu of an answer a motion for summary judgment, which is supported by submission of the publications at issue for *in camera* examination, a statement identifying each page of the publications that contain objectionable content, and a description of that content in sufficient detail to allow petitioner to respond. In addition, respondents are to support their motion with a sworn statement explaining the basis for their belief that the particular passages or content identified pose a threat to a legitimate penological interest and what that legitimate penological interest is.

Petitioner will then have 30 days from the date respondents file their motion in which

to file a response.

The parties in this case are relieved of their obligations under this court's Procedures to be Followed on Motions for Summary Judgment to submit briefs and proposed findings of fact. However, all evidentiary submissions must comport with the Rules of Evidence and Fed. R. Civ. P. 56.

- 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 respondents or to respondents' attorney.

- 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.

- The unpaid balance of petitioner's filing fee is $138.89; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

- 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 respondents Berge and Huibregtse.

Entered this 18th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge