

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

LOUIE E. AIELLO, BRIAN HUISMAN,
DEMIAN McDERMOTT, COREY KELLER,
DEAN SABIN, CODY VANDENBERG, and
CASEY FISHER, on behalf of themselves and
all others similarly situated,

Plaintiffs,

MEMORANDUM

v.

98-C-791-C

JON E. LITSCHER, Secretary,
Department of Corrections,
RICHARD VERHAGAN, Administrator,
Wisconsin Department of Corrections
Division of Adult Institutions,

Defendants.

In an order entered on February 9, 2001, I approved a settlement agreement in this class action lawsuit. Since the settlement was reached, individual class members have on occasion sent the court photographs or other items that prison officials have identified as pornography and thus contraband under the prison's rules. These inmates have asked that I review the items designated as contraband and express an opinion about the propriety of

the prison officials' classification of the items. In this memorandum, I am responding to such a request made by inmate J.M. Washington, a class member incarcerated at the Waupun Correctional Institution. However, because this type of communication has become more frequent, I have decided to enter this memorandum and ask that counsel for the class to arrange to have it posted in the law libraries of the state's penal institutions.

With respect to the contraband that class member Washington has submitted, he and all other class members should be aware that federal judges cannot render legal opinions outside the context of a formal lawsuit. In the past, each time an inmate has written a letter to ask me to review a banned item, I have responded with a letter advising him that I cannot grant his request outside the context of a formal lawsuit. In addition, I have directed the inmate to tell me where to send the contraband item, given the fact that it cannot be returned to the prison. I do not intend to continue this procedure.

The settlement agreement in this case does not prevent inmates from filing two kinds of lawsuits: 1) lawsuits seeking money damages for alleged violations of the First Amendment *before* the settlement agreement was reached; and 2) lawsuits for monetary or injunctive relief for alleged violations of the DOC regulation or policy put into place to codify the terms of the agreement. The latter type of lawsuit, that is, one claiming that prison officials are violating DOC § 309 and IMP 50, is one arising under state law that must be brought in state court.

I have not interpreted the settlement agreement to permit inmates to continue to challenge the facial constitutional validity of the DOC rules that have been modified to incorporate the terms of the settlement agreement. The modifications that were made were intended to insure protection of the First Amendment rights of the inmate class. When I approved the settlement agreement, I was required under 18 U.S.C. § 3626 to find that the relief granted was narrowly drawn and extended no further than necessary to correct the alleged violations of the class members' federal rights. Thus, the members of the Aiello class have agreed that the rule on its face does not violate their constitutional rights.

In addition to filing a state court action, a class member who believes that prison officials are violating the settlement agreement is free to bring the matter to the attention of the lawyer for the class by writing to Lauren Raphael, Roger Baldwin Foundation of ACLU, 180 N. Michigan Avenue, Suite 2300, Chicago, IL, 60613. It is up to counsel to determine whether any inmate's individual concerns are concerns that may affect the interests of all inmates subject to the settlement agreement and, if so, whether a motion for a hearing on contempt is an appropriate response. Individual class members should bear in mind, however, that the settlement agreement precludes enforcement proceedings "based solely upon isolated misinterpretations of the rule or its successor regulations by line staff, so long as adequate procedures are in place to review and address those misinterpretations." Agreement at II.5.

In summary, I will not continue to respond to individual letters or motions from class members about possible misinterpretations of the prison's pornography rule, and I will not ask where the inmates wish the contraband sent. Instead, I will ask the clerk to place such communications in a file drawer with other miscellaneous communications received by the court that are unrelated to any case. These communications will be maintained for a short period of time and then discarded.

Entered this 6th day of June, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge