IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOSEPH D. KOUTNIK,

Plaintiff,

ORDER

04-C-911-C

v.

LEBBEUS BROWN,

Defendant.

- -

In an order dated December 30, 2004, I granted plaintiff Joseph Koutnik leave to proceed on his claim that defendant Lebbeus Brown violated his rights under the First Amendment by refusing to deliver a piece of outgoing mail on September 2, 2004 and by disciplining him for writing the letter on September 5, 2004. Presently before the court is plaintiff's motion to amend his complaint under Fed. R. Civ. P. 15(a), along with a proposed amended complaint.

The Prison Litigation Reform Act requires the court to screen inmate complaints, identify the claims and dismiss any claim that is frivolous, malicious or is not a claim upon which relief may be granted. 28 U.S.C. §§ 1915A(a), (b). The screening obligation applies at all stages of the lawsuit; therefore, the failure to state a claim standard will control the

analysis of plaintiff's motion.

In his amended complaint, plaintiff repeats the allegations of his original complaint. However, the amendment includes a challenge to the constitutionality of Wis. Admin. Code § DOC 303.20(3) that was not raised in the original complaint. Section DOC 303.20(3) provides that

> Any inmate who participates in any activity with an inmate gang, as defined in § DOC 303.02(11), or possesses any gang literature, creed, symbols or symbolisms is guilty of an offense. An inmate's possession of gang literature, creed, symbols or symbolism is an act which shows that the inmate violates the rule. Institution staff may determine on a case by case basis what constitutes an unsanctioned group activity.

Plaintiff contends that the regulation is overbroad in violation of the First Amendment and unduly vague under the due process clause of the Fourteenth Amendment.

A. First Amendment

Plaintiff challenges Wis. Admin. Code § DOC 303.20(3) on overbreadth grounds because it prohibits possession of any literature, creed or symbols associated with an inmate gang, regardless of the material's actual content. In effect, the rule prohibits materials that do not teach or advocate violence or criminal activity simply because they are "gang-related" and permits discipline of inmates even if they are not part of the group from which the prohibited literature, creed or symbol originates.

Although prisoners retain First Amendment rights while incarcerated, limitations on the exercise of these rights "arise both from the fact of incarceration and from valid penological objectives - including deterrence of crime, rehabilitation of prisoners, and institutional security." O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987). The Supreme Court has held that courts are required to give considerable deference to prison officials' adoption of policies that serve security interests. Pell v. Procunier, 417 U.S. 817, 827 (1974). In accord with this deference, analysis of plaintiff's facial challenge to the constitutionality of § DOC 303.20(3) is governed by the Court's holding in Turner v. Safely, 482 U.S. 78, 89 (1987) that prison regulations that allegedly impinge on the constitutional rights of inmates are valid if "reasonably related to legitimate penological interests." Waterman v. Farmer, 183 F.3d 208, 213 (3d Cir. 1999) (substantial overlap between Turner standard and First Amendment doctrines of vagueness and overbreadth "suggests that the Supreme Court did not intend for those doctrines to apply with independent force in the prison litigation context."); Aiello v. Litscher. 104 F. Supp. 2d 1068, 1074-75 (W.D. Wis. 2000) (applying Turner analysis to facial challenge to prison regulation prohibiting access to sexually explicit material).

Plaintiff's allegations fail to state an actionable claim under this standard. It is beyond question that prison officials have a compelling interest in implementing policies designed to combat the threat to institutional security posed by organized gang activity.

Rios v. Lane, 812 F.2d 1032, 1037 (7th Cir. 1987). Plaintiff's allegations do not permit an inference that Wis. Admin. Code § DOC 303.20(3) is not reasonably related to this interest. By its language, the regulation prohibits possession of literature, creeds or symbols that are gang-related. Preventing inmates from possessing gang-related material is obviously related to the interest in preventing the formation and spread of inmate gangs. It is irrelevant that some of the prohibited materials do not advocate violence or criminal activity or that an inmate found with gang-related material does not belong to the gang to which the material is related. Simply stated, the fact that the policy prohibits possession of materials that are merely gang-*related* does not make it constitutionally suspect.

B. Due Process

In addition to his contention that Wis. Admin. Code § DOC 303.20(3) is overbroad, plaintiff contends that the regulation is unconstitutionally vague in violation of the due process clause of the Fourteenth Amendment. He alleges that inmates are not provided a list of sanctioned and unsanctioned groups, which results in two impermissible outcomes. First, inmates have no way of knowing what materials are acceptable and what materials are prohibited. Second, prison officials lack standards (such as a list of unsanctioned groups or criteria for determining whether a group constitutes a "gang") to guide their application of the regulation and are therefore applying it in an arbitrary and discriminatory manner. In

addition, plaintiff alleges that the terms "literature," "creed," "symbol" and "symbolisms" are not defined in the regulation, leading to further confusion and uncertainty regarding the regulation's scope.

The void-for-vagueness doctrine under the due process clause is grounded in the principles of fair warning or notice. Smith v. Goguen, 415 U.S. 566, 572 (1974). It has long been a settled principle of the criminal law that penal statutes must define a criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983). As applied to prison regulations, due process requires "fair notice of prohibited conduct before a sanction can be imposed." Williams v. Nix, 1 F.3d 712, 716 (8th Cir. 1993); see also Rios, 812 F.2d at 1038. Because plaintiff challenges Wis. Admin. Code § DOC 303.20(3) on its face, he must be able to show that it is "impermissibly vague in all of its applications." Server v. Mizell, 902 F.2d 611, 613 (7th Cir. 1990) (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982)).

The Court of Appeals for the Seventh Circuit considered an inmate's vagueness challenge to a prison regulation in Rios. The inmate had been issued a disciplinary report for giving another inmate a note card listing several Spanish radio stations that could be received at the prison. Officials charged the inmate with violating a rule prohibiting "gang

activity," which was defined as "engaging or pressuring others to engage in gang activities or meetings, displaying, wearing or using gang insignia, or giving gang signals." Id. at 1034. At his disciplinary hearing, the inmate explained that he obtained the names and frequencies of the radio stations from a prison-approved newspaper. However, the hearing officers determined that he had violated the gang activity rule. Ultimately, the inmate filed suit, contending that the gang activity rule failed to notify him that his conduct was prohibited. The court reversed a grant of summary judgment for the officials because the inmate could not have known that "the simple transcription of previously authorized information onto a note card" would result in disciplinary sanctions. Id. at 1038. Rios is distinguishable from the present case. Plaintiff does not suggest, or common sense indicate that a drawing of a 24-hour clock with the hands pointing to the numbers 19, 3 and 18 and the phrase "The Watch Dog in the Shadow" were prison-approved.

More broadly, plaintiff's allegations are insufficient to sustain a vagueness challenge to Wis. Admin. Code § DOC 303.20(3). His allegations that the regulation does not list each and every unsanctioned group or provide exhaustive definitions of "literature," "creed," "symbol" and "symbolisms" do not state a claim for vagueness. These terms are reasonably clear on their face. The regulation's ban on possessing gang literature, creeds or symbols gives inmates fair notice that they can be disciplined for possessing gang-related materials. To the extent the terms are imprecise, they afford prison officials necessary and appropriate

discretion to respond to the constantly changing ways in which gang affiliation may be expressed. The law's clear recognition that prison officials are to be given discretion in day-to-day decisions does not make the rules and regulations they enforce unduly vague.

ORDER

IT IS ORDERED that plaintiff Joseph Koutnik's motion to amend his complaint, dkt. #6, is DENIED. Plaintiff's original complaint remains the operative pleading in this case.

Entered this 2nd day of March, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge