IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHNSON W. GREYBUFFALO,
#229871,

Plaintiff,

ORDER

v.

06-C-504-C

MATTHEW J. FRANK, in his individual and
official capacities as Secretary of the Wisconsin
Department of Corrections;
PHIL KINGSTON, in his individual and
official capacities as Warden of Waupun
Correctional Institution;
BRUCE MURASKI, in his individual and
official capacities;
C. CLOUGH, in her individual and
official capacities;
CORRECTIONAL OFFICER BRET MIERZEJEWSKI,
in his individual and official capacities; and
WILLIAM SCHULTZ, in his individual
and official capacities,

Defendants.

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This is a civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff Johnson Greybuffalo is a prisoner at Waupun Correctional Institution in Waupun, Wisconsin. He alleges that defendants Phil Kingston, Bruce Muraski, C. Clough, William

Schultz and Bret Mierzejewski disciplined him for possessing religious literature, in violation of his right to free speech and his right to practice his religion under both the First Amendment and the Religious Land Use and Institutionalized Persons Act. In addition, he alleges that defendants Matthew Frank, Kingston, Muraski, Clough, Schultz and Mierzeiewski punished him for violating disciplinary rules that were enacted after he was incarcerated and without proper notice to him, in violation of his rights under the due process clause and the ex post facto clause. Finally, he alleges that defendants Frank and Kingston have failed to provide an adequate inmate complaint review system, in violation of his right of access to the courts.

Plaintiff has paid the $350 filing fee. Nevertheless, because plaintiff is a prisoner, I am required to screen his complaint and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or seek money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e)(2).

I will allow plaintiff to proceed on his free speech claim against defendants Kingston, Muraski, Clough, Schultz and Mierzejewski. However, I will stay a decision with respect to plaintiff's claims under the free exercise clause and RLUIPA to allow plaintiff to file an addendum to his complaint so that he may explain whether and, if so, how his religious exercise was affected by defendants' actions. Finally, I will dismiss as legally frivolous plaintiff's claims under the due process clause, the ex post facto clause and the right of access

to the courts.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). In his complaint, plaintiff makes the following allegations of fact.

ALLEGATIONS OF FACT

A. Censored Materials

Plaintiff Johnson Greybuffalo is a prisoner in the custody of the Wisconsin Department of Corrections. He is confined in Waupun Correctional Institution in Waupun, Wisconsin. On May 25, 2005, defendant Bret Mierzejewski, a correctional officer at the prison, searched plaintiff's cell. He confiscated several pieces of paper. Defendant Bruce Muraski, the head of the gang intelligence unit, reviewed the materials and determined that the material included references to two "unsanctioned groups," the American Indian Movement and the Warrier Society.

Defendant Muraski directed defendant Mierzejewski to write plaintiff a conduct report for violating Wis. Admin. Code §§ DOC 303.20 (Group resistance and petitions), DOC 303.47 (Possession of contraband) and DOC 303.63 (Violations of institution policies and procedures). The conduct report was filed as a "major offense" because the "alleged violation created a risk of serious disruption at the institution or in the community."

Plaintiff received the conduct report on May 27. According to the report, the confiscated material contained "racially separatist material." It states that the American Indian Movement is "a race group" and likens the group to white supremacists and the Black Panthers. With respect to the Warrior Society, the report states it was "formed for race/cultural preservation safety in prisons. Over the years the unsanctioned group became violent offenders" involved in "criminal drug activities."

Plaintiff received a hearing in front of an adjustment committee, which included defendants C. Clough and William Schultz. Plaintiff denied involvement in either the American Indian Movement or the Warrior Society, stating that the material was religious in nature. His staff advocate argued that the American Indian Movement was a peaceful group and is discussed in various books in the prison library. A staff witness provided written testimony that the American Indian Movement does not support racial supremacy or separatism. At the end of the hearing, the adjustment committee found plaintiff guilty. Plaintiff immediately appealed the decision.

Plaintiff received written reasons for the decision on July 5. The form states that "it is more likely than not that the inmate possessed items which are deemed gang literature and creeds" and that plaintiff was found guilty of violating Wis. Admin. Code §§ DOC 303.20(3) and DOC 303.47(2)(a).

On appeal, defendant Phil Kingston, the warden, upheld the committee's decision as

to § DOC 303.20, but reversed the finding of guilt under § DOC 303.47. Defendant Kingston imposed a punishment of disposal of the materials and 180 days of disciplinary separation (similar to program segregation, but prisoners may still earn good time credits, Wis. Admin. Code § DOC 303.70).

B. Changes to Disciplinary Rules

Plaintiff has been in the custody of the Wisconsin Department of Corrections since 1995. Since that time, he has not received notice of any changes to Chapter DOC 303 of the Wisconsin Administrative Code. He has been disciplined under versions of the disciplinary code that were enacted after he was convicted. Each defendant, including defendant Matthew Frank, Secretary of the Wisconsin Department of Corrections, used the new procedures against plaintiff.

C. Inmate Complaint Review System

Defendants Frank and Kingston have failed to provide an adequate inmate complaint review system. In August and September 2005, plaintiff filed grievances complaining that he should not have been disciplined under new versions of the disciplinary rules and that he had received inadequate notice of changes in the rules, in violation of Wis. Admin. Code § DOC 303.09(2). In dismissing both of these complaints, the inmate complaint examiner

used identical language. On appeal, the responses from the corrections complaint examiners and the office of the secretary were also the same for each grievance.

DISCUSSION

A. Free Speech

I understand plaintiff to contend that his right to free speech was infringed when defendants Phil Kingston, Bruce Muraski, C. Clough, William Schultz and Bret Mierzejewski disciplined him for possessing documents that included references to the American Indian Movement and the Warrior Society. (Plaintiff includes no allegations in his complaint regarding the content of the documents, with the exception that they were "religious" in nature. However, plaintiff does not appear to dispute that the documents did contain references to the American Indian Movement and the Warrior Society.) Censorship in the prison setting is generally governed by the standard enunciated in Turner v. Safley, 482 U.S. 78 (1987), under which the question is whether a policy or practice is "reasonably related to a legitimate penological interest." Courts consider four factors in determining whether a regulation meets this standard: (1) whether there is a valid, rational connection between the restriction and the legitimate interest; (2) whether the prisoner has alternative means of exercising the right in question; (3) the impact accommodation of the asserted right will have on the operation of the prison; and (4) whether prison authorities have ready

alternatives for furthering the interest.

I will allow plaintiff to proceed on this claim. Any censorship of a prisoner's written materials may violate the First Amendment unless there is adequate justification for it. See, e.g., Shakur v. Selsky, 391 F.3d 106 (2d Cir. 2004) (allegation that prison officials confiscated political literature because it was unauthorized stated claim under First Amendment). Although plaintiff acknowledges that defendants have identified security as the basis for censoring his documents, I cannot determine at this stage whether defendants' interest is reasonably related to the restriction. See, e.g., Lindell v. Frank, 377 F.3d 655, 658 (7th Cir. 2004) (holding that it was error for district court to conclude at screening stage that policy was reasonably related to legitimate interest).

I give plaintiff a few words of caution. First, I note that plaintiff emphasized at his hearing and again in his complaint that he is not a member of either the American Indian Movement or the Warrior Society. Whether or not that is true is largely irrelevant for the purpose of this lawsuit. Plaintiff was disciplined not for being a member of these groups, but for possessing writings that included references to them. Second, and more important, plaintiff should be aware that prison officials are afforded substantial deference in any determination regarding security. See, e.g., Koutnik v. Brown, 456 F. 3d 777, 785 (7th Cir. 2006) (deferring to prison staff's assessment regarding gang symbols). Thus, to prevail at later stages of the case, plaintiff may be required to come forward with evidence showing that

it would be unreasonable to believe that the American Indian Movement and the Warrior Society pose a security threat. With respect to the allegations in his complaint, plaintiff should take care to gather specific, admissible evidence that, for example, the prison library includes books discussing these groups. Further, to the extent that he is able, plaintiff may wish to obtain affidavits from individuals who are qualified to testify about the history and nature of these groups, particularly in the prison context. Beard v. Banks, 126 S. Ct. 2572, 2582 (2006) (concluding that prisoner failed to meet burden on summary judgment, because he failed to "offer any fact-based or expert-based refutation" of defendants' opinion).

On the other hand, defendants should be aware that deference does not imply abdication. Miller El v. Cockrell, 537 U.S. 322, 340 (2003). Even under the deferential Turner standard, courts have a duty to insure that a restriction on the constitutional rights of prisoners is not an exaggerated response to legitimate concerns. As the Supreme Court held recently in Beard, 126 S. Ct. at 2582, "Turner requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective."

B. Free Exercise: First Amendment and RLUIPA

I understand plaintiff to contend also that because the documents defendants confiscated were "religious" in nature, disciplining him for possessing this material violated his rights under the free exercise clause of the First Amendment and the Religious Land Use

and Institutionalized Persons Act. A threshold barrier for this claim is that both the First Amendment and RLUIPA prohibit only "substantial burdens" on the "exercise," or practice, of religion. 42 U.S.C. § 2000cc-1; Kaufman v. McCaughtry, 419 F.3d 678, 683 (7th Cir. 2005). Certainly, reading holy books and prayers can be one of the ways in which a believer practices his faith. See, e.g., Lawson v. Dugger, 840 F.2d 781 (11th Cir. 1987). In this case, however, plaintiff alleges only that the documents contained "religious" subject matter. There are no allegations in plaintiff's complaint from which I could infer that plaintiff was using the documents to practice his religion, much less that confiscating the materials substantially burdened his exercise of religion. See, e.g., Borzych v. Frank, 340 F. Supp. 2d 955 (W.D. Wis. 2004) (denial of Azure Green catalogue did not state free exercise clause claim because plaintiff did not use it to practice his religion).

Although plaintiff is silent on these issues, I cannot assume at this stage that plaintiff did *not* use the materials to practice his religion or that taking them away did *not* substantially burden his religious practice. Kolupa v. Roselle Park District, 438 F.3d 713, 715 (7th Cir. 2006) ("Silence is just silence and does not justify dismissal unless Rule 9(b) requires details. Arguments that rest on negative implications from silence are poorly disguised demands for fact pleading"). Plaintiffs are not required to plead facts supporting each element of their claim. Doe v. Smith, 429 F.3d 706, 708 (7th Cir. 2005). Rather, at the pleading stage, courts may not dismiss a complaint for failure to state a claim unless the

plaintiff has pleaded facts showing that it would be impossible for him to prevail on the merits. Kolupa, 438 F.3d at 715.

Although it would be inappropriate to dismiss this claim on the basis of the facts alleged in the complaint, it would be a disservice to both plaintiffs and defendants to permit claims to proceed that will inevitably fail when more facts are revealed. In Hoskins v. Poelestra, 320 F.3d 761, 764 (7th Cir. 2003), the court of appeals held that district courts may call on the plaintiff to provide additional allegations in situations like this one, in which the facts alleged are so sparse that it is difficult to determine whether the plaintiff has a viable claim. Accordingly, plaintiff may have until November 6, 2006, in which to file an addendum to his complaint that includes allegations on the following subjects:

(1) the content of the documents that were confiscated from him;

(2) whether plaintiff used these documents in practicing his religion and, if so, how he used them; and

(3) the effect that taking the documents away had on his ability to practice his religion, if any.

If by November 6, plaintiff does not file an addendum, I will assume that plaintiff does not wish to proceed with his free exercise and RLUIPA claims and I will dismiss those claims.

C. Ex Post Facto and Due Process

I understand plaintiff to contend that defendants violated his rights under the ex post facto and due process clauses when they disciplined him under versions of disciplinary rules that were enacted after he was convicted and incarcerated and without adequate notice to him. Although these are creative claims, they are also legally frivolous.

The ex post facto clause, contained in Article I, section 9, clause 3, of the United States Constitution prohibits the government from *convicting* someone of a *crime,* or increasing the punishment for that crime, under a law that did not exist when the crime was committed. United States v. DeMaree, 459 F.3d 791, 794 (7th Cir. 2006); Grennier v. Frank, 453 F.3d 442, 444 (7th Cir. 2006). However, the clause has no bearing on discipline that a prisoner receives while incarcerated after he has been duly convicted. Westefer v. Snyder, 422 F.3d 570, 576 (7th Cir. 2005) ("'Punishment" for ex post facto analysis concerns the length of imprisonment, not the conditions of imprisonment.")

Plaintiff's challenge under the due process clause is similarly misplaced. In the prison disciplinary context, the due process clause applies in very limited circumstances. In Sandin v. Conner, 515 U.S. 472, 484 (1995), the Supreme Court held that prisoners are not entitled to *any* process under the Constitution unless their duration of confinement is increased or they are subjected to an "atypical and significant" hardship. The punishment that plaintiff received (180 days' disciplinary separation) does not meet this demanding standard. Id. at 485-86 (holding that placement in disciplinary segregation did not trigger

due process protections); Wagner v. Hanks, 128 F.3d 1173, 1175 (7th Cir. 1997) (after Sandin, "it becomes apparent that the right to litigate disciplinary confinements has become vanishingly small").

Plaintiff says that the failure to notify him of changes in the rules also violated Wis. Admin. Code DOC § 303.09(2), which requires the Department of Corrections to make copies of any "published changes" available to all prisoners. It is unlikely that plaintiff may enforce the Department of Corrections regulations in federal court; I am not aware of any law stating that a violation of one of these regulations may be enforced through a civil action. Kranzush v. Badger State Mutual Insurance Co., 103 Wis. 2d 56, 74-79, 307 N.W.2d 256, 266-68 (1981) (right of action to enforce statute or regulation does not exist unless directed or implied by legislature). Most often, challenges to actions under these regulations may be brought only in state court by certiorari, if at all. See, e.g., State ex rel. L'Minggio v. Gamble, 2003 WI 82, ¶23, 263 Wis. 2d 55, 667 N.W.2d 1; see also Outgamie County v. Smith, 38 Wis. 24, 34, 155 N.W.2d 639, 645 (1968) (with respect to laws that are not made enforceable by statute expressly, action is reviewable only by certiorari). In any event, this is a state law claim, which is unrelated to the claims on which I am allowing plaintiff to proceed. Accordingly, I decline to exercise supplemental jurisdiction over this claim. 28 U.S.C. § 1367(c)(3); see also Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) (recognizing that "a district court has the discretion to retain or to refuse

jurisdiction over state law claims").

D. Access to Courts

Finally, plaintiff alleges that the inmate complaint review system is inadequate because there is not enough individualized consideration of grievances, in violation of his right of access to the courts. This claim, too, is legally frivolous. The right of access to the courts prohibits officials from interfering with a prisoner's ability to file and maintain a lawsuit and requires them to provide prisoners with a reasonable opportunity to present their claims to a court. Lewis v. Casey, 518 U.S. 343, 351 (1996). Thus, prison officials may not prevent a prisoner from filing grievances or retaliate against him for filing one. DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000). However, prison authorities are under no constitutional obligation to provide an *effective* grievance system or, for that matter, any grievance system at all. Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993); see also Antonelli v. Sheahan, 81 F.3d 1422, 1431 (7th Cir. 1996) If a prison official fails to give individualized consideration to a grievance, this certainly runs counter to the problem-solving purpose of a grievance system, but it does not prevent or hinder a prisoner from filing a lawsuit, as is demonstrated by plaintiff's bringing of this case.

Plaintiff's claims against defendant Frank were limited to his access to courts claim and his ex post facto and due process claims. Because I am dismissing each of these claims

as legally frivolous, I will also dismiss defendant Frank from the case.

ORDER

IT IS ORDERED that

1. Plaintiff Johnson Greybuffalo is GRANTED leave to proceed on his claim that defendants Phil Kingston, Bruce Muraski, C. Clough, William Schultz and Bret Mierzejewski violated his right to free speech by confiscating documents and disciplining him because the documents contained references to the American Indian Movement and the Warrior Society.

2. The decision whether to grant plaintiff leave to proceed on his claims that defendants Kingston, Muraski, Clough, Schultz and Mierzejewski violated his rights under the free exercise clause and Religious Land Use and Institutionalized Persons Act is STAYED. Plaintiff may have until November 6, 2006, in which to submit an addendum to his complaint. If, by November 6, plaintiff, has not filed an addendum with the court, I will assume that plaintiff does not wish to pursue those claims and I will dismiss them from the case. Plaintiff should not attempt to serve his complaint until the court has ruled on this issue.

3. Plaintiff is DENIED leave to proceed on his claims that (1) defendants Matthew Frank, Kingston, Muraski, Clough, Schultz and Mierzejewski violated his rights under the

ex post facto clause by applying disciplinary rules to him that were enacted after he was convicted and incarcerated; (2) defendants Frank, Kingston, Muraski, Clough, Schultz and Mierzejewski violated his rights under the due process clause by failing to provide him with adequate notice of changes in the disciplinary rules; (3) defendants Frank and Kingston violated his right to have access to the courts by failing to provide an adequate inmate complaint review system.

4. Defendant Matthew Frank is DISMISSED from the case.

5. I decline to exercise supplemental jurisdiction over plaintiff's claim that defendants violated his rights under Wis. Admin. Code § DOC 303.09(2).

Entered this 20th day of October, 2006.

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