IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JERRY CHARLES,

ORDER

Petitioner,

01-C-253-C

v.

DICK VERHAGEN,

Respondent.

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This is a proposed civil action for declaratory, injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Oshkosh Correctional Institution in Oshkosh, Wisconsin, seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. 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 on three or more previous occasions had a suit 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 seeks money damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondent can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), he 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).

Petitioner contends that respondent has implemented policies that violate the free exercise and establishment clauses of the First Amendment and the equal protection clause of the Fourteenth Amendment. He will be granted leave to proceed in forma pauperis on his claim that respondent burdened his free exercise of religion in violation of the First Amendment by restricting his access to prayer oil and by preventing him from celebrating religious feasts. Petitioner will be denied leave to proceed on all other claims.

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

Petitioner Jerry Charles is a devout and practicing Muslim. He follows the teachings established by the prophet Muhammad 1400 years ago. Respondent Dick Verhagen is Programs Director for the Wisconsin Department of Corrections. Beginning on April 17, 2001, respondent established his version of the teachings of the prophet Muhammad and instituted a policy for purposes of services and study groups that required combining followers of true Islam with the adherents of the Nation of Islam, Moorish Science Temple of America, Ahmadiyyah and other sects of Islam. The teachings of the other sects are opposed diametrically to the teachings of the prophet Muhammad in practice, belief and principles. On April 17, 2001, respondent enacted a policy requiring that Muslims who wish to worship do so under the "umbrella" service and study group. Petitioner's religious service and study group are being discontinued because of the new internal management procedure, DOC 309 #6, which states that "under no circumstances will inmates be authorized to lead or conduct a congregate service or study group."

Petitioner has been prevented from buying and keeping in his cell the religious prayer oil used for prayer five times a day. Prayer oil is not listed on the "Religious Property - Inmate Personal" page of the new internal management procedure.

Petitioner has been denied a diet consistent with his religion. His religion recommends kosher meat. Petitioner does not receive two hot meals during the fasting month of Ramadan.

Petitioner's religious feasts are being taken away on the basis of the new procedure DOC 309 #6. Islam has two recognized religious feasts.

Petitioner is required to wear a black prayer cap. Black prayer caps do not come in sizes to fit the average person. Petitioner is required to use only black and natural wood prayer beads.

DISCUSSION

I understand petitioner to contend that respondent violated his rights under the free exercise and establishment clauses of the First Amendment and under the equal protections clause of the Fourteenth Amendment. (Petitioner states also that he is suing under the Religious Freedom Restoration Act, 42 U.S.C. § 2000. Because that statute has been found unconstitutional by the Supreme Court, see City of Boerne v. Flores, 521 U.S. 507 (1997), I will not address petitioner's Religious Freedom Restoration Act claims.)

A. First Amendment

In O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), the Supreme Court enunciated the proper standards to be applied in considering prisoners' free exercise claims. The Court held that prison restrictions that infringe on an inmate's exercise of his religion will be upheld if they are reasonably related to a legitimate penological interest. See id. at 349

(applying same standard to free exercise claims that applies where prison regulations impinge on inmates' constitutional rights). See also Sasnett v. Litscher, 197 F.3d 290, 292 (7th Cir. 1999) ("Nothing in [Employment Division v. Smith, 494 U.S. 872 (1990)] authorizes the government to pick and choose between religions without any justification."). The Court of Appeals for the Seventh Circuit has identified several factors which can be used in applying the "reasonableness" standard:

> 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. the impact accommodation of the asserted constitutional right would have on guards and other inmates and on the allocation of prison resources; and
> 4. although the regulation need not satisfy a least restrictive alternative test, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable.

Al-Alamin v. Gramley, 926 F.2d 680, 685 (7th Cir. 1991) (quoting Williams v. Lane, 851 F.2d 867, 877 (7th Cir. 1988)) (additional quotation marks omitted).

The establishment clause of the First Amendment is violated when "the challenged governmental practice either has the purpose or effect of 'endorsing' religion." County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989) (citations omitted). In this context, the fact that government may not "endorse" religion means that it is precluded "from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." Id. at 593 (citations omitted).

1. Worship and Study Policy

I understand petitioner to contend that respondent violated his rights under the free exercise and establishment clauses of the First Amendment by enacting a policy that requires Islamic inmates who wish to worship or study as a group to do so as part of an umbrella Islamic study group run by the prison. The policy petitioner challenges states that "under no circumstances will inmates be authorized to lead or conduct a congregate service or study group." The First Amendment does not require prisons to provide prisoners with the spiritual counselors of their choice, but need only provide each prisoner with a reasonable opportunity to worship. See Al-Alamin, 926 F.3d at 686-87; Graham v. Coughlin, No. 86 Civ. 163, 2000 WL 1473723 (S.D.N.Y. Sep. 29, 2000) (citing Johnson v. Moore, 948 F.2d 517, 520 (9th Cir. 1991)). Petitioner is not being prevented from worshiping individually or in a group setting. Petitioner simply does not like the requirement that any group worship be done with inmates from other Muslim sects. This is insufficient to state a claim upon which relief may be granted that respondent has violated his rights under the free exercise clause of the First Amendment.

Petitioner alleges that "defendant decided to establish their [sic] version of the teachings of Prophet Muhammad and instituted a policy requiring the amalgamation of true Islam, with the adherents of the Nation of Islam, Moorish Science Temple of America and Ahmadiyyah and any other sundry aberrations of Islam in the Department of Corrections."

Cpt. The requirement that all Muslim inmates worship together, if they choose to worship in a group setting, does not have the purpose or effect of endorsing a particular religion or a particular sect of Muslim. Petitioner has not explained how the prohibition on inmates leading congregate services or study groups means that respondent has established one type of Islam over another. Petitioner will denied leave to proceed in forma pauperis on his claim that respondent violated the establishment clause of the First Amendment because he has failed to state a claim upon which relief may be granted.

2. Prayer oil

I understand petitioner to allege that because prayer oil is not included on a list of approved religious items in internal management procedure DOC 309 #6, he has not been allowed to buy the oil or to keep it in his cell even though his religion teaches that he must use the oil during the 5 daily prayer times. It is possible that the restriction on petitioner's access to prayer oil is related rationally to a legitimate penological interest. However, at this time, I cannot conclude that the restriction is so obviously related to a legitimate interest as to preclude petitioner from proceeding on this claim. Petitioner will be granted leave to proceed in forma pauperis on his claim that defendant has burdened his free exercise of religion by preventing him from keeping oil to use during his daily prayers.

3. Diet

Prison inmates are entitled to reasonable accommodation of their religious dietary needs. See Love v. Reed, 216 F.3d 682, 689 (8th Cir. 2000) (refusal to provide food prepared on Saturday to inmate of "Hebrew religion" for consumption on Sunday violated right of free exercise of religion); see also Makin v. Colorado Dept. of Corrections, 183 F.3d 1205 (10th Cir. 1999) (refusal to deliver meals outside daylight hours to Muslim inmate in segregation during Ramadan violated free exercise of religion by diminishing spiritual experience). "Inmates . . . have the right to be provided with food sufficient to sustain them in good health that satisfies the dietary laws of their religion." McElyea v. Babbitt, 833 F. 2d 196, 198 (9th Cir. 1987). Petitioner contends that he has been denied kosher meat, which is "strictly recommend[ed]" by his religion, and that he is denied two hot meals during the fasting month of Ramadan. He does not contend that he is being denied meals outside of daylight hours during Ramadan; his focus on denial of hot meals suggests that he is being provided with some sort of bag meal. I do not understand him to contend that his religion requires him to eat two hot meals a day during Ramadan. Other courts have held that allegations that a prison or jail fails to provide inmates with two hot meals a day during Ramadan is not a cognizable claim. See Wiggins v. Alameda County Bd. of Supervisors, No. C 94-1172 VRW, 1994 WL 327180 (N.D. Cal. June 22, 1994); Reed v. Banta, Civ. A. No. 91-2867, 1991 WL 80418 (E.D. Penn. May 9, 1991). Cf. Makin, 183 F.3d 1205 (holding

that prison directive that required inmates in segregation to receive regular meals at regular times during Ramadan infringed Muslim prisoner's right to exercise his religion). Petitioner has not alleged that he is not being given nutritionally adequate meals. Petitioner has no right to any kind of meat, let alone kosher meat. Petitioner will be denied leave to proceed in forma pauperis on this claim because he has failed to state a claim upon which relief may be granted.

4. Religious feasts

Petitioner alleges that internal management procedure DOC 309 #6 prevents him from celebrating two religious feasts. Such restriction may be an unconstitutional burden on his right to practice his religion. Petitioner will be granted leave to proceed in forma pauperis on this claim.

5. Skull cap and beads

I understand petitioner to contend that his inability to choose the color of his prayer cap and prayer beads burdens his free exercise of religion. Such a de minimis restriction does not violate the First Amendment. Petitioner will be denied leave to proceed in forma pauperis on this claim because he has failed to state a claim upon which relief may be granted.

B. Equal Protection Clause

Denying a privilege to adherents of one religion while granting it to others is discrimination on the basis of religion in violation of the equal protection clause of the United States Constitution. See Native American Council of Tribes v. Solem, 691 F.2d 382, 384 (8th Cir. 1982) (citing Cooper v. Pate, 382 F.2d 518, 522 (7th Cir. 1967)). Petitioner has not alleged facts suggesting that non-Muslim inmates were granted a privilege that Muslim inmates were denied. Therefore, he will be denied leave to proceed in forma pauperis on his claim under the equal protection clause of the Fourteenth Amendment because he has failed to state a claim upon which relief may be granted.

ORDER

IT IS ORDERED that

1. Petitioner Jerry Charles's request for leave to proceed in forma pauperis against respondent Dick Verhagen on his claim that respondent burdened his free exercise of religion in violation of the First Amendment by restricting his access to prayer oil and by preventing him from celebrating religious feasts is GRANTED;

2. Petitioner's request for leave to proceed in forma pauperis on his other claims under the First Amendment and on his claim under the equal protection clause of the Fourteenth Amendment is DENIED on the ground that the claims fail to state a claim upon

which relief may be granted;

3. The unpaid balance of petitioner's filing fee is $138.47; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2); and

4. Petitioner should be aware of the requirement that he send respondent a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyer who will be representing respondent, he should serve the lawyer directly rather than respondent. Petitioner should retain 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 court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondent or to respondent's attorney.

Entered this 11th day of June, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge