IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES J. KAUFMAN,

OPINION and ORDER

Plaintiff,

11-cv-421-bbc

v.

JEFFREY PUGH, SANDRA COOPER,
TERRY SHUK, ISMAEL OZANNE,
OFFICER O'CONNELL, CHARLES COLE,
DAN WESTFIELD and SHEILA PATTEN,

Defendants.

- -

In this lawsuit, plaintiff James Kaufman is proceeding on First Amendment claims against defendant prison officials for denying him possession of printed materials on the ground that they were pornographic. Defendants have filed a motion for summary judgment that is now fully briefed.

After considering the parties' briefs, proposed findings of fact and attached evidence, I will grant defendants' motion for summary judgment on plaintiff's claims regarding the denial of postcards and greeting cards because I conclude that defendants' regulations concerning the acquisition of those items are related reasonably to the state's legitimate penological interest in prison security. Also, I will grant defendants' motion as it pertains to the denial of two books because the prison regulations prohibiting pornography are reasonably related to legitimate penological interests in prison safety and inmate

rehabilitation and because defendants' denial of the items was consistent with their regulations.

From the parties' proposed findings of fact and supporting evidence, including the materials withheld from plaintiff, I find that the following facts are undisputed and material, unless otherwise noted.

UNDISPUTED FACTS

A. Background

Plaintiff James Kaufman has been incarcerated at the Stanley Correctional Institution since September 19, 2009. At the times relevant to this case, defendants Jeffrey Pugh, Sandra Cooper, Terri Shuk, Shari O'Connell and Sheila Patten worked at the Stanley prison; Pugh is the warden, Cooper was a captain assigned to supervise the mail/property room, Shuk was a sergeant and O'Connell and Patten are correctional officers. Defendant Ismael Ozanne was deputy secretary of the Department of Corrections. Defendant Charles Cole is the deputy secretary now. Defendant Daniel Westfield is the department's security chief.

B. Postcards and Greeting Cards

Prisoners may receive only "[s]igned, non-musical, commercial greeting cards and post cards" in their incoming mail (which I understand to be a regulation concerning the reception of incoming correspondence). Also, inmates may receive new and unused writing materials such as greeting cards through the institution canteen or approved sources (which

I understand to be a regulation concerning the acquisition of materials for future correspondence). The Department of Corrections has established contracts with four vendors from whom allowable inmate property items may be purchased and shipped to an inmate. (Plaintiff disputes these proposed findings, stating that greeting cards and postcards are "publications" that can be purchased from commercial sources in addition to the four approved vendors. However, prison regulations show that greeting cards and postcards are classified as "publications" only for purposes of the pornography regulations. The property regulations at issue with regard to plaintiff's postcard and greeting card claim, Division of Adult Institutions Policies Nos. 309.20.01 and 309.20.03, define "publications" as including newspapers, magazine, pamphlets and books.)

On December 11, 2009, defendant O'Connell completed a property form related to approximately 58 postcards and 22 greeting cards received at the prison addressed to plaintiff. The postcards were contained in two books: David Vance: Best of Photographs #16 and David Vance: Best of Attractions #30. Both of these items were further titled "David Vance Post Card Books." The items depict male models in various stages of undress (although it is debatable whether any of these pictures would qualify as "nudity" as that term is defined in the prison regulations discussed below). The "books" consist of loosely bound blank postcards tailor-made for removal and subsequent mailing and are described appropriately as collections of blank postcards, a contraband item. Defendant O'Connell denied delivery of the postcards and greeting cards and indicated on the form that the items were ". . . not from vendor."

The books of postcards were denied by mailroom staff because they were viewed as postcards, not properly bound "publications," and because unsigned postcards were not an allowable property item at the prison. The greeting cards were denied by mailroom staff because unsigned greeting cards received in this fashion, rather than from an approved vendor, were not allowable property items. Defendant Captain Cooper reviewed the postcards and greeting cards and concurred in the denial because postcards and unsigned greeting cards were not allowed property items.

On December 21, 2009, Kaufman filed an inmate grievance concerning the denial of the postcards and greeting cards. Institution Complaint Examiner Kimberly Richardson recommended denial of the grievance because the postcards were not listed as an allowable property item and because the postcards and greeting cards contained nudity. Defendant Pugh dismissed the grievance. Ultimately, Deputy Secretary Ozanne dismissed plaintiff's appeal.

C. Books

Under Wis. Admin. Code § DOC 309.02(16), "pornography" is defined as

> (a) Any material, other than written material, that depicts any of the following:
>
> 1. Human sexual behavior.
>
> 2. Sadomasochistic abuse, including but not limited to flagellation, bondage, brutality to or mutilation or physical torture of a human being.
>
> 3. Unnatural preoccupation with human excretion.

4. Nudity which is not part of any published photograph or printed material, such as a personal nude photograph.

5. Nudity of any person who has not attained the age of 18.

Under Division of Adult Institutions Policy No. 309.00.50, "unauthorized pornographic material" includes, but is not limited to:

1. Written materials which the average person, applying state contemporary community standards, would find, when taken as a whole:
   a. Appeals to the prurient interest;
   b. Describes human sexual behavior in a patently offensive way; and,
   c. Lacks serious literary, artistic, political, educational, or scientific value.

2. Personal nude photographs which are not part of any published photograph or printed material.

3. Publications that feature photographs, pictures, and/or drawings of nudity.

4. Publications that include photographs, pictures, and/or drawings of:
   a. Sexual intercourse.
   b. Fellatio or cunnilingus.
   c. Sodomy.
   d. Bestiality.
   e. Masturbation.
   f. Necrophilia.
   g. Sadomasochistic abuse.
   h. Unnatural preoccupation with human excretion.
   i. Nudity of any person who has not attained the age of 18, as described in DOC 309.02.

A publication "features" nudity when it "contains depictions of nudity on a routine or regular basis or promotes itself based upon such depictions in the case of individual one-time issues." Id. "'Nudity' for commercially published material means the showing of human male or female genitals or pubic area with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of the areola or nipple, or the depiction

of covered male genitals in a discernibly turgid state." Wis. Admin. Code § DOC 309.02(14). Policy no. 309.00.50 states that "[a] publication will not be prohibited solely because it contains pictorial nudity that has a medical, educational, or anthropological purpose."

On April 18, 2011, defendant Patten completed and signed a DOC-237 form related to books received at the institution via the U.S. Mail, addressed to plaintiff. Patten denied the books titled "Texas Twins" and "The Queer Movie Poster Book," because of "nudity/ sexual acts." On April 18, 2011, Property Sergeant J. Eichner completed and signed forms related to the disposition of the books. Sergeant Eichner determined that plaintiff was denied delivery of the books titled "Texas Twins" and "The Queer Movie Poster Book" because they contained pornography and "the publications [taught] or advocate[d] behavior that violates the law of Wisconsin, the United States or the rules of the Department of Corrections."

Plaintiff filed grievances regarding both books. Institution Complaint Examiner Richardson initially recommended dismissing plaintiff's complaints after seeking the opinion of Security Chief Dan Westfield, who determined that both books should be denied "due to the depictions of nudity." More precisely, Westfield averred that "Texas Twins"

> featured nudity when looked at as a whole, not based on any individual page. Of the 96 pages, there was only one (1) page that contained text, eleven (11) pages that depict male genitals.
> . . . .
> I determined that the book titled The Story of Morgan & Nash Texas Twins by Howard Roffman features nudity because all of the pictures were of these two very young men, in most they were not fully clothed, and in several they were completely nude. There is only one page of actual text in the book

> that contains "The Story" of these young male models, and the cover presents these two men as not fully clothed. Given this, I believe nudity is featured in the book and an import[ant] aspect of the sale and marketing of this book—this is a book of young male models that do pose nude.

Dfts' Resp. to Plt.'s PFOF ¶ 66, dkt. #56.

Regarding "The Queer Movie Poster Book," Westfield averred that

> The ISBN number of the book titled The Queer Movie Poster Book is #0-8118-4261-4 and the book contains 131 pages plus an Index. I determined that the book was unallowable pornography under DAI Policy No. 309.00.50 because it featured nudity when looked at as a whole, not based on any individual page.
> . . . .
> Approximately twelve (12) of the pages contain nudity, and sexual contact is depicted on almost all of the pages. The cover contains unclothed individuals engaged in sexual contact. Given this, I believe nudity is featured in the book and an import[ant] aspect of the sale and marketing of this book.

Id., ¶ 74.

Plaintiff's grievances proceeded to the completion of the inmate complaint review process. Defendant Pugh dismissed plaintiff's grievances and defendant Cole dismissed plaintiff's appeals.

D. Plaintiff's Criminal History

In November 1997, plaintiff was convicted of first-degree sexual assault of a child in Eau Claire County, Wisconsin. In May 1998, plaintiff was convicted of possession of child pornography. In January 2008, plaintiff was jailed for violating his probation rules by using the internet, viewing pornography and maintaining a MySpace account. Plaintiff eventually was placed in a "transitional residence" but was incarcerated after his probation was revoked

for possessing pornographic pictures and using the internet without prior agent approval.

OPINION

A. Summary Judgment and the Turner Standard

When a prison regulation limits an inmate's constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. Turner v. Safley, 482 U.S. 78, 89 (1987). To determine the reasonableness of the prison regulation, courts examine four factors set out in Turner: (1) whether a valid, rational connection exists between the regulation and a legitimate government interest behind the rule; (2) whether there are alternative means of exercising the right in question that remain available to prisoners; (3) whether accommodation of the asserted constitutional right will have negative effects on guards, other inmates or prison resources; and (4) whether there are obvious, easy alternatives at a *de minimis* cost. Turner, 482 U.S. at 89–91. The Turner test governs judicial review of specific applications of prison regulations as well as facial challenges. Shaw v. Murphy, 532 U.S. 223 (2001).

Inmates who challenge the reasonableness of a prison regulation bear the burden of proving its invalidity. Overton v. Bazzetta, 539 U.S. 126, 132 (2003); Jackson v. Frank, 509 F.3d 389, 391 (7th Cir. 2007). Courts "must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most

appropriate means to accomplish them." Overton, 539 U.S. at 132. Deference to prison officials is appropriate because the judiciary does not possess the necessary expertise and resources to deal with the "difficult and delicate problems of prison management." Thornburgh v. Abbott, 490 U.S. 401, 407 (1989). Moreover, "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.

B. Postcards and Greeting Cards

Plaintiff brings a claim that defendants O'Connell, Shuk, Cooper, Pugh and Ozanne violated his First Amendment rights by denying him possession of greeting cards and books of postcards. At the outset, I note that plaintiff disputes the characterization of the two David Vance "Post Card Books." He states that these are "bound books of photographs, which contained perforated edges," and these items should be treated as "books" under the Department of Corrections' property regulations. Defendants argue that the items should be treated as "postcards." I am required to give "substantial deference to the professional judgment of prison administrators," Overton, 539 U.S. at 132, but even without this deference, plaintiff's characterization falls flat.

Additionally, I note that plaintiff's claim regarding the postcards and greeting cards was framed in the screening order as concerning the rejection of pornographic material. The summary judgment record shows that defendants offered multiple rationales for the rejection of these materials, including the pornography issue but also including regulations banning

commercial photographs and blank or unsigned postcards and greeting cards, and requiring that retail merchandise include a receipt and be shipped from an approved vendor. In Hammer v. Ashcroft, 570 F.3d 798, 803 (7th Cir. 2009), the court stated that a prison official's actual reasons for taking a particular action are irrelevant under Turner. Under Hammer, it makes little difference when officials identify a legitimate penological interest for a restriction so long as there is a reasonable nexus between the interest and the restriction. I conclude that defendants have proven such a connection with regard to its policies forbidding the reception of unsigned postcards and greeting cards in correspondence and the acquisition of blank postcards and greeting cards for future correspondence.

Defendants' policies are rationally connected to a legitimate governmental interest: the safety of staff and inmates. Prisoner cannot receive unsigned postcards or greeting cards through the mail because of the risk that those items could be used to hide or smuggle contraband. Defendants note that this risk is higher in the case of unsigned cards because those items cannot be tracked, whereas an item sent by an identified source can be traced back to that source. Likewise, blank writing materials such as greeting cards cannot be acquired other than through canteen or approved vendors because unknown sources may be untrustworthy; defendants explain that "inmate families have attempted to establish a business for the sole purpose of mailing contraband to inmates." Preventing contraband from entering a prison is a legitimate penological interest that justifies some intrusions on an inmate's First Amendment rights. E.g., Gaines v. Lane, 790 F.2d 1299, 1304 (7th Cir. 1986); Stewart v. Berge, 2005 WL 1532604 (W.D. Wis. June 22, 2005). The prison

regulations represent a reasonable balance: prisoners may receive (signed) correspondence from the outside world, but in order to send their own cards, they must order these items from trusted sources. See, e.g., Sadler v. Lantz, 2011 WL 4561189 (D.Conn. Sept. 30, 2011) (upholding prison regulations prohibiting blank greeting cards sent in mail).

Plaintiff has the burden on the remaining three factors under Turner. Singer v. Raemisch, 593 F.3d 529, 536-37 (7th Cir. 2010) ("[T]he burden shift[s] to" prisoner "once the prison officials provid[e] the court with a plausible explanation."). Plaintiff does not provide arguments about any of these factors, and in any case, the evidence suggests that there are alternatives for plaintiff to exercise the right that has been intruded upon (which I understood in the August 20, 2011 screening order to be the right to receive sexually explicit material), that prison resources would be significantly burdened by forcing prison staff to review incoming materials more thoroughly, and there are no obvious, easy alternatives to the regulations.

Plaintiff argues that the rules were applied unfairly to his requests because he has received at least 58 blank postcards or greeting cards or both that were not signed by the sender and not received from an approved vendor. Plaintiff seems to be making an apples-to-oranges comparison; he avers that the vast majority of the cards he received were "business reply cards" found inserted into magazines, which have no relevance to this case. The other postcards were "unsigned" but were not blank; the exhibits he produces have messages from the senders, but no signature, indicating that these items were not blank "writing supplies" of the sort he received in this case. Finally, he submits a greeting card that

is blank except for a message apparently written on a "post it note" affixed to the card suggesting that plaintiff reuse the card. In any case, to the extent that any of these unsigned materials were received by plaintiff in contravention of the rules articulated by defendants, a failure to enforce the rules consistently does not make that rule unconstitutional. Azeez v. Fairman, 795 F.2d 1296, 1299 (7th Cir. 1986). Because plaintiff fails to raise any persuasive argument that the prison regulations at issue or the application of those regulations are not related reasonably to legitimate penological interests, I will grant defendants' motion for summary judgment on these claims.

C. Books Denied as Pornography

1. Background

At the outset, I note that in past cases plaintiff has attempted to file several similar claims about the denial of publications deemed to be pornographic, but he was not allowed to pursue those claims because he was bound by the settlement agreement reached in Aiello v. Litscher, 98-cv-791-bbc, regarding the types of descriptions and depictions of sex and nudity that would be permitted within the Wisconsin prison system. E.g., Kaufman v. McCaughtry, 419 F.3d 678 (7th Cir. 2005); Kaufman v. Frank, 2006 WL 1982692 (W.D. Wis. July 13, 2006). In the August 30, 2011 screening order in this case, I stated that the parties in the Aiello case seem to agree that the settlement agreement is no longer enforceable in federal court, Aiello, 98-cv-791-bbc (W.D. Wis. May 18, 2011), so the settlement agreement did not appear to be an impediment in the present case. However, I

noted that "defendants remain free to raise this issue going forward if they think that it is appropriate." Dkt. #4. Defendants have not done so, so I will address plaintiff's claims that prison officials improperly denied him two books, "Texas Twins: The Story of Morgan and Nash" and "The Queer Movie Poster Book," because they are "pornographic" as that term is defined in prison regulations.

2. Facial challenge

Turning to the Turner test, defendants state that their regulations further interests such as security and safety issues within prisons, deterrence of crime within the institutions and rehabilitation of prisoners. For instance, defendants state that "[a]n inmate's possession of pornographic materials would promote disrespect for male and female correctional staff, and erodes the authority of all staff members by encouraging inmates to harbor inappropriate thoughts and to make inappropriate comments and gestures, especially to female correctional staff." They state further that "[p]ornographic materials that depict explicit sexual acts and nudity threaten[] prison security because they can lead to violence against the inmate possessing the materials or assaults on other inmates" and "[t]he possession of pornography would increase the probability of other inmates attempting to gain possession of the pornographic publication(s) through stealing, gambling or extortion."

They argue that the regulation also promotes rehabilitation of inmates, stating that "[a]n inmate's access to pornography can promote a sexual preoccupation instead of engaging in functional pro-social activities" and that "[t]he possession of pornography by

inmates who have been convicted of sex crimes, goes against the efforts of the DAI to provide programming and services that prisoners leave prison unlikely to commit another crime because the pornography feeds the deviate behavior and immoderate preoccupation that contributed to their incarceration in the first place."

Finally, defendants submit testimony from Jonathan W. Dickey, a psychologist at the Oshkosh Correctional Institution who administers that prison's sex offender treatment program. Dickey states that plaintiff's continued attempts to possess books with pornographic imagery, in light of his convictions and violations of probation rules regarding accessing pornography, "suggest[] a high level of sexual preoccupation" that needs to be treated. He considers plaintiff's attempts to possess these publications as "counter therapeutic."

There is no question that the Department's regulations are *aimed* at legitimate penological objectives like security and rehabilitation. E.g., Van den Bosch v. Raemisch, 658 F.3d 778, 785 (7th Cir. 2011) ("Such legitimate penological interests might include crime deterrence, prisoner rehabilitation, and protecting the safety of prison guards and inmates.") The issue is whether the regulations are *related rationally* to those objectives. E.g., Aiello v. Litscher, 104 F. Supp. 2d 1068 (W.D. Wis. 2000). If the regulations ban far more than is necessary to meet those objectives, then the regulations may not meet this standard. Id. (Suggesting that prison regulation not rationally related to penological interest where "logic suggests the regulation prohibits access to such great works of literature as the Bible and the

writings of Walt Whitman, as well as countless others whose depictions of nudity and sexual intimacy are enlightening and inspiring rather than 'degrading and disrespectful.'")

However, since the Aiello case, the state has refined its pornography regulations to define the types of banned materials more narrowly. It appears from the regulations that many written depictions of sexual behavior are now allowed and plaintiff does not dispute this. Publications that were banned under the policy at issue in the Aiello case, such as *Vanity Fair*, *Rolling Stone* and the *Sports Illustrated* swimsuit issue, are specifically listed in the current DAI Policy No. 309.00.50 as "[e]xamples of publications which as currently published do not feature nudity or are otherwise currently allowed." For further clarity, the current policy also lists examples of publications featuring nudity, such as *Playboy*, *Penthouse* and *Outlaw Biker*. Thus, there does not appear to be the same overbreadth problem as in Aiello, where, for example, the plain language of the regulations barred depictions of Michelangelo's Sistine Chapel. Id. at 1080. For his part, plaintiff offers no concrete examples of banned materials suggesting that a similar overbreadth problem exists. Accordingly, at least for purposes of summary judgment in this case, I conclude that a valid, rational connection exists between the regulation and a legitimate government interests behind the rules.

Turning to the remaining Turner factors, the evidence in the record suggests that alternatives exist for plaintiff to exercise his right to read sexually explicit communications; plaintiff states that he "possess[es] several written erotica books geared towards homosexuals, which he purchased over a year ago." Regarding the third and fourth factors,

further accommodation of plaintiff's right could potentially harm security and rehabilitation interests and it is difficult to envision alternatives to the regulations that are obvious or easy. Plaintiff does not raise any argument about these factors, even though it is his burden to do so. Thus, I conclude that plaintiff has failed to show that the regulations are unconstitutional on their face.

3. "Texas Twins"

The main focus of plaintiff's brief is that he should be allowed to possess the books because they are not pornographic, which I understand is a a challenge to the way the regulations have been applied to him. To resolve these claims, I will discuss the books in turn.

The first book, "Texas Twins," has a one-page introduction discussing how the photographer met twin brothers Morgan and Nash and describes some of their life story. The remainder of the book is a series of approximately 100 pictures of one or both of the brothers. Twelve of the pictures include images of the genitals of at least one of the brothers. The front cover of the book shows one of the brothers, shirtless, lying on the back of the other brother, who is wearing an undershirt. The back cover has three photographs of the brothers. One of the pictures shows the brothers wearing snowboarding gear. Another shows both brothers shirtless. The third shows the brothers (apparently both naked) in a whirlpool. One of the brothers can be seen partially obscuring his pubic area with his hand.

Plaintiff argues that "Texas Twins" contains no images of "sexual intercourse, fellatio, cunnilingus, bestiality, masturbation, necrophilia, sexual sadism, sexual masochistic abuse, or sexual excitement," and that the images "which depict male genitals depict those genitals as flaccid (completely limp), with no sexual content to the images at all." I generally agree with plaintiffs' characterizations of the content of the book, but they are irrelevant to the discussion. Defendants argue that the dozen pictures of male genitalia violate prison regulations against publications that "feature nudity."

Under Division of Adult Institutions policy no. 309.00.50, a publication "features" nudity when it "contains depictions of nudity on a routine or regular basis or promotes itself based upon such depictions in the case of individual one-time issues." Id. Plaintiff focuses on the phrase "promotes itself based upon . . . depictions [of nudity]." He asserts that "Texas Twins" does not "promote itself" on the basis of nudity and states that "[t]he front and back covers of the book do not, in any way, advertise, depict, or promote, nudity or sexual acts." He argues that the banning of this book shows that defendants interpreted the phrase "promotes" to mean "containing nudity," an extremely broad category, and states that "even one image in a publication, no matter how many pages of non-nude material that publication may contain, is to be banned under the pornography policy."

In George v. Smith, 467 F.Supp. 2d 906 (W.D. Wis. 2006), I discussed the contours of an "as applied" challenge to prison regulations under Turner.

> In Shaw v. Murphy, 532 U.S. 223, the Supreme Court held that the Turner test governs judicial review of specific applications of prison regulations as well as facial challenges. In remanding the case for a determination whether a specific application of a prison regulation was

> acceptable, the Court stated that "[u]nder Turner, the question remains whether the prison regulations, as applied to [plaintiff], are reasonably related to legitimate penological interests." Id. at 232 (internal citation omitted). The emphasis the Court placed on the first Turner factor hints at the reality that when a case involves a challenge to a prison regulation as applied in a specific instance, as opposed to a challenge to the regulation on its face, it is not necessary to frame the analysis in terms of all four factors set forth in Turner. By definition, a regulation that is permissible under the Turner test is reasonably related to a legitimate penological interest. Therefore, actions taken by prison officials that are consistent with such a regulation are permissible under Shaw. Where the regulation itself is valid, the only question that remains for a court is whether the actions being challenged are consistent with the regulation. Shaw, 532 U.S. at 232.

Plaintiff's argument that defendants apply the phrase, "promotes itself based upon . . . depictions [of nudity]," to mean "contains nudity" is essentially an argument that defendants ignored the meaning of "promotes" in its application of the rule. (Although "promote" is not defined in the regulations, plaintiff provides his own definition, from an unidentified dictionary, that "'promote' means to further the sale of a product by advertising and publicity." This definition suffices for purposes of this opinion.)

As an initial matter I note that plaintiff seems to mischaracterize the content of the book. He states that the covers "do not, in any way . . . depict . . . nudity," without acknowledging that the back cover includes a picture of the partially obscured pubic area of one of the brothers. In any case, plaintiff's argument is not borne out by defendant Westfield's testimony about why he considered the book pornography. Westfield stated that the book "featured nudity when looked at as a whole, not based on any individual page. Of the 96 pages, there was only one (1) page that contained text, eleven (11) pages that depict male genitals," and that "[t]here is only one page of actual text in the book that contains

'The Story' of these young male models, and the cover presents these two men as not fully clothed. Given this, I believe nudity is featured in the book and an import[ant] aspect of the sale and marketing of this book—this is a book of young male models that do pose nude." This shows that Westfield considered how the nudity was promoted in the way contemplated by plaintiff's own definition of "promote."

Moreover, plaintiff's concern that "even one image in a publication" could define a publication as "featuring nudity" is not supported by the facts in this case. The regulations provide numerous examples of the types of publications that are banned or allowed under the nudity rules, making it apparent that one fleeting example of nudity in a publication will not disqualify it. Conversely, there are approximately one dozen pictures in "Texas Twins" showing "nudity" as it is defined in the regulations, and Westfield's testimony makes clear that he considered the publication as a whole in making his determination, including the relationship of the pictures to the relatively short narrative and the nature of the pictures on the cover. The evidence submitted by the parties shows that the actions taken by defendants were consistent with the regulations. Accordingly, summary judgment will be granted to defendants on this claim.

4. "The Queer Movie Poster Guide"

The second book, "The Queer Movie Poster Guide," bills itself as "a captivating visual history of the best of queer film culture." It presents reproductions of roughly 150 posters from movies running from 1915 to 2000 and ranging from mainstream Hollywood films

such as "The Birdcage" and "In & Out" to handwritten flyers representing films the book dubs "early gay porn." Most of the posters are accompanied by a written description of the movie as well as a note about the artwork itself, the social era in which the film was created or the movie's cultural impact. As a note on the jacket states, "the book turns a critical eye on the development and changing definitions of queer cinema itself, from the often heterosexually produced films with negative themes (loneliness, madness, and often enough, suicide and punishment) to the emerging, independent, queer-produced film scene."

Plaintiff argues first that the book simply contains no material discussed under the pornography regulations, and submits a proposed finding of fact that "he saw absolutely *no* images that depict any kind of sexual activity, or sexual acts, not a single image." No reasonable juror would agree with this assessment; the book contains numerous depictions of "nudity" as that term is defined in the administrative code and several instances of what would fit any reasonable definition of "human sexual behavior" under Wis. Admin. Code § DOC 309.02(16), such as unclothed persons in romantic embraces.

Plaintiff's other main argument regarding this book is that it should have been allowed because it has "educational or anthropological" value. Policy no. 309.00.50 states that "[a] publication will not be prohibited solely because it contains pictorial nudity that has a medical, educational, or anthropological purpose." Defendants deny that the nudity contained in the book has educational or anthropological purposes. They are almost certainly incorrect; the book in part presents a scholarly examination of movies and movie posters, albeit ones that often include depictions of human sexual behavior. The mere fact

that the discussion concerns somewhat risqué material does not mean that the discussion has no educational or anthropological purpose.

The problem for plaintiff is that this does not settle his claim. The regulations prohibit a publication from being banned "solely" because of educational or anthropological nudity, but such a publication can be banned for other reasons. The security and rehabilitation goals discussed by defendants still hold, including the notion that it is counter therapeutic for a sex offender such as plaintiff to have access to images depicting sexual behavior. Plaintiff disputes this rationale, arguing that it is healthy for him to look at pictures of naked men and that his rehabilitation is actually aided by possession of adult sexual imagery as opposed to pictures of children. However, plaintiff is not qualified to state an opinion about the best course of treatment for sex offenders. Defendants' expert is qualified to do so and his testimony supports the articulated rehabilitation interest.

Finally, it is important to remember the deference the court must give to defendants' discretion in regulating sexual material. The question is whether the actions taken by defendant were consistent with the regulation, not whether the court would make a different decision. Because defendants' actions were consistent with the regulations that I have already concluded meet the Turner standard from a facial standpoint, I will grant defendants' motion for summary judgment on this claim.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Jeffrey Pugh, Sandra Cooper, Terri Shuk, Shari O'Connell, Sheila Patten, Ismael Ozanne, Charles Cole and Daniel Westfield, dkt #39, is GRANTED.

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

Entered this 25th day of September, 2012.

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