

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

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LOUIE E. AIELLO,

Petitioner,

v.

FRANK J. MATTHEW, DANIEL  
BERTRAND, ROBERT NOVITSKI,  
GERALD BERGE and TODD OVERBO,

Respondents.  
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ORDER

03-C-0127-C

This is a proposed civil action for monetary and injunctive relief brought pursuant to 42 U.S.C. § 1983. Petitioner Louie Aiello is currently an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. He alleges that a prison policy forbidding him to have in the segregation unit (1) a Tallith (prayer shawl), yarmulke and Siddurim (two-volume prayer book) and (2) all but first-class mail violates his First Amendment rights. In addition, petitioner contends the policy is at odds with state law as articulated in the Wisconsin Administrative Codes (DOC §§ 309.61 and 309) and Internal Management Procedures (IMP ## 6 and 6A). 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, the prisoner's complaint must be dismissed if, even under a liberal construction, it 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. See 42 U.S.C. § 1915e.

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

#### ALLEGATIONS OF FACT

Petitioner Louie Aiello was confined at the Green Bay Correctional Institution's segregation unit from September 12, 2000 to December 18, 2002, and at the Wisconsin Secure Program Facility's segregation unit from December 18, 2002 to present. Petitioner is Jewish. Respondent Frank J. Matthew is Secretary of the Department of Corrections. Respondent Daniel Bertrand is warden and respondent Robert Novitski is the treatment director at the Green Bay Correctional Institution. Respondent Gerald Berge is warden and respondent Todd Overbo is chaplain at the Wisconsin Secure Program Facility.

While in segregation at Green Bay, petitioner was deprived of his "personal, legal and religious books, garments and all but first-class mail." Petitioner was given a Green Bay segregation handbook, which provides that: (1) no magazines or newspapers are permitted,

including personal and state-issued; (2) only soft-covered books are allowed; and (3) no personal books are permitted with the exception of one soft-covered religious text.

On September 24, 2002, petitioner wrote to Mike Donovan, chaplain at the Green Bay prison, asking for approval to obtain a prayer shawl (Tallith) and prayer books (Siddurim) so that petitioner could continue his three daily prayers. (Such prayers are a tenet of Judaism). That same day, Donovan wrote to respondent Novitski, asking Novitski to approve petitioner's request for the prayer shawl. (Donovan did not include the request for the prayer books.) Novitski denied the request. On September 26, 2002, petitioner wrote to respondent Novitski directly, requesting his Siddurim. The request was ignored. As a result, petitioner was deprived of his religious garments and literature and could not recite his prayers.

On December 18, 2002, petitioner was transferred to the Wisconsin Secure Program Facility under "seg-hold" status to finish the remainder of his 360 days of program segregation (petitioner had served three months).

On December 22, 2002, petitioner "began to renew rounds of the ICE's that [petitioner] had merri-go-rounded with GBCI." (According to Exhibit B-1, petitioner asked for his Tallith, yarmulke and Siddurim). Petitioner was told to look at the "SMCI General Segregation Handbook" for what property would be allowed during his stay in segregation. (According to a memorandum from Todd Overbo dated January 17, 2003, petitioner is

allowed to possess a pocket Tallith and a black yarmulke.) On December 23, 2003, petitioner was deprived of all but first-class mail, including subscription magazines, non-profit religious organization mail, and bulk-rate mail.

Respondents at both prisons refused to photocopy some pages within the Siddurim as an alternative. The prayers are too long to commit to memory. The Siddurim consists of two prayer books: one for the weekdays, the other for Sabbath and festivals.

## DISCUSSION

### A. Religious Garments and Books

Petitioner alleges that respondents have violated his First Amendment free exercise rights by denying him a Tallith, yarmulke and Siddurim. It is well settled that prisoners do not leave their First Amendment rights at the prison gates. See Al-Alamin v. Gramley, 926 F.2d 680, 686 (7th Cir. 1991); Caldwell v. Miller, 790 F.2d 589, 596 (7th Cir. 1986). However, following the Supreme Court's decisions in Turner v. Safley, 482 U.S. 78 (1987), and O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), a prisoner's free exercise claims are analyzed on a rational basis standard. According to the Supreme Court, a "regulation must have a logical connection to legitimate governmental interests invoked to justify it." O'Lone, 482 U.S. at 350. At this early stage of the proceedings, I am unable to determine whether respondents' security concerns are rationally related to legitimate penological interests.

Accordingly, petitioner will be granted leave to proceed as to this claim.

B. First-Class Mail

I understand petitioner to allege that his free speech and free exercise rights under the First Amendment have been violated because so long as he is held in segregation, he is being denied all but first-class mail, including subscription magazines, non-profit religious organization mail and bulk-rate mail.

As to petitioner's free exercise claim, the Court of Appeals for the Seventh Circuit held that "the Free Exercise Clause does not require states to make exceptions to neutral and generally applicable laws even when those laws significantly burden religious practices." Goshtasby v. Board of Trustees of Univ. of Ill., 141 F.3d 761, 769 (7th Cir. 1998) (citing Employment Division Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 887 (1990)); see also City of Boerne v. Flores, 521 U.S. 507 (1997) (Scalia, J., concurring) ("Religious exercise shall be permitted so long as it does not violate general laws governing conduct."); Sasnett v. Sullivan, 91 F.3d 1018, 1020 (7th Cir. 1996), vacated on other grounds, 521 U.S. 1114 (1997) ("After Smith the only way to prove a violation of the free-exercise clause is by showing that government discriminated against religion, or a particular religion, by actually targeting a religious practice, rather than accidentally hit it while aiming at something else. . . . [O]nly intentional discrimination . . . is actionable

under Smith.”). In other words, the policy about which petitioner complains must target Jews alone or amount to intentional discrimination against those who practice Judaism. In his complaint, petitioner alleges that it is the prison’s general policy to deny prisoners in segregation all but first-class mail. Petitioner has not alleged that the policy applies only to Jews or was enacted in order to target them specifically. Accordingly, petitioner has failed to state a First Amendment free exercise claim as to the withholding of written materials to segregated inmates.

As to petitioner’s free speech claim, at this stage of the proceedings, I am unable to determine whether respondents’ security concerns are rationally related to legitimate penological interests. Accordingly, I conclude petitioner has stated a First Amendment free speech claim.

### C. State Law Claims

Petitioner alleges that denying him religious garments, religious books and all but first-class mail violates Wisconsin Administrative Codes (DOC §§ 309.61 and 309) and Internal Management Procedures (IMP ## 6 and 6A). Because the federal constitutional claims on which I am granting petitioner leave to proceed involve the same facts and respondents as those in petitioner’s state law claim, I will exercise supplemental jurisdiction over his state law claims. See 28 U.S.C. § 1367(a) (district courts have supplemental

jurisdiction over claims so related to claims in action that they form part of same case or controversy); Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) (district court has discretion to retain or refuse jurisdiction over state law claims).

## ORDER

IT IS ORDERED that

1. Petitioner Louie Aiello's request for leave to proceed in forma pauperis on his claim that respondents are denying him his First Amendment right to freely exercise his religion by enforcing a policy forbidding inmates in segregation from having a Tallith, yarmulke and Siddurim is GRANTED;

2. Petitioner's request for leave to proceed in forma pauperis on his claim that respondents are denying him his First Amendment rights by enforcing a policy forbidding inmates from having all but first-class mail is GRANTED as to his free speech claim and is DENIED as to his free exercise claim;

3. I will exercise supplemental jurisdiction over petitioner's state law claims;

4. The unpaid balance of petitioner's filing fee is \$140.00; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2); and

5. Petitioner should be aware of the requirement that he send respondents 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 respondents, he should serve the lawyer directly rather than respondents. 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 respondents or to respondents' attorney.

Entered this 10th day of April, 2003.

BY THE COURT:

BARBARA B. CRABB  
District Judge