

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

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TITUS HENDERSON,

Plaintiff,

v.

PETER HUIBREGSTE, MATTHEW  
FRANK, Secretary of the Wisconsin  
Department of Corrections, CITY OF  
BOSCOBEL,

Defendants.

OPINION and ORDER

06-C-407-C

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This is a civil action for declaratory, injunctive and monetary relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Titus Henderson is presently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. He contends that (1) defendants Peter Huibregste and Matthew Frank violated his First Amendment right to free speech by prohibiting him and other prisoners at the Wisconsin Secure Program Facility from subscribing to the Boscobel Dial newspaper and (2) the City of Boscobel ordinance that urges the publisher of the Boscobel Dial to refuse to distribute the newspaper to prisoners at the Wisconsin Secure Program Facility violates his constitutional right to free speech.

Now before the court are the motions for summary judgment of defendants Frank and

Huibregste and defendant City of Boscobel. Because I find that plaintiff was not denied access to the Boscobel Dial as a result of a policy at the Wisconsin Secure Program Facility and because I find that the City of Boscobel resolution is not mandatory, both motions will be granted.

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

## FACTS

### A. Parties

Plaintiff Titus Henderson is a prisoner incarcerated at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. He has been incarcerated there since January 10, 2003. At times relevant to this case, defendant Peter Huibregste was the deputy warden at the Wisconsin Secure Program Facility. Defendant Matthew Frank is, and was at times relevant to this case, Secretary of the Wisconsin Department of Corrections. Defendant City of Boscobel is a Wisconsin municipal corporation located in Grant County, Wisconsin.

### B. Wisconsin Secure Program Facility Policy Regarding the Boscobel Dial

\_\_\_\_ Prior to May 2003, there was a policy in place at the Wisconsin Secure Program Facility that prohibited prisoners from subscribing to or possessing the Boscobel Dial

newspaper. The Boscobel Dial is the local weekly newspaper for the City of Boscobel and the surrounding southwestern Wisconsin area. Morris Multimedia, Inc. website, <http://www.morrismultimedia.com/?cat=8> (last visited June 14, 2007). The Boscobel Dial is published by Morris Newspaper Corporation of Wisconsin.

A prisoner at the Wisconsin Secure Program Facility challenged the constitutionality of the prison policy prohibiting prisoners from possessing or subscribing to the Boscobel Dial by filing case no. 03-CV-525 in the Circuit Court for Dane County, Wisconsin. On April 30, 2003, Dane County Circuit Court Judge Michael Nowakowski issued an order in that case, in which he granted a declaratory judgment and an injunction in favor of the plaintiff. The order “restrained and enjoined” defendants from prohibiting the plaintiff from subscribing to or possessing the Boscobel Dial. Wisconsin Consolidated Court Automation Programs (CCAP), <http://wcca.wicourts.gov> (last visited June 21, 2007) (identifying defendants in case no. 03-CV-525). Since May 15, 2003, there has been no official policy at the Wisconsin Secure Program Facility prohibiting prisoners from possessing or subscribing to the Boscobel Dial. On November 7, 2005, plaintiff attempted to send a letter requesting a three-month subscription to the Boscobel Dial. Sgt. Huibregste, who is not a defendant in this case, rejected the request, denied delivery of the letter and money order and returned both to plaintiff. Plaintiff filed an inmate complaint regarding the denial. This complaint, WSPF-2006-11627, was the only complaint that plaintiff filed at any point

concerning denial of the Boscobel Dial. On May 2, 2006, defendant Huibregste dismissed complaint number WSPF-2006-11627, stating “WSPF has no control over private industry decisions regarding sales to inmates.” Also on May 2, defendant Huibregste responded to an Interview/Information Request from plaintiff, in which plaintiff had asked about the alleged interference with his mail and effort to purchase the Boscobel Dial. Plaintiff never received the response. In the response, defendant Huibregste stated

WSPF does not stop orders for the Boscobel Dial. There is no record of you requesting to send money out for this purposes. Based on your wild accusations/threats it is clear you do not know what our policy is relative to the Dial. You are free to order the Dial if you have funds to do so.

Although plaintiff appealed the dismissal of WSPF-2006-11627 to defendant Frank’s office, defendant Frank did not personally review the appeal. Instead, his deputy, who was designated to make final decisions regarding inmate complaints, affirmed its dismissal. Furthermore, defendant Frank is unaware of any current policy at the Wisconsin Secure Program Facility to prohibit prisoners from possessing the Boscobel Dial and has not participated in formulating or approving such a policy.

In November 2006, after he filed this lawsuit, plaintiff sent a series of “Information/Interview Requests” to various prison staff members. In a request addressed to Sgt. Sickinger, and dated November 21, 2006, plaintiff wrote, “I’m requesting to know if prisoners are allowed to have the Boscobel Dial sent in.” “No” is written on the bottom

half of the request. In a request addressed to Sgt. Huibregste, and dated November 23, 2006, plaintiff wrote, “I’m requesting to know if prisoners can ‘order’ the Boscobel Dial?” “No” is written on the bottom half of the request, which was signed by Sgt. Huibregste on November 24, 2006. In requests addressed to “Sgt. Rudy” and “Mrs. Oatman” and dated November 20 and 21, respectively, plaintiff wrote, “I’m requesting to know if prisoners [are] allowed to have the Boscobel Dial Newspaper.” L. Oatman wrote “No” and Sgt. Rudie wrote “No, you are not allowed to.”

C. City of Boscobel Ordinance Regarding Distribution of the Boscobel Dial

On May 19, 2003, the City of Boscobel Common Council held a meeting. All nine common council members attended. Defendant Huibregste is an alderperson on the Boscobel Common Council. At the meeting, Gerard O’Rourke, a representative of the union that represents prison guards, spoke to the Common Council regarding his concerns about Wisconsin Secure Program Facility prisoners receiving the Boscobel Dial. The meeting minutes state that

WSPF officials are worried that access to the Boscobel Dial will unnecessarily provide too much personal information about WSPF staff and local residents to WSPF convicts. If access to the Dial policy is allowed, residents can expect solicitations from some convicts for money or for other motives. A Dane County Judge ruled in favor of a WSPF inmate, reversing a WSPF policy that inmates would not have access to the local paper. Mr. O’Rourke stated that there are publications that have policies that prohibit sales to inmates at

correctional facilities. He believes that the publications are not legally bound to honor subscriptions because of private ownership laws. He went on to say that the Boscobel Dial would not have to honor subscriptions to WSPF inmates for the same reason. The Boscobel Dial has decided that they will honor requests from WSPF inmates if so asked. David Krier, Dial Editor, stated if the Dial were to adopt the policy being discussed, they would be the only paper in the state to do so.

Alderman Cashman moved to draft an “advisory resolution” to the owners of the Boscobel Dial, requesting that they deny prisoners at the Wisconsin Secure Program Facility access to the newspaper, because of security concerns for local residents. The motion passed unanimously; however, defendant Huibregste abstained from voting.

On June 2, 2003, the Common Council adopted City of Boscobel Resolution #6-2-2003. The Resolution states

Therefore, Be It Resolved, that the Common Council of the City of Boscobel urges Morris Newspaper Corporation, publisher of the *Boscobel Dial*, to establish a policy that it will not sell subscriptions to the *Dial* to any inmate of the wisconsin secure program facility (sic).

Morris Newspaper Corporation of Wisconsin has adopted the following policy regarding the sale of newspapers to prisoners at the Wisconsin Secure Program Facility:

For the safety of the communities which it serves, Morris Newspaper Corporation of Wisconsin with newspapers in Boscobel, Gays Mills, Fennimore, Lancaster, Platteville and Cuba City will not be selling subscriptions to inmates at the Maximum Security Prison that is in the newspaper’s readership area.

Plaintiff wrote to the Boscobel Dial in a letter dated January 23, 2006 and requested

a weekly subscription to the newspaper for himself and another prisoner, to be delivered to the Wisconsin Secure Program Facility, from January 30, 2006 through April 3, 2006. Plaintiff enclosed a money order for twenty dollars. The letter and the money order were returned to plaintiff. At the bottom of the letter, an unsigned, handwritten notes states “We are returning your money order—We cannot mail papers to our local prison. Sorry.”

## OPINION

### A. Wisconsin Secure Program Facility Policy Regarding the Boscobel Dial

Prison actions that affect an inmate’s receipt of non-legal mail must be “reasonably related to legitimate penological interests.” Thornburgh v. Abbott, 490 U.S. 401, 409 (1989). In Turner v. Safely, 482 U.S. 78 (1987), the Supreme Court set out four factors to be used in determining the reasonableness of prison regulations. Those factors are 1) the existence of a “valid, rational connection” between the regulation and a legitimate, neutral government interest; 2) the existence of alternative methods for the inmate to exercise his constitutional right; 3) the effect the inmate's assertion of that right will have on the operation of the prison; and 4) the absence of an alternative method to satisfy the government's legitimate interest. Id. at 89-90. Thus, a prison policy limiting prisoners’ access to reading material will be held constitutional so long as it is an unexaggerated response to legitimate penological interests. Beard v. Banks, 126 S. Ct. 2572, 2578 (2006)

(citing Turner, 482 U.S. at 87).

As an initial matter, I note that defendant Frank contends that he could not be liable under § 1983 for any violation of plaintiff's First Amendment rights because he lacked sufficient personal involvement in any development and application of a blanket policy prohibiting prisoners at the Wisconsin Secure Program Facility access to the Boscobel Dial. This may be true. However, I need not decide this question because plaintiff has failed to adduce evidence that his First Amendment rights were violated in the first place. Therefore, defendant Frank's personal involvement is beside the point.

Defendants Huibregste and Frank do not attempt to defend the legitimacy of the blanket policy followed at the Wisconsin Secure Program Facility until May 15, 2003, under which prisoners were prohibited from subscribing to or possessing copies of the Boscobel Dial. Instead, they assert that this is no longer the official prison policy and that plaintiff was never denied access to the Boscobel Dial pursuant to the policy when it was in place.

Plaintiff does not suggest that he was denied access to the Boscobel Dial before May 15, 2003 under the blanket policy in place at that time. Instead, he argues that prison officials at the Wisconsin Secure Program Facility still follow a de facto policy of prohibiting prisoners access to the newspaper. The facts reveal that in an attempt to gain evidence of this policy, plaintiff collected responses from several members of the staff at the Wisconsin Secure Program Facility to "Interview/Information Requests," after he filed this lawsuit. In



these responses, four non-defendant Wisconsin Secure Program Facility staff members answered “No” to plaintiff’s questions “I’m requesting to know if prisoners [are] allowed to have the Boscobel Dial Newspaper” and “I’m requesting to know if prisoners can order the Boscobel Dial?” He appears to wish to use these Interview/Information request forms to put into dispute defendant Huibregste’s statement under oath and the proposed facts related to it that no such policy is in place.

Unfortunately, plaintiff’s proffered evidence is not sufficient to put defendant’s facts into dispute. First, out-of-court statements, such as the responses to plaintiff’s “Information/Interview Requests,” are hearsay when they are offered to “prove the truth of the matter asserted.” Fed. R. Evid. 801(c). The “truth” that plaintiff is attempting to show is that prisoners are not allowed to have the Boscobel Dial. From this hearsay evidence, plaintiff urges the court to infer that a policy prohibiting possession of the newspaper still exists at the Wisconsin Secure Program Facility. Second, plaintiff has provided no information from which it is possible to assess whether the individuals who responded to his information requests had personal knowledge of the existence or lack of existence of a policy at the Wisconsin Secure Program Facility. Even if I could consider the responses plaintiff received to his questions for “the truth of the matter,” the questions and answers are too vague to be dispositive. Plaintiff asked whether prisoners were allowed to have the Boscobel Dial or order it. The staff members responded “no.” But what “no” meant in this context

is not clear. Perhaps they meant that the prison would not allow prisoners to possess the Boscobel Dial, as plaintiff contends, or perhaps their answers reflected their understanding of the newspaper's policy to deny prisoner's requests for subscriptions.

But this is all academic. Even if plaintiff is correct and a de facto policy prohibits prisoners at the Wisconsin Secure Program Facility from possessing the Boscobel Dial, plaintiff has not been injured by the application of any prison policy. Books v. City of Elkhart, Indiana, 235 F.3d 292, 299 (7th Cir. 2000) (holding that to demonstrate injury in fact, party must "show an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical") (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). None of the staff members plaintiff questioned denied plaintiff access to the Boscobel Dial; they answered a theoretical question. Moreover, plaintiff's effort to order the Boscobel Dial was refused by the newspaper itself. Unless the newspaper changes its policy or someone else sends plaintiff a clippings from the Boscobel Dial and prison officials deny them on the ground that prisoners are not allowed to possess the newspaper, plaintiff cannot be injured by the de facto policy he contends exists.

Finally, to the extent plaintiff asserts that the prison's refusal to deliver his letter to the Boscobel Dial is evidence of a policy limiting prisoners' access to the newspaper, he comes up short again. Refusal to deliver mail is not a claim in this lawsuit. Moreover,

defendant Huibregste's response that "WSPF has no control over private industry decisions regarding sales to inmates," makes clear that he understood plaintiff's complaint number WSPF-2006-11627 to relate to the denial and return of his money order by the Boscobel Dial and not to a prison official's refusal to deliver a letter to the newspaper.

B. City of Boscobel Ordinance Regarding Distribution of the Boscobel Dial

Next, I turn to the question whether the City of Boscobel's non-binding resolution, which "urges" the publisher of the Boscobel Dial to refuse to distribute the newspaper to prisoners, violates plaintiff's First Amendment rights. Although the fit is not perfect, courts have applied the Turner standard when considering constitutional challenges to legislative actions, as well as prison actions, that restrict prisoners' First Amendment rights. See, e.g., Amatel v. Reno, 156 F.3d 192, 196 (D.C. Cir. 1998) (considering validity of congressional act barring use of federal funds for distribution of sexually explicit materials to prisoners). However, applying the Turner standard to the City of Boscobel resolution would be of little use. The resolution speaks in non-binding language and simply "urges" a private entity to take action. Shortly after the passage of the resolution, Morris Newspaper Corporation of Wisconsin developed a policy that it would not mail any of its regional newspapers to the Wisconsin Secure Program Facility. Finally, even if I were to determine that the resolution is unconstitutional, the appropriate remedy would be to enjoin the city from enforcing it.

But to what effect? That it could no longer “urge” Morris Newspaper Corporation of Wisconsin, a private entity, to take a particular action? This would be futile, especially where there is no evidence that the resolution is coercive. Therefore, I find that the resolution does not violate plaintiff’s First Amendment rights.

Plaintiff’s access to the Boscobel Dial is limited not by the Boscobel resolution or prison regulations, but by a policy of Morris Newspaper Corporation of Wisconsin. As discussed at greater length in the order screening plaintiff’s complaint, the newspaper is not a state actor that can be sued under § 1983, and its acquiescence to a “non-binding resolution” does not make it one. E.g., Gayman v. Principal Financial Services, 311 F.3d 851, 852 (7th Cir. 2002). When prisoners challenge regulations limiting their constitutional rights, prison officials must demonstrate that these regulations are reasonable. Apparently, in the case that was before Judge Nowakowski, he found that defendants presented insufficient evidence to make such a showing with respect to the policy regarding the Boscobel Dial. However, this ruling does not render unconstitutional the policy of a private entity that has the same effect, or a city resolution “urging” the private entity to adopt such a policy.

ORDER

IT IS ORDERED that

1. The motion for summary judgment of defendants Peter Huibregste and Matthew Frank is GRANTED.

2. The motion for summary judgment of defendant City of Boscobel is GRANTED.

The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 21st day of June, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge