IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NATHANIEL ALLEN LINDELL,

OPINION &
ORDER

Plaintiff,

02-C-21-C

v.

MATTHEW J. FRANK[1], Secretary of the Wisconsin Department of Corrections, JON E. LITSCHER, former Secretary of the Wisconsin Department of Corrections; CINDY O'DONNELL, Deputy Secretary to Litscher; JOHN RAY, Corrections Complaint Examiner ("C.C.E."); GERALD BERGE, Warden at Supermax Correctional Institution; PETER HUIBREGTSE, Deputy Warden of Supermax; LIEUTENANT JULIE BIGGAR, a Lt. at Supermax; ELLEN RAY, I.C.E.; SGT. JANTZEN; C.O. WETTER; C.O. S. GRONDIN; C.O. MUELLER; C.O. CLARK, all guards at Supermax; JOHN SHARPE, Manager Foxtrot Unit at Supermax,

Defendants.

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[1]In January 2003, Matthew J. Frank succeeded Jon Litscher as Secretary of the Wisconsin Department of Corrections. To the extent petitioner seeks injunctive and declaratory relief, Frank will be substituted as a respondent for Litscher, in accordance with Fed. R. Civ. P. 25(d).

This is a civil action for monetary, declaratory and injunctive relief, brought pursuant to 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-2000cc-5. Plaintiff Nathaniel Allen Lindell, a prisoner at the Wisconsin Secure Program Facility, maintains that defendants violated his First Amendment rights when they refused to allow him to keep writing paper mailed to him by persons outside the prison; by enforcing a prison policy prohibiting prisoners from receiving items cut out of newspapers or magazines or photocopies of such materials; and by refusing to post two letters plaintiff wrote. In addition, plaintiff maintains that defendants violated the First Amendment by placing him in a more restrictive prison status in retaliation for pursuing a pending lawsuit. Plaintiff also maintains that he was denied access to the courts in violation of the Fourteenth Amendment when he was denied paper, envelopes and postage for a two-week period in 2001. Finally, plaintiff contends that defendants violated the Religious Land Use and Institutionalized Persons Act by denying him writing paper mailed to him at the prison and by limiting his access to a telephone. The case is before the court on the parties' cross motions for summary judgment.

I conclude that defendants are entitled to summary judgment on all of plaintiff's claims, with the exception of his First Amendment challenge to the prison's policy regarding newspaper clippings and photocopies. Although defendants are entitled to qualified immunity on that claim, I will grant plaintiff's summary judgment motion on that claim to

the extent he seeks declaratory and injunctive relief.

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

UNDISPUTED FACTS

A. Parties

Plaintiff Nathaniel Allen Lindell is presently confined at the Wisconsin Secure Program Facility, formerly known as the Supermax Correctional Institution, in Boscobel, Wisconsin. Plaintiff arrived at the Wisconsin Secure Program Facility on February 28, 2001 and has been there continuously except for a brief stay at the Wisconsin Resource Center from May 21, 2002 to July 8, 2002.

Defendant Jon Litscher is the former secretary of the Wisconsin Department of Corrections. (Defendant Matthew Frank succeeded Litscher as department secretary in January 2003.) The Department of Corrections receives approximately $15 million each year in federal funding.

Defendants Terrence Clark, Sandra Grondin and Gary Wetter are employed as correctional officers at the Wisconsin Secure Program Facility. Defendants Clark, Grondin and Wetter have each worked at the prison for several years. Their responsibilities include supervision, counseling and treatment of the prison's inmates, inspection of the prison

facility and inmates for security, health and safety purposes, reporting to supervisors and adjustment committees regarding inmates and their behavior and maintaining prison records. Defendant Grondin works in the mailroom processing the prison's mail. Defendant Wetter works in the prison's property room and assists in the mailroom.

Defendant Keith Jantzen is a correctional sergeant at the prison. He is responsible for the security and control of inmates, the proper treatment of inmates, maintenance of proper security, health and safety standards at the prison, reporting to supervisors and disciplinary committees regarding inmates and their behavior, maintenance of the prison's records and the direction of correctional officers as a lead worker. Defendant Jantzen has worked at the Wisconsin Secure Program Facility since August 30, 1999.

Defendant Daniel Mueller was employed as a "Correctional Officer A" at the Wisconsin Secure Program Facility from October 22, 2000 to July 29, 2001. His responsibilities included directing prison inmates, counseling and treating inmates, inspecting the prison and inmates for security, health and safety purposes, reporting to supervisors and adjustment committees regarding inmates and their behavior and maintaining prison records. Defendant Mueller's duties at the prison included screening inmate mail. He has an associates degree in police science from Waukesha Technical College. Defendant Mueller is currently employed at the Milwaukee Secure Detention Facility.

Defendant John Sharpe is employed as a captain at the Wisconsin Secure Program

Facility. He is responsible for supervising assigned security staff, providing security services for the institution, developing, implementing and coordinating prison health and safety programs, procedures and policies and complying with federal and state civil rights laws. Defendant Sharpe has been employed by the state of Wisconsin since May 13, 1985, and was a unit manager at the Wisconsin Secure Program Facility from December 3, 2000 until July 20, 2002, when he assumed his current position.

Defendant Ellen Ray has been employed as an institution complaint examiner at the Wisconsin Secure Program Facility since February 18, 2001. She is the custodian of complaints filed by inmates incarcerated at the prison and has custody and control over records that are generated or regularly maintained at the prison in the ordinary course of the prison's operation and which pertain to prison inmates.

Defendant John Ray is employed by the Department of Corrections as a corrections complaint examiner. In this capacity, he receives and investigates decisions on inmate complaints that are appealed to the secretary of the Department of Corrections.

Defendant Gerald Berge is the warden at the Wisconsin Secure Program Facility. Defendant Peter Huibregtse is the deputy warden at the prison and defendant Cindy O'Donnell is the deputy secretary of the Department of Corrections.

B. Denial of Paper

Plaintiff has been indigent since he arrived at the Wisconsin Secure Program Facility on February 28, 2001, and therefore has been unable to purchase writing paper from the prison canteen. According to plaintiff, he needs paper to write friends and family and to write and draw religious poetry and "spellcraft" required by his religion. Plaintiff's indigency is mostly a result of large debts he owes to courts and the Department of Corrections stemming from various lawsuits he has filed and prison legal loans he has obtained. Plaintiff has been unable to pay off his debts because he is not allowed to earn wages at the Wisconsin Secure Program Facility and his family and friends are unable or unwilling to pay off his debts on his behalf. Prison policy forbids plaintiff from using paper obtained with a legal loan for anything other than correspondence to courts, attorneys or parties in litigation or within the inmate complaint system.

Plaintiff does receive some free writing paper from the prison. From April 18, 2001 through September 16, 2001, inmates such as plaintiff who were in program segregation, adjustment segregation or administrative confinement at the Wisconsin Secure Program Facility were provided access to a pen, one stamped envelope and one sheet of paper each week. Since September 16, 2001, plaintiff has received two sheets of paper weekly. However, except for the one or two free pieces of paper plaintiff was given each week by prison staff, plaintiff was without paper that he could use for non-legal matters from March 26, 2001 through October 1, 2002 (excluding plaintiff's six-week stay at the Wisconsin

Resource Center).

On March 26, 2001, plaintiff sent the following request to the manager of the prison's Alpha Unit: "I have no more writing paper to write family & friends can I have lined filler paper sent to me directly from a store w/a receipt so I can write my family/friends? They can't afford to pay my legal loans but can do this at least." The Alpha Unit manager denied plaintiff's request. On numerous occasions, plaintiff's family, friends and lawyers have mailed paper to plaintiff that prison officials refused to let him keep. On April 23, 2001, defendant Mueller told plaintiff that he had been mailed approximately 300 sheets of paper by a Seattle, Washington law firm and Howard Eisenberg, but that if he didn't agree to allow prison authorities to dispose of the paper, he would be disciplined. On April 24, 2001, a prison official notified plaintiff that he would not be given the "ream" of paper mailed to him by the law firm. On May 3, 2001, a prison official notified plaintiff that he would not be given 71 sheets of paper mailed to him by his father. On October 31, 2001, a prison official notified plaintiff that he would not be given paper that had been mailed to him.

On April 23, 2001, plaintiff filed offender complaint SMCI-2001-12330, alleging that he had been denied approximately 300 sheets of writing paper sent to him by two lawyers. On April 26, 2001, defendant Ellen Ray recommended that the complaint be dismissed, noting that prison policy allowed inmates to possess only writing paper purchased from the

prison canteen. The reviewing authority, defendant Huibregtse, accepted the recommendation and dismissed the complaint on April 27, 2001. Plaintiff appealed defendant Huibregtse's decision to dismiss the complaint to defendant John Ray, the corrections complaint examiner, on May 8, 2001. On May 16, 2001, defendant John Ray recommended that the appeal be dismissed. Defendant O'Donnell accepted the recommendation and dismissed plaintiff's appeal on June 2, 2001.

On May 3, 2001, plaintiff filed offender complaint SMCI-2001-13215, in which he objected to the prison's refusal to deliver to him 71 sheets of paper mailed to him by his father. On May 22, 2001, defendant Ellen Ray recommended that the complaint be dismissed pursuant to Wis. Admin. Code § 309.04(4)(f), which states that an inmate may appeal decisions regarding non-delivery of mail to the warden. A review of the record showed that plaintiff had failed to follow this process, which was to be accomplished before submission of a formal complaint to the inmate complaint examiner's office. The reviewing authority, defendant Huibregtse, accepted defendant Ellen Ray's recommendation and dismissed the complaint on May 25, 2001. Plaintiff appealed defendant Huibregtse's dismissal of his complaint to the corrections complaint examiner on November 28, 2001. Because plaintiff's appeal of offender complaint SMCI-2001-13215 did not conform to the requirement found in Wis. Admin. Code § 310.13(1) that appeals be filed within 10 days of the date the complaint was decided, defendant John Ray recommended on December 12,

2001, that the appeal be dismissed as untimely. Defendant O'Donnell accepted defendant John Ray's recommendation and dismissed the appeal on December 13, 2001.

On October 31, 2001, plaintiff wrote defendant Berge regarding prison officials' refusal to allow him to keep writing paper mailed to him, noting that he had no money to buy paper from the canteen. On November 15, 2001, defendant Berge sent plaintiff a memorandum informing him that he had to buy writing paper at the canteen.

On November 20, 2001, plaintiff filed offender complaint SMCI-2001-34146, in which he objected to the refusal to deliver to him approximately 100 sheets of paper mailed to him by his girl friend. On December 10, 2001, defendant Ellen Ray recommended that the complaint be dismissed, noting that inmates may obtain extra writing paper only by purchasing it at the canteen and that writing paper mailed into the prison is considered contraband. Defendant Huibregtse accepted the recommendation and dismissed the complaint on December 17, 2001. On January 2, 2002, plaintiff appealed defendant Huibregtse's decision to the corrections complaint examiner. On January 15, 2002, defendant John Ray recommended that the appeal be dismissed, noting that plaintiff was provided one stamped envelope and two pieces of paper each week free of charge. Defendant O'Donnell accepted the recommendation and dismissed the complaint on January 29, 2002.

It is necessary for defendants to monitor and control inmates' property in order to

prevent the possible manufacture of weapons or contraband and to suppress trafficking between inmates. Monitoring and controlling inmate property helps eliminate strife among inmates stemming from gambling and theft, assists in the monitoring of inmate destruction or waste of property, aids in the discovery of possible safety concerns and in controlling items that might be used to aid escape attempts. Therefore, a written inventory of all property in an inmate's possession is maintained. The Department of Corrections returns to the sender items mailed to inmates that are not approved for inmate possession and are therefore deemed contraband, but does so only after notice to the inmate. The Department of Corrections forwards such items by commercial carrier to a person on the inmate's visiting list at the inmate's expense or arranges to have the items picked up by such a person within 30 days. The institution disposes of items that are not approved and that pose a security concern to the institution.

The prison allows inmates to acquire personal property by purchase from a prison canteen or purchase from approved retail outlets. Vendors send items to the prison that are required to be new and in a sealed package. The Wisconsin Secure Program Facility maintains a canteen that is accessible to inmates and sells approved personal property items. The prison also permits inmates to purchase approved property items not carried in the canteen from a sufficient number of vendors to insure a reasonable selection and a competitive price. However, if approved property items are available at the canteen, then

those items must be purchased from the canteen. Pads of writing paper are available for purchase from the Wisconsin Secure Program Facility's canteen. Therefore, paper cannot be purchased from an outside retailer or otherwise mailed to inmates from outside the prison.

This policy is in effect for two reasons. First, because property items are sold by the prison's approved canteen vendor, the risk of contraband being introduced is greatly diminished. This reduces the need for staff to inspect a host of items mailed into the prison for contraband. Second, as the ability to send narcotics through the mail has increased with the potency of today's drugs, the ability of prison staff to detect drugs concealed in inmate mail has diminished. Even a minuscule amount of a potent narcotic has the ability to affect the orderly functioning of a prison. Inmates who obtain drugs can consume them or sell them to other inmates for a substantial profit. An inmate who is under the influence of a narcotic in a correctional setting can be a danger to staff, other inmates and the orderly functioning of the institution.

C. Press Clippings and Photocopies

On October 12, 2001, plaintiff received in the mail four pages of pictures cut from the October 1993 issue of "Farm & Ranch Living." Because prison policy prohibits inmates from receiving materials cut from a magazine, plaintiff received a notice indicating the mail

would not be delivered to him. Plaintiff appealed the non-delivery notice to defendant Berge, who denied the appeal on the basis of prison policy.

On October 16, 2001, plaintiff received in the mail photocopies of newspaper articles. Because inmates are not allowed to receive photocopies of newspaper articles, plaintiff received a notice that the mail would not be delivered to him. Plaintiff appealed the non-delivery notice to defendant Berge, to no avail.

On numerous occasions and as a result of prison policy, plaintiff has not received photocopies or clippings that were mailed to him. Since plaintiff's transfer to the Wisconsin Secure Program Facility, he has spent at least 14 months on levels one or two, during which time he was not allowed to request magazines or newspapers from the prison's limited library selection. Plaintiff has been incarcerated at several other Wisconsin prisons, including the Dodge Correctional Institution, the Waupun Correctional Institution and the Wisconsin Resource Center and at each of these prisons, he was allowed to receive photocopies in the mail.

Inmates may receive only publications sent to them directly from the publisher or from other recognized commercial sources. Publications include books, magazines, newspapers and professionally published pamphlets that have more than one sheet of paper bound with staples, stitching or glue. Inmates may not receive mail containing photocopies of publications, including books, magazines, newspapers, pamphlets or internet materials.

Similarly, all cutouts or pullouts from books, magazines and newspapers are considered contraband. The only exception is for photocopies of legal materials or clippings relating to an inmate's legal proceedings. Newspaper and magazine clippings are treated the same as the full work from which an article is clipped. That is, they must be sent to an inmate from a retail outlet or the publisher. If an inmate wishes to receive a particular article, he may order the publication edition or issue in which the article appears from the publisher or a retail outlet. Additionally, clipping services are available. Inmates may not receive internet materials downloaded and mailed to them by family or friends. Mail that is not delivered to an inmate because it contains impermissible clippings or photocopies is returned to the sender along with a notice explaining why the letter was not delivered. The inmate to whom the letter was sent also receives a notice that the letter was not delivered.

To allow photocopies of publications or clippings to be mailed to inmates from a source other than the publisher or another recognized commercial source would require staff to read all of the copied or clipped material sent into the prison to insure that hidden communications had not been included in the mailing. Such messages would raise security concerns at the prison. Searching for hidden messages would consume a significant amount of staff time and delay the delivery of mail to inmates. By prohibiting photocopies of publications, the Department of Corrections can also avoid copyright infringement issues. Generally, because bound printed materials and newspapers come directly from a business

source, they are not scrutinized by prison staff to the extent that personal mail is. Personal mail is thoroughly searched because of its uncertain origin. Allowing the inclusion of clippings would burden mailroom staff and slow the delivery of mail to inmates.

Two mailroom workers process the mail received at the Wisconsin Secure Program Facility. It takes approximately two hours to process large envelopes and magazines. Mailroom workers spend approximately three hours processing first class mail, which includes institution and inmate mail. They need approximately 30 to 45 minutes to distribute the mail to all the units at the prison. Prison staff deliver the mail to the inmates on their units. The remainder of the day is spent completing property disposition forms and responding to questions from institution complaint examiners regarding inmate property. Prison staff members on the third shift also read inmate-to-inmate mail to search for contraband. Any change in the policy prohibiting photocopies and clippings would drain personnel resources because more employee time would have to be devoted to searching inmate mail.

D. Refusal to Post Two Letters

On June 27, 2001, defendant Clark was searching outgoing inmate mail for contraband. In screening an outgoing letter from plaintiff, defendant Clark noted that plaintiff was attempting to order a pen pal magazine for himself and two other inmates.

Inmates are not allowed to correspond on behalf of other inmates or solicit information on their behalf. Therefore, defendant Clark returned the letter to plaintiff and advised him that he would receive a warning in his behavior log. Defendant Clark followed and applied established prison policies and procedures when screening and processing plaintiff's outgoing mail on June 27, 2001.

The prohibition on inmates' corresponding on behalf of other inmates or soliciting information on their behalf was implemented for several reasons. First, the inmate who corresponds or solicits goods or information on behalf of other inmates may expect something in return for his efforts, such as canteen items. Moreover, because an inmate who engages in this conduct must invest his own postage and envelopes in order to gain something for other inmates, a system of bartering can develop that vests power in inmates and can lead to strong arming, violence and disruptive conduct. Additionally, it would be difficult for security staff to monitor what certain inmates are writing to persons outside the prison if inmates could correspond on each other's behalf. For instance, an inmate who has a history of criminal solicitation, gang involvement or other dangerous behavior could use this method to circumvent the monitoring of his own outgoing mail. This could lead to the disruption of the orderly operation of the institution. An inmate who corresponds or solicits information on behalf of other inmates could also be said to be operating a service for inmates. With limited exceptions, any inmate who engages in a business or enterprise, for

profit or otherwise, is guilty of an institutional offense.

On August 21, 2001, defendant Jantzen was searching outgoing inmate mail for contraband. During this process, defendant Jantzen observed a short message written on the back of an envelope that plaintiff had submitted for mailing. Defendant Jantzen returned the letter and envelope to plaintiff because prison policy allows only a return address, a mailing address and a stamp to appear on an envelope. No notes, drawings, pictures or stickers are allowed on an envelope. Defendant Jantzen followed and applied established prison policies and procedures at all times when screening and processing plaintiff's outgoing mail on August 16, 2001.

On August 17, 2001, plaintiff filed offender complaint SMCI-2001-24327, alleging that his outgoing mail was returned to him because he wrote a message on the back of the envelope. On August 24, 2001, defendant Ellen Ray recommended that the complaint be dismissed on the basis of a prison internal management procedure requiring that only the return address, mailing address and a stamp appear on an outgoing envelope. On August 31, 2001, defendant Huibregtse accepted the recommendation and dismissed the complaint. Plaintiff appealed the dismissal to the corrections complaint examiner on November 14, 2001. Because plaintiff's appeal of offender complaint SMCI-2001-24327 did not conform to the requirement found in Wis. Admin. Code § 310.13(1) that appeals be filed within 10 days of the date the complaint was decided, defendant John Ray recommended on December

3, 2001 that the appeal be dismissed as untimely. Defendant O'Donnell accepted the recommendation and dismissed the complaint on December 4, 2001.

E. Telephone Access

Plaintiff is a Wotanist. Plaintiff is allowed to telephone a spiritual adviser if that person is on his visiting list, although there are significant restrictions on how often plaintiff may use the telephone and for how long. Plaintiff has never asked the Wisconsin Secure Program Facility's chaplain, Todd Overbo, to assist him in telephoning a spiritual adviser and plaintiff has not provided Overbo with the name of a spiritual adviser for his faith in order to assist him in making such an arrangement. Plaintiff has never asked to make a phone call to a religious leader.

It is the policy of the Wisconsin Secure Program Facility to encourage communication between an inmate and his family, friends, government officials, courts and people concerned with the welfare of the inmate. Communication fosters reintegration into the community and the maintenance of family ties. It helps to motivate the inmate and thus contributes to morale and to the security of inmates and staff. Inmates are permitted to phone individuals whose names appear their approved visiting lists. Plaintiff is allowed to have 12 adults on his visiting list. Minor children of the inmate or approved visitor and spouses of those close family members on the approved visitor list are not counted toward the 12 visitor total.

Plaintiff has not had any request to place a person on his visiting list denied since he has been incarcerated at the Wisconsin Secure Program Facility. Inmates are not permitted to call business, cellular or toll-free telephone numbers.

The frequency and length of an inmate's telephone calls depend on the inmate's level status. Inmates on level one are allowed one phone call each month lasting 10 minutes. Inmates on level two are allowed two 10-minute phone calls each month. Inmates on level three are allowed three 10-minute phone calls each month. Inmates on level four are allowed four 15-minute phone calls each month. Inmates on level five are allowed five 15-minute phone calls each month. The phone policy is intended as a behavior inducement tool. As an inmate progresses through the level system, which is contingent upon appropriate behavior, he obtains more use of the phone. This is intended to help him learn the benefits of appropriate behavior in a correctional setting. The knowledge that a reduction in his level status will limit his telephone access may cause him to pause before engaging in misbehavior.

F. Denial of Court Access

According to prison policy, correspondence to courts, lawyers, parties in litigation, the inmate complaint review system or the parole board may not be denied because of a lack of funds. Inmates without sufficient funds in their general account to pay for paper, photocopies or postage relating to legal work may receive a legal loan from the institution

where they reside. Legal loans up to $200 per year are available to inmates. Once an inmate hits the $200 legal loan cap, he can obtain more money through a legal loan extension only if the warden at his institution concludes that an "extraordinary" need exists, such as a court order requiring submission of specified documents. Inmates are not given loans to buy paper, photocopies and postage for non-legal matters. Plaintiff is currently on legal loan extension; therefore, the warden's office must approve all of his disbursement requests. If plaintiff does not provide the case number for an active case along with his disbursement request, his request is denied. For the year 2001, plaintiff accumulated $527.52 in legal loans, including $133.87 incurred at the Waupun Correctional Institution and $393.65 incurred at the Wisconsin Secure Program Facility. As of December 11, 2002, plaintiff had accumulated $875.23 in legal loans, which includes $11.93 incurred at the Wisconsin Resource Center and $863.30 incurred at the Wisconsin Secure Program Facility.

On or about March 30, 2001, plaintiff filed Dane County case no. 01-CV-868. The action was a petition for a writ of mandamus, prohibition and injunction, seeking an order to require prison officials to segregate him from other prison inmates at the Dodge Correctional Institution. On April 2, 2001, the Dane County court issued a writ in case no. 01-CV-868, ordering the respondents to show cause why the court should not order the relief that plaintiff requested. On or about May 15, 2001, plaintiff filed a motion in case no. 01-CV-868 seeking an order allowing him to amend his complaint and directing two of

the respondents to implement eight policies at the Supermax Correctional Institution for the benefit of all prisoners with respect to access to legal materials.

On May 24, 2001, plaintiff requested a legal loan for "50 sheets type [sic] paper, 5 envelopes – needed to write courts and lawyers, do motions and briefs." Plaintiff included case no. 01-CV-868 on his request, along with a case number for a different case. Even though plaintiff listed case numbers on his request, the warden or his designee denied the request, asserting that there was "no case number on disbursement." On or about May 25, 2001, counsel for the respondents in case no. 01-CV-868 filed a motion to quash the writ of mandamus, prohibition and injunction. On June 5, 2001, the circuit court denied plaintiff's May 15 motion. The circuit court judge noted that "a person who appears to be a fellow-inmate of petitioner has written the court (without copying the assistant attorney general handling the case) informing it that Mr. Lindell has no funds available to prosecute this action and that the warden will not give him another legal loan to do so." Because the court wished to avoid "micro-managing the decisions of the prison administration" and to "address only those issues *properly* raised as part of this lawsuit," it ordered that the case be held in abeyance for six months to allow plaintiff time to amass the funds he needed to pay for copying and postage. In response to the circuit court's June 5, 2001 order, plaintiff informed the court by letter dated June 21, 2001, that he wished to voluntarily dismiss his case in order to bring it in federal court and to amend his claims. In his motion to

voluntarily dismiss case no. 01-CV-868, plaintiff stated:

> Due to the related claims I wish to raise (in order to simplify the case) in one action by amending my suit (which you stated you would not allow), and due to my desire to obtain justice as soon as possible, I wish to dismiss the above cited action so that I may refile the case in the federal courts along with the related claims showing retaliatory actions . . . . I do not expect a just determination from a court which will not even issue an order requiring my captors to supply me with the necessary writing supplies and law library access so that I might be able to properly litigate my case.

Although on July 5, 2001, the respondents filed a motion to dismiss the case with prejudice, the circuit court granted plaintiff's motion to voluntarily dismiss his case and dismissed case no. 01-CV-868 without prejudice on July 7, 2001.

G. Retaliation

At the Wisconsin Secure Program Facility, an inmate's behavior can result in a change in his level status at any time. Inappropriate conduct can result in a demotion to a lower level status. On November 13, 2001, defendant Sharpe issued a memorandum to plaintiff, informing him that he would be demoted to level one. Defendant Sharpe indicated that the decision was based on the fact that plaintiff had received eight warnings for rule violations from the Foxtrot Unit team since October 15, 2001. The behavior log that prison staff keep lists the various warnings and their dates. The warnings included lying about staff, disruptive behavior and "fishing." The decision to demote plaintiff to level one was not made by defendant Sharpe alone. Rather, it was made by the Foxtrot Unit team, of which Sharpe was

a participating member.

On October 15, 2001, a correctional officer gave plaintiff a warning for allegedly misusing the law library. On November 1, 2001, a prison sergeant gave plaintiff a warning because he used his intercom to complain about not having shoes and another warning for lying about staff, although the alleged lie was not described in the warning. On November 5, 2001, the same sergeant gave plaintiff a warning for allegedly pressing his intercom to report that his face was "dirty," although plaintiff maintains that he said his face was "hurting." On November 5, 2001, a correctional officer gave plaintiff a warning for allegedly yelling about being denied use of the law library. On November 11, 2001, a correctional officer gave plaintiff a warning for allegedly having too many state forms, too much carbon paper and too many letters in his cell. On November 12, 2001, a prison sergeant gave plaintiff two warnings, one for allegedly "fishing" and another for allegedly lying about staff denying plaintiff access to the law library. On November 12, 2001, the prison's law librarian sent plaintiff a memo stating in part:

> I have checked with the unit staff regarding your allegations of denial of access to the law computer. According to the logbook you were in the electronic law library twice during the week of Nov. 5th to Nov. 9th. I have notified your staff that you have been sending numerous complaints stating allegations of denial to the law computer. Because the accusations have proven to be untrue I have instructed the staff to make a notation in your behavior log about the many complaints initiated regarding this issue.

OPINION

A. Denial of Paper

At issue are three instances in which prison officials have denied plaintiff writing paper mailed to him by persons outside the prison, even though plaintiff is indigent and has no funds with which to purchase paper at the canteen. It is unlikely that he will have funds for this purpose in light of his debts to the prison. Chances are that any money he would earn or receive as a gift would have to be used for debt repayment.

As an initial matter, defendants argue that plaintiff failed to exhaust his administrative remedies with respect to one instance when he was not delivered paper sent by his father. (In their summary judgment brief, defendants identify the allegedly unexhausted claim as relating to the April 23, 2001 refusal to give plaintiff paper mailed to him by a law firm, but the documents they cite in support of their exhaustion argument do not relate to this incident). The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), states that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." The term "prison conditions" is defined in 18 U.S.C. § 3626(g)(2), which provides that "the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by

government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." The Court of Appeals for the Seventh Circuit has held that "a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits." Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999); see also Massey v. Helman, 196 F.3d 727 (7th Cir. 1999). Moreover, the court of appeals has held that "if a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim. The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures." Massey, 196 F.3d at 733.

Wis. Admin. Code § DOC 310.04 requires that before commencing a civil action, an inmate "shall file a complaint under s. DOC 310.09 or 310.10, receive a decision on the complaint under s. DOC 310.12, have an adverse decision reviewed under s. DOC 310.13, and be advised of the secretary's decision under s. DOC 310.14 ." The regulations require an inmate wishing to file a complaint to do so within 14 calendar days of the occurrence giving rise to the complaint, but allow the inmate complaint investigator to accept a late complaint for good cause. Wis. Admin. Code § DOC 310.09(3). According to § DOC 310.11(11), the inmate's complaint is to be examined by the inmate complaint investigator,

who investigates the complaint and recommends a decision to the appropriate reviewing authority . Within five working days after receipt of the inmate complaint investigator's report, the appropriate reviewing authority (defined in § DOC 310.03(3) as "the warden, bureau director, administrator or designee who is authorized to review and decide an inmate complaint") is to issue a written decision. Wis. Admin. Code § DOC 310.12(1). An inmate has ten calendar days after the date of the decision to file a written request for review with the corrections complaint examiner and the corrections complaint examiner has discretion to accept a late appeal under certain circumstances "if the elapsed time has not made it difficult or impossible to investigate the complaint." Wis. Admin. Code § DOC 310.13(1), (3). The corrections complaint examiner makes a written recommendation that is forwarded to the secretary, who determines within ten days of receiving the recommendation whether to accept the recommendation, adopt the recommendation with modifications, reject the recommendation or return the recommendation to the corrections complaint examiner for further investigation. Wis. Admin. Code § DOC 310.13(7), 310. 14.

Plaintiff filed inmate complaint number SMCI-2001-13215, in which he objected to defendants' refusal to give him 71 sheets of paper mailed to him by his father in May 2001. However, the undisputed facts show that after the complaint was dismissed on May 25, 2001, plaintiff failed to appeal the dismissal to the corrections complaint examiner until November 28, 2001, well after the 10-day time limit for filing appeals had expired. See Wis.

Admin Code § 310.13(1). "To exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require." Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). When plaintiff failed to appeal the dismissal of his inmate complaint in a timely fashion, he failed to exhaust his administrative remedies on this claim. Id. (exhaustion not accomplished because plaintiff failed to file timely appeal). Accordingly, defendants will be granted summary judgment on plaintiff's claim that his First Amendment rights were violated when he was not given writing paper mailed to him by his father in May 2001.

Nevertheless, it is undisputed that plaintiff properly exhausted his administrative remedies with respect to two other occasions on which he was denied writing paper mailed to him at the prison. Therefore, I must address the merits of plaintiff's First Amendment claim. It is well-established that prisoners have a First Amendment right to communicate with persons outside the prison, even for non-legal purposes. Thornburgh v. Abbott, 490 U.S. 401 (1989); Turner v. Safley, 482 U.S. 78 (1987); Procunier v. Martinez, 416 U.S. 396 (1974); Pell v. Procunier, 417 U.S. 817 (1974); Rowe v. Shake, 196 F.3d 778, 782 (7th Cir. 1999). Defendants' refusal to allow plaintiff to keep writing paper mailed to him at the prison has limited his ability to communicate with persons outside the prison. In Turner, the Court held that a prison regulation that impinges on a prisoner's constitutional rights must be reasonably related to legitimate penological interests. Turner, 482 U.S. at 89;

Thornburgh, 490 U.S. at 413-14. The Court set forth four factors for courts to consider in evaluating whether this test is satisfied: (1) whether a valid, rational connection exists between the regulation and a legitimate governmental interest; (2) whether the prisoner has available alternative means of exercising the right in question; (3) whether accommodation of the asserted right will have negative effects on guards, inmates or prison resources; and (4) whether there are obvious, easy alternatives at a minimal cost. "The Court adopted a reasonableness standard, as opposed to heightened scrutiny, to permit prison administrators 'to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration' and thereby prevent unnecessary federal court involvement in the administration of prisons." Al-Alamin v. Gramley, 926 F.2d 680, 685 (7th Cir. 1991); see also Young v. Lane, 922 F.2d 370, 375 (7th Cir. 1991) ("The standard set out in Turner is not demanding . . . and is driven by a wide-ranging deference to prison officials, especially state prison officials."). Of course, courts are not to defer completely and uncritically to prison administrators. Caldwell v. Miller, 790 F.2d 589, 596 (7th Cir. 1986).

Defendants contend that there is a rational relationship between legitimate penological interests and their refusal to allow plaintiff to receive writing paper in the mail and the underlying policy of permitting paper to be purchased only at the prison canteen. They argue that the policy is necessary to diminish the risk of introducing contraband, such as illegal drugs, into the prison. Defendants rely on the affidavit of Gary Boughton, the

security director at the Wisconsin Secure Program Facility. According to Boughton, the ability to send narcotics covertly through the mail has increased with the potency of today's drugs and the ability of prison staff to detect drugs concealed in inmate mail has diminished correspondingly. He notes that even a minuscule amount of a potent narcotic has the ability to affect the orderly functioning of a prison. According to Boughton, because many consumer items, including writing paper, are available to inmates only through the prison canteen, the risk of contraband being introduced into the prison in packages mailed to inmates is greatly diminished.

Keeping drugs out of prisons is a legitimate penological interest. See, e.g., Thompson v. Souza, 111 F.3d 694, 701 (9th Cir. 1997). Courts have found that limiting inmates' receipt of mailed packages is rationally related to the goal of insuring that prisons remain free of contraband. See Weiler v. Purkett, 137 F.3d 1047, 1050-51 (8th Cir. 1998) (en banc) ("We find it beyond dispute that packages may easily conceal contraband, and that the control of contraband is a legitimate penological interest."). Similarly, I concluded in Walker v. Litscher, case no. 02-C-430-C, opinion and order dated March 14, 2003, at 10, that a prison policy forbidding inmates to receive stamps and embossed envelopes in the mail was a reasonable means of preventing inmates from obtaining drugs through the mail. Although defendants have not presented any evidence that there have been problems in the past with importing drugs through packages containing paper, such evidence is not required.

See Caldwell, 790 F.2d at 599 (defendants may show rational connection through affidavit of prison official who makes discretionary decisions regarding security matters). In short, I am convinced that defendants' policy of requiring inmates to buy paper from the prison canteen is neither irrational nor arbitrary. There is a rational link between the policy and defendants' desire to limit the opportunities for the introduction of contraband into the prison's controlled environment.

The second Turner factor is whether the prisoner has available alternative means of exercising the right in question. Plaintiff cannot buy writing paper from the prison canteen because he is indigent and prison officials set aside for debt repayment any money sent to him by family or friends. However, it is undisputed that plaintiff receives one stamped envelope and two sheets of paper each week free of charge from prison officials and that he has always received at least one sheet of paper and stamped envelope each week since arriving at the prison. This is on top of the legal supplies, including paper, that plaintiff receives through the prison's legal loan program. Under this policy, plaintiff receives an adequate amount of paper to allow him to send mail to persons outside the prison. Cf. Hershberger v. Scaletta, 33 F.3d 955, 956-57 (8th Cir. 1994) ("[I]ndigent inmates have no constitutional right to free postage for nonlegal mail."). "Where 'other avenues' remain available for the exercise of the asserted right, courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the

regulation.'" Turner, 482 U.S. at 90. (internal citations omitted). The First Amendment is not violated by the fact that prison policies and plaintiff's indigency combine to prevent him from writing as many people outside of the prison as he might like to.

The third and fourth Turner factors weigh in defendants' favor as well. It is undisputed that the policy requiring inmates to buy those items available at the canteen only from the canteen reduces the need for prison staff to inspect a host of items mailed into the prison from inmates' friends and family for contraband or to locate and approve outside vendors for various articles, thus preserving scarce prison resources. Finally, plaintiff has pointed to no "obvious, easy alternatives to the policy" adopted by defendants.

Focusing on the package of writing paper he received from a law firm, plaintiff argues that mail from lawyers or their firms is highly unlikely to contain contraband and therefore he should have been allowed to keep the paper mailed to him in April from a Seattle law firm and a local attorney. Providing such an exception would indeed be an approach less restrictive of plaintiff's First Amendment rights. But prison officials need not meet a least restrictive alternative test to satisfy the standard set forth in Turner, 482 U.S. at 90-91 ("[P]rison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint."). Moreover, because special restrictions apply to prison officials' handling of inmate legal mail, see, e.g., Wolff v. McDonnell, 418 U.S. 539, 577 (1974), an exception allowing law firms and lawyers to mail

in packages containing various and sundry consumer items such as paper might place a significant burden on staff and other prison resources. Because I am satisfied that defendants' policy requiring inmates to purchase paper from the prison canteen is rationally related to legitimate penological interests and that even indigent inmates have access to a supply of writing paper that is adequate for purposes of the First Amendment, I will grant defendants' motion for summary judgment on this claim.

B. Press Clippings and Photocopies

Inmates at the Wisconsin Secure Program Facility may receive only publications sent to them directly from the publisher or from another recognized commercial source. On numerous occasions, plaintiff has not received photocopies or clippings that were mailed to him by friends or relatives as a result of this prison policy. Plaintiff does not challenge the prison's publisher-only rule as a general proposition. Rather, his challenge relates to the application of the rule to magazine and newspaper clippings and photocopies that he has received in the mail.

"Regulations affecting the sending of a 'publication' . . . to a prisoner . . . are 'valid if [they are] reasonably related to legitimate penological interests.'" Thornburgh v. Abbott, 490 U.S. 401, 413 (1989) (citations omitted). I concluded in a previous case that a Wisconsin prison's policy forbidding inmates to receive clippings from publications was

reasonably related to the prison's interest in maintaining security and order and therefore did not violate the inmate plaintiff's First Amendment rights, a conclusion that was affirmed by the Court of Appeals for the Seventh Circuit in an unpublished order. See Larkin v. Murphy, 1 F.3d 1244, No. 92-2527, 1993 WL 269365, at *6 (7th Cir. July 19, 1993). However, that case is distinguishable on at least two grounds. First, in Larkin, the prison policy at issue allowed inmates to possess photocopies of newspaper articles. The policy challenged here bans photocopies as well as clippings. Second, the defendant prison officials justified the clipping regulation on the grounds that it minimized vandalism of periodicals in the prison library and enhanced the efficiency of cell searches by reducing the number of odd-sized papers through which guards were forced to sift. Id. at *5. By contrast, in this case, defendants justify their clipping and copy policy on the ground that clippings could be altered to contain hidden messages and therefore staff would be required to read all of the clipped and copied material sent into the prison to insure that they contained no hidden communications. (Defendants also say that the policy serves to "diminish[] any copyright concerns," but this rationale is so underdeveloped in defendants' briefs that it does not warrant further discussion.)

At least two courts have cast a skeptical eye on the compatibility of similar prison regulations with the First Amendment. In Allen v. Coughlin, 64 F.3d 77 (2d Cir. 1995), the Court of Appeals for the Second Circuit considered the confiscation by prison officials of

newspaper clippings from an inmate's mail. Like defendants in this case, the defendants in Allen considered the clippings contraband on the basis of a rule permitting the receipt of newspapers only from a publisher or approved distributor. Id. at 79. The court first noted that as applied to newspaper clippings, the publisher-only rule was "tantamount to a complete prohibition" because "[n]ewspaper publishers generally do not run clipping services" and there was no indication in the record that professional clipping services were "a practical alternative" for prison inmates. Id. at 80. In Allen, the defendants maintained that the clipping policy was intended to "prevent the dissemination of inflammatory material that might threaten the order and security of the prison." The court did not credit this justification, finding that newspapers "received directly from publishers and ordinary correspondence may also contain inflammatory material." Id. Accordingly, the court concluded that "the validity of the publishers-only rule for news clippings is not established as a matter of law" and remanded the case to the district court. Id. at 81.

Allen is also distinguishable. The court of appeals never considered the argument that clipped or photocopied material might contain hidden communications, which is the penological interest advanced by defendants in this case. Although the court noted that clippings "are far easier to examine for content than entire newspapers," its reference to content concerned articles containing inflammatory subject matter, not hidden messages. Although newspapers may contain inflammatory content whether they are mailed to an

inmate from a publisher or a friend on the outside, prison officials are understandably less concerned about hidden messages when material originates with a commercial publisher, rather than an inmate's acquaintances.

At issue in Clement v. California Department of Corrections, 220 F. Supp. 2d 1098, 1103 (N.D. Cal. 2002), was a prison policy deeming materials printed from the internet contraband that could not be enclosed in letters mailed to prisoners. The defendant prison officials justified the regulation on two grounds. First, allowing mail that contained internet materials would substantially increase the overall volume of mail received at the facility. Second, "Internet-produced material has unique characteristics that make it susceptible to misuse. Specifically, Internet-produced material is more difficult to trace and facilitates transmission of hidden impermissible coded messages." Id. at 1110. The court rejected these arguments. With respect to controlling the volume of mail entering the prison, the court concluded that "prohibiting all mail produced by a certain medium — downloaded from the Internet — is an . . . arbitrary way to achieve a reduction in mail volume" and noted that prison officials could more directly address their volume concerns by "limit[ing] the number of pages an inmate may receive in each piece of correspondence." Id. The court observed that "because the prison may directly regulate the quantity of pages or the number of pieces of mail received by each prisoner, defendants' policy of identifying an arbitrary substitute for volume and regulating that substitute lacks any rational basis." Id. The court

also rejected the defendants' argument that internet materials are particularly well-suited for transmitting hidden messages, noting that defendants had failed to articulate any reason to believe that internet materials were more likely to contain hidden messages than handwritten or typed materials. Id. at 1111.

I conclude that plaintiff is entitled to summary judgment on this claim. Prison officials undoubtedly have a legitimate interest in limiting the ability of inmates to receive hidden messages that might relate to escape attempts or other criminal activities. And like the court in Clement, I assume "that controlling mail quantity serves a valid penological purpose." Id. at 1113. Nevertheless, defendants have not conclusively demonstrated a reasonable relationship between these objectives and their policy prohibiting prisoners from receiving all clippings and photocopies. Like the defendants in Clement, defendants have not explained why newspaper clippings are any more likely to contain hidden messages than the handwritten, typed or word processed correspondence routinely sent to inmates. Therefore, the policy regarding clippings and photocopies appears to be an arbitrary and irrational method for screening out hidden messages.

Defendants' real concern appears to be with controlling the volume of mail that prison staff are required to carefully scrutinize. Defendants argue that they have "the discretion to determine where to better focus their limited resources, i.e., screening personal letters and correspondence or screening clippings and/or photocopies." Dfts.' Reply Br. in

Supp. of Mot. for Summ. J., dkt. #93, at 6. In other words, defendants have chosen to deny inmates at the Wisconsin Secure Program Facility access to an enormous class of published materials as a way of controlling the prison's mail volume. This ignores the fact that there are far more direct methods for limiting the volume of inmate mail that must be closely examined that would not take such a heavy toll on inmates' First Amendment rights. For instance, prison officials could "limit the number of pages an inmate may receive in each piece of correspondence." Clement, 220 F. Supp. 2d at 1110; see also N.Y. Comp. Codes R. & Regs. tit. 7, § 720.4 (2002) (noting that a "limit of five pages of printed or photocopied materials . . . may be received within a piece of regular correspondence" and that "an individual newspaper clipping will be considered one page"). Therefore, I am unable to conclude that defendants' chosen method for controlling the volume of inmate mail is not arbitrary.

Similarly, I am not convinced that the other Turner factors weigh in defendants' favor. In particular, it is not clear whether prisoners such as plaintiff have meaningful alternative means of receiving published information. It is undisputed that since plaintiff's transfer to the Wisconsin Secure Program Facility, he has spent at least 14 months on levels one or two, during which time he was not allowed to request magazines or newspapers from the prison's limited library selection. Defendants maintain that inmates may receive published materials directly from a publisher or a clipping service. They also suggest that

plaintiff's friends or family could order particular publications for plaintiff or "recite [the] clippings in their written correspondence." But because plaintiff is indigent, it is unlikely that he can order publications for himself. In addition, like the court in Allen, 64 F.3d at 80, I am unpersuaded by the argument that plaintiff or other inmates can use clipping services in the absence of any evidence that such services are a practical alternative for prisoners. The suggestion that plaintiff's family transcribe newspaper articles for plaintiff ignores defendants' stated goal of limiting the volume of mail that prison staff must examine for hidden messages. Further, in the past plaintiff has been denied pictures cut from magazines. Obviously, pictures cannot be transcribed. Finally, limiting the number of pages an inmate may receive in each piece of correspondence may represent an obvious, easy alternative that would not unduly burden prison staff charged with inspecting incoming mail.

For the foregoing reasons, I will grant plaintiff's summary judgment motion as to his First Amendment claim regarding application of the publisher's only rule to magazine and newspaper clippings and photocopies received in the mail. I will enjoin defendants from enforcing the publisher's only rule to the extent it prohibits inmates from receiving all newspaper and magazine clippings and photocopies in the mail. However, I note that defendants are free to craft regulations limiting the quantity of such materials that inmates may receive in incoming correspondence. Moreover, because I conclude that defendants are entitled to qualified immunity on this claim, they are not liable for monetary damages.

Qualified immunity operates "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." Saucier v. Katz, 533 U.S. 194, 206 (2001). It "is a judicially created doctrine that stems from the conclusion that few individuals will enter public service if such service entails the risk of personal liability for one's official decisions." Donovan v. City of Milwaukee, 17 F.3d 944, 947 (7th Cir. 1994). The doctrine "'gives public officials the benefit of legal doubts,'" id. at 951 (citation omitted), and protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). The doctrine of qualified immunity involves a two-step inquiry. The "first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question [is] whether the right was clearly established." Saucier, 533 U.S. at 200. The inquiry into whether a right is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." Id. at 201.

The rights alleged to have been violated must be sufficiently particularized to put potential defendants on notice that their conduct is unlawful. Anderson v. Creighton, 483 U.S. 635, 640 (1987). "For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the

light of pre-existing law the unlawfulness must be apparent.'" Hope v. Pelzer, 122 S. Ct. 2508, 2515 (2002) (citations omitted). The relevant question is whether the state of the law at the time of the challenged acts gave the defendants fair warning that the plaintiff's alleged treatment was unconstitutional. See id. at 2516. Although qualified immunity is an affirmative defense, the plaintiff bears the burden of establishing the existence of a clearly established right at the time of the alleged violations. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

Under the first step of a qualified immunity analysis, a court must consider whether the alleged facts show that the defendant's conduct violated a constitutional right when those facts are read in the light most favorable to the plaintiff. As discussed earlier, I have determined that defendants' policy regarding newspaper and magazine clippings and photocopies is not reasonably related to legitimate penological interests and therefore violates the First Amendment.

The second step of the analysis requires the plaintiff to show that his right to receive newspaper clippings and photocopies in the mail was clearly established. Neither the United States Supreme Court nor the Seventh Circuit has ruled that a prison policy prohibiting inmates from receiving newspaper clippings or photocopies in the mail violates the First Amendment. That would not foreclose the possibility of finding a right clearly established if there is "such a clear trend in the case law that we can say with fair assurance

that the recognition of the right by controlling precedent was merely a matter of time." Denius v. Dunlap, 209 F.3rd 944, 951 (7th Cir. 2000) (quoting Cleveland-Perdue v. Brutsche, 881 F.2nd 430, 431 (7th Cir. 1989)). However, there is no clear trend on the issue of the application of a publisher's only rule to newspaper clippings and photocopies. Indeed, because this court has previously upheld a similar, if less restrictive, policy (albeit on the basis of different penological interests), defendants can hardly be said to have been on notice that their current policy violates the First Amendment. Accordingly, I find that defendants are qualifiedly immune to plaintiff's request for money damages on this claim.

C. Refusal to Post Two Letters

Plaintiff maintains that his First Amendment rights were violated when prison officials refused to mail two letters he wrote. One letter was not mailed because it contained a short message written on the outside of the envelope, in violation of a prison policy allowing only a return address, a mailing address and a stamp to appear on an envelope. The other letter was not mailed because in it, plaintiff requested pen pals for two other inmates, even though prison policy forbids inmates to correspond or solicit information or services on behalf of other inmates.

Plaintiff's claim regarding the letter with the short message on the envelope is easily dispatched. It is undisputed that after defendant Huibregtse dismissed plaintiff's inmate

complaint on this issue on August 31, 2001, plaintiff did not appeal the dismissal to the corrections complaint examiner until November 14, 2001, well after the 10-day time limit for filing appeals had expired. See Wis. Admin Code § 310.13(1). When plaintiff failed to appeal the dismissal of his inmate complaint in a timely fashion, he failed to exhaust his administrative remedies on this claim, entitling defendants to summary judgment. See Pozo, 286 F.3d at 1025.

Plaintiff properly exhausted his claim that his First Amendment rights were violated when defendants refused to mail the letter in which he requested pen pals for other inmates. Regulations affecting outgoing inmate correspondence to non-prisoners must further "one or more of the substantial governmental interests of security, order, and rehabilitation" and be "no greater than is necessary or essential to the protection of the particular governmental interest involved." Procunier, 416 U.S. at 413; Thornburgh, 490 U.S. at 413 ("The implications of outgoing correspondence for prison security are of a categorically lesser magnitude that the implications of incoming materials.").

Defendants maintain that their policy prohibiting inmates from corresponding or soliciting information or services on behalf of other inmates promotes the state's substantial interest in security and order for several reasons. Foremost among these is the fact that if inmates were routinely allowed to correspond on one another's behalf, prison officials would have no practical way of monitoring the communications of inmates with a history of

participating in or soliciting criminal acts from within the confines of the prison. For instance, an inmate who was active in a gang before his incarceration could circumvent monitoring of his contacts with gang members on the outside by the simple expedient of having another inmate correspond on his behalf. Prison officials are understandably concerned about outgoing correspondence "concerning proposed criminal activity, whether within or without the prison," Procunier, 416 U.S. at 413, and must have some method for effectively detecting and monitoring such missives. In addition, by prohibiting inmates from using their postage and writing supplies to solicit information or services on behalf of other inmates, prison officials seek to prevent the creation of a system of bartering within the prison that could lead to strong-arming, violence and disruptive conduct. Moreover, it takes little imagination to envision the disruptive mischief that could arise if, for instance, a white inmate were to request that white supremacist literature be mailed to a black inmate.

I am convinced that defendants have adequately justified the regulation forbidding inmates to correspond or solicit services on behalf of other inmates. Defendants' desire to effectively monitor particular inmates' communications and to avoid the problems that can arise when inmates, in good faith or in bad, order services on another inmate's behalf are clearly related to substantial government interests in maintaining prison security and order. Nor does defendants' policy appear to be broader than is "generally necessary" to head off these security concerns. Id. at 414 (it is "essential" that prison administrators enjoy "[s]ome

latitude in anticipating the probable consequences of allowing certain speech in a prison environment"). I note that other courts have upheld similar regulations. See, e.g., Malsh v. Garcia, 971 F. Supp 133, 137-38 (S.D.N.Y. 1997) (regulation prohibiting sending out correspondence using another inmate's name and identification does not violate First Amendment). I will grant defendants' summary judgment motion as to this claim.

D. Religious Land Use and Institutionalized Persons Act Claims

The Religious Land Use and Institutionalized Persons Act prohibits governmental imposition of a "substantial burden on the religious exercise" of a prisoner, unless the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1. The rule

> applies in any case in which -
> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
> (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

The act is to be construed broadly to favor the protection of inmates' religious exercise. 42 U.S.C. § 2000cc-3(g). Although there is little case law interpreting the act's key terms, its predecessor, the Religious Freedom Restoration Act, had an analogous requirement that plaintiffs demonstrate a "substantial burden" on their exercise of religion before defendants were called upon to show a compelling interest furthered by the least restrictive means

available. In Mack v. O'Leary, 80 F.3d 1175 (7th Cir. 1996), judgment vacated and remanded by O'Leary v. Mack, 522 U.S. 801 (1997), the Court of Appeals for the Seventh Circuit elaborated on what the Religious Freedom Restoration Act meant by "substantially burdening" a person's exercise of religion. Although the court of appeal's decision in that case was vacated after the Supreme Court invalidated the RFRA as it applied to the states in City of Boerne v. Flores, 521 U.S. 507 (1997), the court of appeals' reasoning in Mack is instructive nonetheless. The court of appeals held that

> a substantial burden on the free exercise of religion . . . is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs.

Mack, 80 F.3d at 1179; but see Henderson v. Kennedy, 253 F.3d 12, 17 (D.C. Cir. 2001) (rejecting this definition of "substantial burden" as "read[ing] out of RFRA the condition that only *substantial* burdens on the exercise of religion trigger the compelling interest requirement") (emphasis added).

Plaintiff maintains that defendants violated his rights under the act by (1) refusing to allow him to keep paper mailed to him by family and acquaintances and (2) limiting his access to a telephone. Plaintiff maintains that he needs paper because his religion requires him to write and draw religious poetry and "spellcraft" and more access to the telephone in order to commune and sustain ties of kinship with his co-religionists.

Plaintiff is a Wotanist. Initially, the parties debate whether Wotanism is a genuine religion or a secular system of beliefs not entitled to protection under the act. Defendants note that the expert report plaintiff submitted in support of his claims under the act never mentions Wotanism, but instead deals with Odinism and Asatru. According to defendants and their expert, although Wotanism employs religious symbolism and rites, it is a primarily secular movement that is aimed at advancing policies of racial segregation and white supremacy. Defendants maintain that although "Wotan" is ostensibly the Germanic equivalent of the Old Norse god Odin or the Old English god Woden, the term is actually nothing more than an abbreviation of the secular movement's slogan, "Will of the Aryan Nation." In response to these arguments, plaintiff maintains that Wotanism is closely aligned with Odinism and Asatru and that in any case the fact that Wotanism includes racial components as part of its belief system is no reason to deem it non-religious. Fortunately, I need not resolve this dispute. Even assuming that Wotanism is a religion and that plaintiff is a sincere practitioner of that faith, he has failed to demonstrate that his religious practice is substantially burdened by defendants' refusal to give him paper mailed to him at the prison or more frequent access to a telephone.

Even though what constitutes a "substantial burden" on a prisoner's religious exercise is to be defined generously so as to be "sensitive to religious feeling," courts interpreting that term are nonetheless required "to separate center from periphery in religious observances"

because "prison officials do not have to do handsprings to accommodate the religious needs of inmates." Mack, 80 F.3d at 1179-80. Although plaintiff need not submit expert evidence on this topic, he nonetheless relies on the report of his expert to demonstrate that his religious practice is substantially burdened by the prison's mail and telephone policies. Even assuming that the substance of plaintiff's expert's report, which refers only to Asatru and Odinism, is applicable to plaintiff's Wotanist beliefs, the report is of little assistance in determining whether plaintiff's religious exercise is substantially burdened by defendants' refusal to let him keep writing paper mailed to him at the prison. Plaintiff's expert asserts that "the question presented to me was, is there a need for writing paper, phone calls and the like in our religion. The answer is unquestionably — 'Yes,'" and that "it is my expert opinion that the denial of . . . paper for letters and skaldic poetry . . . would substantially burden and/or otherwise deny the beliefs and practice of the Asatru/Odinist religion." Statement of Expert Witness Paul F. Rather, dkt. #45, at 3. In short, plaintiff's expert report speaks to the need for writing paper. It is undisputed that plaintiff currently receives two sheets of writing paper each week free of charge from prison officials and that he has always received at least one sheet of paper each week since arriving at the prison. The report sheds no light on whether plaintiff's expert was aware that plaintiff is given free paper each week and what impact such knowledge would have on his opinion. Moreover, plaintiff never suggests what quantity of paper would satisfy his religious needs.

The same deficiencies are applicable to plaintiff's claim under the act regarding access to the telephone. Plaintiff's expert avers that "there is a need . . . for phone calls . . . in our religion" and that the denial of "phone calls to family and troth" would burden practitioners of Odinism and Asatru. It is undisputed that inmates on level one are allowed one phone call each month lasting 10 minutes and inmates on level two are allowed two 10-minute phone calls each month. It is also undisputed that plaintiff is allowed to have 12 adults, including a spiritual adviser, on his call list and that prison officials have not denied him any request to place a person on his list since he has been incarcerated at the Wisconsin Secure Program Facility. Further, it is undisputed that plaintiff has never asked to make a phone call to a religious leader. Plaintiff's expert does not indicate in his report that he was aware of these facts or took them into consideration when determining whether plaintiff's religious exercise is substantially burdened by the prison's telephone policy. Indeed, plaintiff's expert never avers that *plaintiff* is substantially burdened in the exercise of his religion. He merely states generically that "there is a need for writing paper, phone calls, and the like, in our religion" and that "the denial of" such things would "substantially burden and/or otherwise deny the beliefs and practice of the Asatru/Odinist religion."

In addition, the prison's mail and phone policies do not force plaintiff to refrain from religiously motivated conduct. He is free to use his two pieces of paper each week to write religious poetry or letters to his co-religionists and to use his monthly phone calls to speak

with his family and "troth." Of course, this is not to say that plaintiff is not faced with difficult choices. Using both pieces of state-provided paper to write poetry or spells may mean that plaintiff will have to wait a week before writing a letter. But the fact that plaintiff must make such choices does not mean that his religious practice is substantially burdened unless the word "substantial" is to be drained of all meaning. Plaintiff argues that Walker v. Thompson, 288 F.3d 1005, 1008-09 (7th Cir. 2002), shields prisoners from being forced to make these kinds of choices, but that is not what the case held. Rather, the court of appeals considered a claim that prison officials *retaliated* against a prisoner for using the law library by refusing to let him exercise outside his cell. The court held that it was improper to interpret such a claim "merely" as a complaint that the prisoner was forced to choose between two alternative uses for the same block of time. Walker does not suggest that prisoners cannot be forced to make decisions about how they will use their limited resources.

Because plaintiff has failed to demonstrate that his religious exercise is substantially burdened by defendants' refusal to allow him to receive writing paper in the mail or to use the telephone more frequently, he cannot succeed on his claims under the Religious Land Use and Institutionalized Persons Act. I will grant defendants' motion for summary judgment on these claims.

E. Denial of Court Access

It is well established that prisoners have a constitutional right of access to the courts for pursuing post-conviction remedies and for challenging the conditions of their confinement. Campbell v. Miller, 787 F.2d 217, 225 (7th Cir. 1986) (citing Bounds v. Smith, 430 U.S. 817 (1977)); Wolff, 418 U.S. at 578-80 (1974); Procunier, 416 U.S. at 419. The right of access is grounded in the due process and equal protection clauses of the Fourteenth Amendment. Murray v. Giarratano, 492 U.S. 1, 6 (1989). To insure meaningful access, states have the affirmative obligation to provide inmates with "adequate law libraries or adequate assistance from persons trained in the law." Bounds, 430 U.S. at 828.

To have standing to bring a claim of denial of access to the courts, a plaintiff must allege facts from which an inference can be drawn of "actual injury." Lewis v. Casey, 518 U.S. 343, 349 (1996). The plaintiff must have suffered injury "over and above the denial." Walters v. Edgar, 163 F. 3d 430, 433-34 (7th Cir. 1998) (citing Lewis , 518 U.S. 343). At a minimum, the plaintiff must allege facts showing that the "blockage prevented him from litigating a nonfrivolous case." Id. at 434; Sanders v. Sheahan, 198 F.3d 626, 630 (7th Cir. 1999) (prisoner must "allege injury or prejudice" to state a claim of denial of access to the courts). Plaintiff cannot make this showing because the undisputed facts show that rather than being blocked from litigating case no. 01-CV-868 in the Circuit Court for Dane County, plaintiff voluntarily dismissed his case after his motion to amend his complaint was

denied, in order to file an expanded case in federal court. Specifically, plaintiff stated in his motion seeking a voluntarily dismissal:

> Due to the related claims I wish to raise (in order to simplify the case) in one action by amending my suit (which you stated you would not allow), and due to my desire to obtain justice as soon as possible, I wish to dismiss the above cited action so that I may refile the case in the federal courts along with the related claims showing retaliatory actions . . . . I do not expect a just determination from a court which will not even issue an order requiring my captors to supply me with the necessary writing supplies and law library access so that I might be able to properly litigate my case.

Plaintiff's contention that he was forced to seek a voluntary dismissal because defendants refused to provide him with legal supplies is disingenuous. First, his motion indicates that he was seeking a dismissal because he was displeased with the state court's refusal to allow him to amend his complaint. Second, plaintiff brought his argument regarding lack of supplies to the state court's attention and in response, the court agreed to hold plaintiff's case in abeyance for six months to allow him time to amass the funds he needed to pay for copying and postage. If plaintiff was dissatisfied with this resolution of his allegation that he was being denied legal supplies, his obligation was to raise his concerns with the state court, not seek a voluntary dismissal and then file a federal suit alleging that he was denied access to the courts. Plaintiff simply cannot show the requisite "actual injury" required to succeed on his claim. Accordingly, I will grant defendants' motion for summary judgment on this claim.

G. Retaliation

Finally, plaintiff was allowed to proceed on a claim that in November 2001, defendant Sharpe demoted him to level one in retaliation for complaining about his access to legal materials and pursuing a pending civil action against prison officials in state court. Plaintiff was also allowed to proceed on this claim against various other defendants who rejected his inmate complaints regarding the alleged retaliation. Prison officials may not retaliate against inmates for the exercise of a constitutional right, such as seeking access to the courts. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996); DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000). "This is so even if the [retaliatory] action does not independently violate the Constitution." DeWalt, 224 F.3d at 618. A plaintiff pursuing a retaliation claim shoulders a heavy burden. See Babcock, 102 F.3d at 275. Not only must he "establish that his protected conduct was a motivating factor" behind the allegedly retaliatory act, he must also show that "events would have transpired differently absent the retaliatory motive." Id. In other words, it is insufficient for plaintiff to show that a retaliatory motive played a substantial role in defendant Sharpe's decision to demote him to level one. Plaintiff has "no claim" if defendants can show that plaintiff would have been demoted to level one in any case. Id.; see also Crawford-El v. Britton, 523 U.S. 574, 592-93 (1998) (noting that "proof of an improper motive is not sufficient to establish a constitutional violation — there must also be evidence of causation" and therefore showing

a retaliatory motive will not "automatically carry a plaintiff to trial."). Courts "'should afford appropriate deference and flexibility to prison officials in evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory'" without "turn[ing] a blind eye to claims that prison officials have retaliated against inmates for exercising their right to seek judicial remedy." Id. (citations omitted).

In an affidavit, defendant Sharpe states that he was unaware that plaintiff was litigating a case against prison officials in state court when plaintiff was demoted to level one in November 2001, thus suggesting that plaintiff's demotion was not retaliatory in nature. Plaintiff maintains that defendant Sharpe "had to have known [plaintiff] was litigating [the state court case], as [plaintiff] sent Sharpe the briefing schedule for this case to try to get additional time with law books" and that "third shift staff puts requests/correspondence from inmates to Sharpe in a special box for Sharpe" and therefore "he certainly received the briefing schedule." Plt.'s Resp. to Dfts.' Findings of Fact, dkt. #81, at ¶¶ 257-58. In other words, plaintiff assumes that defendant Sharpe became aware of the state court case before the demotion because plaintiff sent Sharpe a briefing schedule, although plaintiff does not have personal knowledge regarding what Sharpe knew or when he knew it, such as would be the case if plaintiff had told Sharpe personally about his pending action. Indeed, defendant Sharpe states in his affidavit that he did not receive any court documents from plaintiff before plaintiff was demoted. Plaintiff's evidence does not demonstrate that defendant

Sharpe actually received plaintiff's briefing schedule during the relevant time period and thus knew that plaintiff was suing prison officials. Plaintiff's assumption that defendant Sharpe "certainly received the briefing schedule" is insufficient to create a swearing contest that would make summary judgment inappropriate. Therefore, plaintiff has failed to produce evidence showing that his state court case against prison officials was a substantial or motivating factor in defendant Sharpe's decision to demote him to level one.

Even if I assume that defendant Sharpe had some knowledge that plaintiff was litigating a case against prison officials before plaintiff was demoted to level one, I would grant defendants' summary judgment motion on plaintiff's retaliation claim because defendants have demonstrated that plaintiff would have been demoted to level one regardless of the existence of a retaliatory motive on defendant Sharpe's part. It is undisputed that inappropriate conduct can result in an inmate's demotion to a lower level status at any time. It is also undisputed that between October 15, 2001 and plaintiff's demotion to level one on November 13, 2001, plaintiff received eight warnings for rule violations from various prison staff. Although plaintiff maintains that some of these warnings were unjustified, he essentially concedes that he engaged in the prohibited conduct described in other warnings he received. For instance, On November 5, 2002, plaintiff was given a warning for yelling at prison staff about his limited access to the law library. Although plaintiff maintains that he didn't yell, but only "spoke up" when a guard didn't respond to a question put to him in

"a normal tone," plaintiff does not fairly dispute the substance of the warning by trying to draw a fine distinction between "yelling" and "speaking up." See Plt.'s Proposed Findings of Fact, dkt. #80, at ¶¶ 366-67. On November 11, 2001, plaintiff received a warning for having too many forms, carbon paper and letters in his cell. Plaintiff maintains that the warning was "illegal" because he only had a few more forms than are allowed. Id. at ¶¶ 368-69. This is also a distinction without a difference. In short, the record reflects that an inmate can be demoted to level one at any time for disobeying prison rules and that on more than one occasion shortly before he was sent to level one, plaintiff disobeyed prison rules. See Brookins v. Kolb, 990 F.2d 308, 315 (7th Cir. 1993) (inmate's retaliation claims fails in face of admitted rule violations). Moreover, the record reveals that defendant Sharpe did not issue plaintiff the warnings that prompted his demotion. Rather, Sharpe's role was limited to reviewing plaintiff's history of warnings before deciding to demote him. With the exception of one of the eight warnings he received, plaintiff does not allege that he informed defendant Sharpe that he believed the warnings were unfounded. Thus, plaintiff has presented no evidence from which a reasonable jury could conclude that defendant Sharpe decided to demote plaintiff as a result of personal animus, rather than on the basis of his lengthy list of rule infractions. Accordingly, I conclude that defendants have submitted sufficient evidence to demonstrate that plaintiff would have been demoted to level one for violating prison rules regardless of any retaliatory motive on defendant Sharpe's part.

Defendants are entitled to summary judgment on plaintiff's retaliation claim.

H. Appointment of Counsel, Writs and Subpoenas

On April 23, 2003, plaintiff filed a motion for appointment of counsel. On April 28, 2003, he wrote the court to request writs of habeas corpus ad testificandum and forms with which to subpoena witnesses. Because all the issues in this case will be disposed of on the basis of the parties' summary judgment motions, I will deny plaintiff's motion and requests as moot.

ORDER

IT IS ORDERED that

1. The motion of defendants Litscher, Berge, Mueller, Huibregtse, O'Donnell, Ellen Ray and John Ray for summary judgment is GRANTED with respect to plaintiff's First Amendment free expression claim regarding writing paper mailed to him at the prison;

2. The motion of defendants Clark, Janzen, O'Donnell, Huibregtse, Ellen Ray and John Ray for summary judgment is GRANTED with respect to plaintiff's First Amendment free expression claim that he was not allowed to send mail on two occasions;

3. The motion of defendants Berge, Huibregtse, O'Donnell, Ellen Ray, John Ray and Litscher for summary judgment is GRANTED with respect to plaintiff's claim that his

inability to keep writing paper mailed to him at the prison violates the Religious Land Use and Institutionalized Persons Act;

4. The motion of defendants Litscher, Berge and Biggar for summary judgment is GRANTED with respect to plaintiff's claim that his limited access to the telephone violates the Religious Land Use and Institutionalized Persons Act;

5. The motion of defendants Berge and Ellen Ray for summary judgment is GRANTED with respect to plaintiff's Fourteenth Amendment claim that he was denied access to the courts;

6. The motion of defendants Sharpe, Huibregtse, O'Donnell, John Ray and Ellen Ray for summary judgment is GRANTED with respect to plaintiff's First Amendment retaliation claim;

7. The motion of defendants Litscher, Berge, Grondin and Wetter for summary judgment on plaintiff's First Amendment challenge to the Wisconsin Secure Program Facility's policy prohibiting inmates from receiving newspaper and magazine clippings and photocopies in the mail from sources other than a publisher or a recognized commercial source is GRANTED IN PART and DENIED IN PART. Defendants Litscher, Berge, Grondin and Wetter are entitled to qualified immunity on this claim. The motion of plaintiff for summary judgment on this claim is GRANTED IN PART and DENIED IN PART. Plaintiff is entitled to declaratory and injunctive relief on this claim. IT IS

DECLARED that defendants' application of a publisher's only rule to prevent inmates from receiving any and all magazine and newspaper clippings and photocopies in the mail from sources other than a publisher or a recognized commercial source violates the First Amendment. Defendants are ENJOINED from enforcing the publisher's only rule to the extent that it prohibits inmates from receiving any newspaper and magazine clippings and photocopies in the mail from any source other than the publisher or a recognized commercial source. The injunction does not prohibit defendants from crafting rules or regulations limiting the quantity of such materials that inmates may receive in incoming correspondence.

8. Plaintiff's motion for summary judgment is DENIED in all other respects.

9. Plaintiff's motion for appointment of counsel is DENIED as moot.

10. The Clerk of Court is directed to enter judgment accordingly and close this case.

Entered this 5th day of May, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge