

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

TITUS HENDERSON,

Petitioner,

v.

PETER HUIBREGSTE, MATTHEW
FRANK, Secretary of the Wisconsin
Department of Corrections, CITY OF
BOSCOBEL,

Respondents.

ORDER

06-C-0407-C

Plaintiff Titus Henderson is proceeding in this civil action on his claims that (1) defendants Peter Huibregste and Matthew Frank deprived him of his First Amendment right to free speech by instituting a policy at the Wisconsin Secure Program Facility that prohibits the distribution of the Boscobel Dial to prisoners and (2) defendant City of Boscobel's ordinance prohibiting the distribution of the Boscobel Dial to prisoners at the Wisconsin Secure Program Facility violates petitioner's First Amendment right to free speech. Defendant City of Boscobel responded to plaintiff's complaint by filing an answer on December 6, 2006, and a motion for summary judgment on December 8, 2006. Three days earlier, on December 5, 2006, defendants Huibregste and Frank accepted informal service

of process of plaintiff's complaint upon them. Under the informal service agreement between the court and the office of the Attorney General, these defendants are not expected to answer the complaint until sometime in mid-January. Nevertheless, the case was scheduled for a preliminary pretrial conference to be held on January 10, 2007. Ordinarily, it is this court's procedure to delay scheduling a preliminary pretrial conference until after all of the defendants in a lawsuit have filed a response to the complaint. There is no reason to depart from that procedure in this case. Therefore, I am cancelling the preliminary pretrial conference presently scheduled for January 10.

With briefing proceeding on defendant City of Boscobel's motion for summary judgment, it is not surprising that plaintiff has filed an undated letter postmarked December 13, 2006, in which he requests subpoena forms so that he can obtain from the Boscobel Dial editor, David Krier, and publisher John Ingebritsen, "[production of] files of their public records prohibiting sell (sic) of Boscobel Dial by City of Boscobel."

If plaintiff wants to view the public record concerning the City of Boscobel's decision to prohibit the sale of the Boscobel Dial to inmates at the Wisconsin Secure Program Facility, he does not need a subpoena to obtain it. Public records are generally available to the public and copies may be purchased by any individual wanting them at the rate set by the record holder. To the extent that plaintiff may wish to subpoena private business records from the Boscobel Dial, he is no doubt entitled to subpoena them, particularly if he needs

them in order to respond to defendant City of Boscobel's motion for summary judgment.

When the court schedules a preliminary pretrial conference, it sends the parties a "Notice Regarding the Telephone Preliminary Pretrial Conference," that explains what will happen at the conference and directs that discovery not begin until after the pretrial conference. Under the circumstances, it appears that everyone has jumped the gun in this case and that a return to the starting blocks is in order. Therefore, I am rescinding the schedule for briefing defendant City of Boscobel's motion for summary judgment. Once defendants Huibregtse and Frank have filed their response to the complaint, a preliminary pretrial conference will be scheduled. At the conference, the parties will be free to discuss with the magistrate judge plaintiff's need for subpoena forms and, if they are warranted, he can direct the clerk of court to issue them. At the same time, the magistrate judge can determine whether fairness dictates that the discovery plaintiff seeks be provided before his response to the motion for summary judgment is due and, if so, he can set the schedule for briefing the motion accordingly.

For plaintiff's information, if the magistrate judge were to determine that the issuance of subpoena forms is appropriate, he should be aware of four things:

1. Fed. R. Civ. P. 45, the rule governing subpoenas, was amended effective December 1, 2006. The full text of the amended rule is attached to this order.
2. Plaintiff should take special notice that he may arrange to have the subpoenas

served by any person who is not a party to this action and is not less than 18 years of age.

3. No person commanded by subpoena to produce documents need appear in person at the place of production or inspection “unless commanded to appear for deposition, hearing or trial.” Fed. R. Civ. P. 45(c)(2)(A). In the absence of a person’s attendance, no witness and mileage fees need accompany the subpoena. Fed. R. Civ. P. 45(b)(1).

4. Plaintiff will need to pay the costs of copying the documents produced, even if he is proceeding in forma pauperis.

ORDER

IT IS ORDERED that the clerk of court refrain from issuing the subpoena forms plaintiff requested in his undated letter postmarked December 13, 2006 until the magistrate judge has had an opportunity to discuss the timing of discovery with the parties at the preliminary pretrial conference.

Further, IT IS ORDERED that briefing on defendant City of Boscobel’s motion for summary judgment is RESCINDED and the preliminary pretrial conference scheduled for January 10, 2007 is CANCELLED. The preliminary pretrial conference will be rescheduled

after defendants Peter Huibregtse and Matthew Frank have filed a response to the complaint.

Entered this 22d day of December, 2006.

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