IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM F. WEST,

Plaintiff,

v.

GERALD A. BERGE and JUDITH HUIBREGTSE,

Defendants.

OPINION AND ORDER

05-C-37-C

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This is a civil action brought under 42 U.S.C. § 1983 in which plaintiff William F. West contends that defendants Gerald A. Berge and Judith Huibregtse violated his First Amendment rights by refusing to deliver magazines and newsletters sent to plaintiff through the mail. In an order dated February 18, 2005, this court instructed defendants to respond to plaintiff's complaint by moving for summary judgment and supporting the motion with (1) the publications at issue for *in camera* examination; (2) a statement identifying each page of the publications that contains objectionable contentl; and (3) a description of the objectionable content and a sworn statement explaining why defendants believe the content poses a threat to a legitimate penological interest. Plaintiff was given an opportunity to

respond to defendants' motion for the purpose of challenging defendants' assertions of a legitimate penological interest in withholding these publications. Plaintiff filed his response on April 21, 2005. In support of their motion, defendants have submitted four of the five publications at issue, together with affidavits. Plaintiff has submitted an affidavit in opposition.

I conclude that it is not unreasonable to view the publications submitted as a threat to prison security and that defendants acted within the broad discretion afforded to officials in applying prison regulations. Therefore, I will grant defendants' motion for summary judgment with respect to these publications. Because defendants did not submit the issue of ESPN the Magazine, I will stay a decision on that part of their motion with respect to that publication. From the *in camera* review of the publications and the affidavits submitted by the parties, I find that the following facts are undisputed and material.

FACTS

At all times relevant to this case, plaintiff William F. West was housed at the Wisconsin Secure Program Facility. Defendant Gerald A. Berge is Warden of the Wisconsin Secure Program Facility and supervises its inmate complaint review system. Defendant Judith Huibregtse is a mail screener at the Wisconsin Secure Program Facility.

On September 24, 2003, the mail room received a copy of the Forum for

Understanding Prisons newsletter #4 addressed to plaintiff. Defendant Huibregtse reviewed the newsletter and issued plaintiff a notice of non-delivery on October 17, 2003. On March 11, 2004, the mail room received a copy of the Forum for Understanding Prisons newsletter #5 addressed to plaintiff. That same day, defendant Huibregtse reviewed the newsletter and issued a notice of non-delivery to plaintiff.

Timothy Gilberg has been employed by the Department of Corrections for more than nine years and is certified at the coordinators skill level in the Disruptive Groups program. He has been the Mail and Property Department Supervisor at Wisconsin Secure Program Facility for two and a half years. Gilberg reviewed newsletter #4 and determined that inmate West could not possess it because it teaches or advocates violence and presents a clear danger to institutional security and contains information that, if communicated, would create a clear danger of physical or mental harm to a person. He based this conclusion on his determination that the newsletter contained passages that would create hostility toward the staff if read by inmates. In his opinion, the resulting hostility could cause inmates to act in non-compliant and aggressive ways that could ultimately lead to violence. Gilberg identified the specific passages in the publication that contain the objectionable material. Gilberg also reviewed newsletter #5 and determined that inmate West could not be in possession of this newsletter because it teaches or advocates violence and presents a clear and present danger to institutional security and contains information that, if communicated,

would create a clear danger of physical or mental harm to a person. He based this conclusion on his determination that language used in this newsletter was consistent with specific themes of known disruptive groups. Gilberg has identified the specific passages in the publication that contain the objectionable material.

On April 21, 2004, the mail room received a copy of the May 2004 edition of Spin magazine addressed to plaintiff. That same day, defendant Huibregtse reviewed the magazine and issued plaintiff a notice of non-delivery. The notice indicated that the magazine contained "pictures of individuals using signs or symbols that are consistent with a known disruptive group." On July 14, 2004, the mail room received a copy of the October 2004 issue of Tailgate magazine addressed to plaintiff. That same day, defendant Huibregtse issued plaintiff a notice of non-delivery. The notice indicated that the magazine contained "signs or symbols that are consistent with a known disruptive group."

Disruptive groups, also known as gangs, are groups of individuals who threaten, coerce and harass others as well as engage in other illegal activities. Institutional security is threatened by the presence of gangs because of the threat of violence and because gangs undermine prison authority by providing a support system for those taking an oppositional stance to the prison administration.

Gang affiliation is not in the best interest of the inmate and his rehabilitation. Gang members are physically endangered by the presence of rival groups and their chances of

rehabilitation are compromised because gangs are antisocial and promote criminal activities. In the Department of Corrections, a large number of inmates have a criminal mentality that is associated with these gangs. Effecting change in this mentality is essential to helping inmates lead a crime free lives after leaving the Department of Corrections.

Disruptive groups use colors, symbols and hand signs to identify themselves as members of the gang and to show solidarity. Publications that contain pictures or drawings depicting known street gang hand signs give credence to the idea that the gang is strong and that inmates will prosper by associating with a gang. For this reason, the Department of Corrections does not allow symbols associated with street gangs in the prisons.

Suppressing gang activity in Department of Corrections institutions is imperative to maintaining a safe and secure environment for staff, inmates and visitors. Gang activity is managed by educating staff, searching inmates' property and living areas for contraband, monitoring telephone conversations and monitoring incoming and outgoing mail for disruptive materials.

Lebbeus Brown has been the Disruptive Groups coordinator at Wisconsin Secure Program Facility since April 3, 2003. His responsibilities include tracking disruptive groups and their members in the institution, documenting gang members' activities, reviewing incoming and outgoing mail and property for gang-related content, instructing staff regarding gang identification and gang management strategies and assessing ongoing gang activity

within the institution. As Disruptive Groups Coordinator, Brown is familiar with Wisconsin Secure Program Facility policies. Brown reviewed the copies of Spin and Tailgate magazines at issue and determined that plaintiff was denied the magazines because they contain pictures depicting signs or symbols of known disruptive groups that are active in the state of Wisconsin and prohibited by the Department of Corrections. Defendants submitted the passages that contain the objectionable material.

On April 5, 2004, the mail room received an issue of ESPN the Magazine addressed to plaintiff. That day, defendant Huibregtse reviewed the magazine and issued plaintiff a notice of non-delivery. Defendant Huibregtse indicated on the notice of non-delivery that the magazine contained a photo of individuals using signs "consistent with a known disruptive group." Plaintiff appealed the non-delivery of this publication by filing an inmate complaint on April 6, 2004. After plaintiff's appeal was dismissed on April 16, 2004, he was told he could have the magazine (1) mailed to someone else; (2) held for a visitor to pick up; or (3) destroyed. Plaintiff notified defendant Huibregtse that his appeal was denied and that he intended to have the magazine sent out with a visitor.

After defendants denied delivery of plaintiff's copy of ESPN the Magazine, the mail room staff also denied delivery of the same issue to another prisoner at the Wisconsin Secure Program Facility. Some time after plaintiff's appeal was dismissed, the other prisoner appealed the non-delivery of his copy of the magazine. The corrections complaint examiner

recommended that the denial be overturned for this other prisoner. The Secretary of the Department of Corrections agreed with the corrections complaint examiner's recommendation and the other prisoner was allowed to have the magazine. Brown reviewed this publication and determined that it contains pictures depicting signs or symbols of known disruptive groups that are active in the State of Wisconsin and prohibited by the Department of Corrections. Defendants did not submit this publication for *in camera* inspection.

Wisconsin Secure Program Facility is Wisconsin's most secure prison. Inmates on levels four and five cannot bring publications out of their cells. Wisconsin Secure Program Facility has a practice of removing all staples from the publications it allows into the prison. Defendants could take the objectionable pages out of the publications and deliver the remaining pages. The Forum for Understanding Prisons newsletter is a loose bound newsletter using no staples or glue to bind the pages together. Defendants could have withheld only the portions of the newsletters they deemed disruptive and delivered the remaining pages.

OPINION

I granted plaintiff leave to proceed on his claim that defendants violated his First Amendment right to free speech by refusing to deliver these publications. Plaintiff has not

forfeited all of his constitutional rights as a result of his conviction and incarceration. Thornburgh v. Abbott, 490 U.S. 401, 407 (1989); Turner v. Safley, 482 U.S. 78, 84 (1987); Bell v. Wolfish, 441 U.S. 520, 545 (1979). However, the Supreme Court has stated repeatedly that "[t]he fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration." Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 125 (1977) (citing Pell v. Procunier, 417 U.S. 817, 822 (1974)). A prisoner retains only those First Amendment rights that are "not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Pell, 417 U.S. at 822; see also Shaw v. Murphy, 532 U.S. 223, 229 (2001) (some First Amendment rights are simply inconsistent with status of incarceration).

A. The Turner Test

In Turner v. Safley, 482 U.S. 78 (1987), the Supreme Court established the test that governs a challenge to a prison regulation on the ground that it restricts an inmate's First Amendment rights. Under Turner, a prison regulation is valid so long as it is "reasonably related to a legitimate penological interest." Id. at 89. A regulation cannot be sustained where the logical connection to a legitimate interest is "so remote as to render the policy arbitrary or irrational." Id. at 89-90. The Court outlined four factors that are considered

when reviewing a prison regulation: (1) the existence of a valid, rational connection between the prison regulation and the legitimate governmental interest; (2) whether there are alternative means of exercising the constitutional right open to the prisoner; (3) the impact of the accommodation of the asserted constitutional right on guards, other inmates and institution resources; and (4) the existence or absence of ready alternatives to the prison regulation that can be provided at *de minimis* cost to the institution. Turner, 482 U.S. at 89-91. Courts have acknowledged that these factors tend to blend together and are not meant to be weighed according to any precise formula. Waterman v. Farmer, 183 F.3d 208 (3d Cir. 1999); Amatel v. Reno, 156 F.3d 192 (D.C. Cir 1998); Aiello v. Litscher, 104 F. Supp. 2d 1068, 1075 (W.D. Wis. 2000).

In addition, it is well established that a court may not substitute its own judgment for that of prison officials when reviewing the validity of prison regulations. Thornburgh, 490 U.S. at 407-08; Turner, 482 U.S. at 89; Aiello, 104 F. Supp. 2d at 1075 (courts do not second-guess prison administrators lightly). Deference to prison officials is appropriate because the judiciary does not possess the necessary expertise and resources to deal with the "difficult and delicate problems of prison management." Thornburgh, 490 U.S. at 407. When, as in this case, a state penal system is involved, the federal courts have further reason to accord deference to prison authorities. Turner, 482 U.S. at 85; Procunier v. Martinez, 416 U.S. 396, 405 (1974). Finally, this court is mindful of the Supreme Court's statement

that "where the regulations at issue concern the entry of materials into the prison, . . . a regulation which gives prison authorities broad discretion is appropriate." Thornburgh, 490 U.S. at 416.

In Shaw, 532 U.S. 223, the Supreme Court held that the Turner test governs judicial review of specific applications of prison regulations as well as facial challenges. In remanding the case for a determination whether a specific application of a prison regulation was acceptable, the Court stated that "[u]nder Turner, the question remains whether the prison regulations, as applied to [plaintiff], are reasonably related to legitimate penological interests." Id. at 232 (internal citation omitted). The emphasis the Court placed on the first Turner factor hints at the obvious reality that when a case involves a challenge to a prison regulation as applied in a specific instance, as opposed to a challenge to the regulation on its face, it is illogical to frame the analysis in terms of the four factors set forth in Turner. A regulation that is permissible under the Turner test is, by definition, reasonably related to a legitimate penological interest. Therefore, actions taken by prison officials that are consistent with such a regulation are permissible under Shaw. Where the regulation itself is valid, the only question that remains for a court is whether the actions being challenged are consistent with the regulation. Shaw, 532 U.S. at 232.

Plaintiff asserts that delivering the publications with the objectionable pages removed is an "easily available alternative" to the regulations. However, I denied plaintiff leave to

proceed on his claim that the regulations under which the publications were refused are facially unconstitutional. Therefore, the existence or absence of an alternative to the regulation itself is irrelevant. Plaintiff's remaining claim is not that the regulations themselves are invalid, but rather that the publications at issue do not contain material that these regulations prohibit.

B. Wis. Admin. Code § DOC 309.04(4)(c)

Wis. Admin. Code § DOC 309.04(4)(c) contains twelve subsections that set out reasons why incoming mail may not be delivered to prisoners. Two of these subsections are at issue in this case. Wis. Admin. Code § DOC 309.04(4)(c)(10) states that the Department of Corrections may not deliver incoming mail that "[t]eaches or advocates illegal activity, disruption, or behavior consistent with a gang or a violent ritualistic group." This provision justifies denial of published materials and other mail that explicitly threaten prison security. Wis. Admin. Code § DOC 309.04(4)(c)(12) prohibits the delivery of mail that "[i]s determined by the warden, for reasons other than those listed in this paragraph, to be inappropriate for distribution throughout the institution." This provision gives the warden the type of broad discretion concerning entry of materials into the prison that the Supreme Court encouraged in Thornburgh.

I must note that in reviewing the application of these regulations, the starting point

is a strong presumption that defendants acted within their "broad discretion." Shaw, 532 U.S. at 232; Thornburgh, 490 U.S. at 413.

C. Forum for Understanding Prison Newsletters

I have found as fact that the newsletters were denied because they teach and advocate violence and contain information that would create a clear danger of physical harm to a person. The language used in the articles is consistent with specific themes of known disruptive groups. From my *in camera* review of the newsletters, I find that Gilberg's assessment of the passages is not arbitrary or irrational and that it was reasonable for the warden to conclude that the newsletters threaten institution security. Therefore, his denial of delivery was a proper exercise of the discretion granted by Wis. Admin. Code § DOC 309.04(4)(c)(12). Turner, 482 U.S. 89-90. Defendants' refusal to deliver the newsletters was consistent with the regulations and therefore did not impermissibly impinge on plaintiff's First Amendment rights.

D. Spin and Tailgate Magazines

The notices of non-delivery for the copies of Spin magazine and Tailgate magazine stated that the magazines contained "signs or symbols consistent with a known disruptive group." The undisputed facts show that the presence of magazines containing pictures of

gang hand signs bolsters the credibility of gangs among prisoners and threatens prison security. I have found from an *in camera* examination of the magazines that Brown's assessment of the pictures is not arbitrary or irrational and that defendants reasonably concluded that the pictures depict gang related hand signs. Therefore, defendants acted within their discretion in concluding that such publications "advocate . . . behavior consistent with a gang" and are prohibited by Wis. Admin. Code § DOC 309.04(4)(c)(10). Defendants are entitled to summary judgment with regard to these publications.

E. ESPN the Magazine

It is undisputed that defendants denied delivery of the April 12, 2004 issue of ESPN the Magazine because they believed it contained material that is prohibited by Wis. Admin. Code § DOC 309.04(4)(c)(10). A copy of the same issue was later delivered to a different prisoner after that prisoner appealed to the Secretary of the Department of Corrections.

In an order dated February 18, 2005, this court instructed defendants to submit the publications at issue for *in camera* examination. Defendants have not submitted the April 12, 2004 issue of ESPN the Magazine. In light of the Secretary's decision to allow another copy of this publication into the prison, it may be that defendants' failure to submit the magazine to this court is a concession that it contains no prohibited material and that plaintiff was denied the magazine improperly. If defendants did not intend to make such

a concession, they should promptly notify the court and submit the relevant sections of the magazine along with a sworn statement describing the objectionable content and why it poses a threat to a legitimate penological interest. If, however, defendants notify the court that it is their intention to concede that plaintiff was improperly denied ESPN the Magazine on April 5, 2005, they may have until June 20, 2005, in which to file an answer to plaintiff's complaint in which they may raise any affirmative defenses applicable to plaintiff's claim.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Gerald A. Berge and Judith Huibregtse is GRANTED with respect to plaintiff's claim that defendants violated his First Amendment rights by denying delivery of the Forum for Understanding Prisons newsletters #4 and #5, Spin magazine and Tailgate magazine.

2. Defendants' motion is STAYED with respect to plaintiff's claim that defendants violated his First Amendment rights by denying delivery of ESPN the Magazine.

3. Defendants may have 14 days, or until June 22, 2005, in which to submit the relevant portions of the magazine and sworn statement describing the objectionable content and why it threatens a legitimate penological interest.

4. If defendants chose to concede that plaintiff was improperly denied ESPN the Magazine, they may have until June 22, 2005, to submit an answer raising any affirmative defenses applicable to plaintiff's claim.

Entered this 8th day of June, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge