UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

PRISON LEGAL NEWS, a project of the HUMAN RIGHTS DEFENSE CENTER, Plaintiff, v. SULLIVAN COUNTY, TENNESSEE SULLIVAN COUNTY SHERIFF'S OFFICE, and J. WAYNE ANDERSON, in his official and Individual capacity, Defendants.	)	NO.: 2:13-CV-266

ORDER

On October 10, 2013, the plaintiff, Prison Legal News ("PLN"), filed this section 1983 action and alleged violations under the First and Fourteenth Amendments. It seeks damages and declaratory and injunctive relief. [Doc. 1]. PLN also filed a Motion for Preliminary Injunction, [Doc. 4]. It seeks to enjoin the defendants from enforcing their October 14, 2011 postcards-only mail policy and order them "to afford Plaintiff, prisoners, and correspondents due process notice and an opportunity to challenge Defendants' censorship decisions." [Doc. 5, pg.2]. The defendants have responded that the matter is moot. [Doc. 13]. Several other replies and supplements have since been filed, [Docs. 19, 21, 22, and 23]. The matter is ripe for review. For the reasons that follow, the motion is DENIED.

I. Background

The Human Rights Defense Center, a nonprofit organization, publishes *Prison Legal News* ("PLN"), a monthly magazine that provides information about legal news, prisoner rights,

and other prison-related issues. PLN sends its subscribers these monthly issues. It also sends subscription renewal letters, informational brochures, book catalogs, and paperback books. PLN distributes these publications and correspondence inside prisons to carry out its mission "to promote public safety through educational and journalistic avenues." [Doc. 1, ¶ 27].

Defendant Sullivan County, by and through the Sullivan County Sheriff's Office and Sheriff J. Wayne Anderson, ("defendants") implemented a postcards-only mail policy ("Policy I") for the Sullivan County Jail (the "jail") on October 14, 2011. [Doc. 15-1]. Section IV. of Policy I addressed mail rejection. Policy I is silent as to what specific magazines may be delivered to or accessed by the inmates. However, the jail's commissary permits inmates to access eight different pre-selected periodicals. [Doc. 5-9].

PLN alleges that under Policy I, the jail censored its mailings starting in February 2012. In so doing, the jail returned only some of them to PLS. The mailings contained notations such as "RTS" or "Not Here." On some items that were returned, jail staff wrote "Post Cards Only! Can Not Have," only to then mark it out and write "RTS" or "Not Here." For some of these returned mailings, which noted "RTS" or "Not Here," PLN had confirmed the inmate's presence in the jail. The jail allegedly stock-piled some undelivered copies of PLN's mail in the jail major's office. [Doc. 5-2, ¶ 20].

As a result of this "censorship," PLN filed suit on October 10, 2013. Specifically, PLN alleges the following: (1) "violations of Plaintiff's rights, the rights of other correspondents who have attempted to or intend to correspond with prisoners at the Sullivan County Jail, and the rights of prisoners confined at the Sullivan County Jail, under the First Amendment to the United States Constitution, through 42 U.S.C. § 1983," [Doc. 1, ¶ 54]; (2) "violations of Plaintiff's rights, and rights of other correspondents who have attempted to or intend to correspond with

prisoners at the Sullivan County Jail, and the rights of prisoners confined at the Sullivan County Jail, under the Fourteenth Amendment to the United States Constitution through 42 U.S.C. § 1983," [Doc. 1, ¶ 58]; and (3) violation of the First Amendment "by permitting access to periodicals such as *O Magazine, Field and Stream,* and *Outdoor Life*, while banning access to core political speech such as PLN's monthly magazine, . . . engag[ing] in unlawful discrimination based on content," [Doc. 1, ¶ 63].

On October 24 2013, the Tennessee Corrections Institute ("TCI") inspected the jail and recommended the jail abandon the postcards-only policy and return to regular mail. [Doc. 15, pg. 3, ¶ 13]. According to Corrections Major Greg Simcox, who is the overseer of the jail, he began the process to eliminate Policy I for incoming inmate mail. [Doc. 15, pg. 3, ¶ 14]. This process began before the summons in this case was issued on October 29, 2013, [Doc. 3]. Jail staff distributed a memo to the inmates, informing them of the planned return to regular mail. [Doc. 15, pg. 3, ¶ 16; Doc. 15-2]. The new mail policy ("Policy II") went into effect on November 4, 2013. [Doc. 17, pg. 3, ¶ 16; Doc. 15-3]. It abandoned the postcards-only policy and returned to regular mail. [Doc. 15-3]. Section IV. regarding "Mail Rejection" remained unchanged. Policy II also remained silent as to magazines.

Finally, Major Simcox stated in his sworn affidavit that regardless of which policy was in place, the jail never had a policy to intercept PLN's mail and stop it from being delivered to the inmate to whom it was addressed. [Doc. 15, pg. 4, ¶ 20]. Major Simcox also stated that the jail has allowed, and continues to allow, delivery of all of PLN's mailings to the inmate to whom it was addressed. [Doc. 15, pg. 4, ¶ 20].

As stated above, PLN has moved for a preliminary injunction. In the motion PLN "moves this honorable Court to enter a preliminary injunction enjoining Defendants from

enforcing their post-cards only mail censoring Plaintiff's publications." [Doc. 4, pg. 1]. PLN states in its Memorandum , "Because [Policy I], violates the First and Fourteenth Amendments to the United States Constitution, PLN respectfully moves this Court for an order preliminarily enjoining Defendants as follows: (1) from enforcing its unconstitutional jail mail policies to reject or otherwise censor news journals, subscription materials, book offers, book catalogs, and other correspondence; and (2) ordering Defendants to afford Plaintiff, prisoners, and other correspondents due process notice and an opportunity to challenge Defendants' censorship decisions." [Doc. 5, pgs. 1-2]. It was somewhat difficult to discern PLN's specific arguments because of inconsistencies between PLN's Complaint [Doc. 1], the Motion, [Doc. 4], and the Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction, [Doc. 5]. To be sure, however, the motion seeks a preliminary injunction on the postcards-only portion of Policy I, and the Memorandum goes beyond that and seeks one regarding a due process issue. To complicate matters further, parts of the Memorandum and subsequent filings seem to seek a preliminary injunction to enjoin an unwritten policy regarding access to magazines because it violates the First Amendment, *see* [Doc. 1, pg. 10, ¶ 50]. However, PLN did not clearly seek an injunction as to this issue.

This Court concludes that the only issue properly before the Court is the postcards-only issue of Policy I. Nonetheless, the Court will briefly address the due process issue but declines to address the unwritten magazine policy. As such, the Court will specifically decide: (1) whether to enjoin the postcards-only portion of Policy I because it violates the First Amendment; and (2) whether to enjoin the jail to establish due process procedures regarding censorship because Policy I's procedures violate the Fourteenth Amendment. The Court will discuss each in turn.

II. Postcards-Only Portion of Policy I

Again, PLN seeks to enjoin the postcards-only portion of Policy I because it violates the First Amendment. However, the defendants abandoned the postcards-only policy and returned to a regular-mail policy in Policy II. Therefore, the defendants argue that this issue is moot. Before reaching the merits of the preliminary injunction on this issue, this Court must decide if the matter is moot.

At the time a federal court decides a case, there must be a live case or controversy, *Burke v. Barnes*, 479 U.S. 361, 363 (1987); otherwise, the mootness doctrine applies. *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 644 (6th Cir. 1997). "The mootness doctrine [is] a subset of the Article III justiciability requirements." *Id*. "Claims become moot when the issues presented are no longer 'live' or parties lack a legally cognizable interest in the outcome." *Brandywine, Inc. v. City of Richmond, Ky.*, 359 F.3d 830, 836 (6th Cir. 2004). "The test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties." *Bowman v. Corrections Corp. of America*, 350 F.3d 537, 549-550 (6th Cir. 2003) (quoting *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc)) (internal quotations and citations omitted). Moreover, a federal court "can neither declare unconstitutional nor enjoin the enforcement of a provision that is no longer in effect." *Brandywine*, 359 F.3d at 836 (plaintiffs' claims for declaratory and injunctive relief mooted when city repealed allegedly unconstitutional provision of ordinance); *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974 (6th Cir. 2012) (plaintiff's claims for injunctive and declaratory relief mooted by amended code sections to ordinance).

PLN argues that the voluntary cessation exception to the mootness doctrine applies. Under this exception, a case may be mooted only "if subsequent events made it absolutely clear

that the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of the Earth Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968)), and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). The heavy burden of demonstrating mootness rests on the party claiming mootness. *Friends of the Earth*, 528 U.S. at 189. However, "cessation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties." *Ammex, Inc. v. Cox*, 351 F.3d 697, 705 (6th Cir. 2003) (quoting *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir.1990) (internal quotation marks omitted)).

Here, there was an unambiguous change in Policy I. *See Prison Legal News v. Chapman*, -- F.Supp.2d --, No. 3:12-CV-00125, 2014 WL 4247772, at *11 (M.D. Ga. Aug. 26, 2014) (citing *Doe v. Wooten*, 747 F.3d 1317, 1322 (11th Cir. 2014), which lists three factors a court considers in determining whether the government has carried its burden of mootness: (1) unambiguous change, (2) change result of substantial deliberation, and (3) consistent application of new policy or adherence to new conduct) (*Chapman II*). The postcards-only policy was clearly abandoned when Policy II was implemented. This change seemed to be as a result of substantial deliberation, for Major Simcox, the jail overseer, discussed the policy with the TCI after the TCI completed an inspection of the jail. *See id*. The policy was then changed after heeding TCI's advice. Major Simcox began implementing this change in the postcards-only policy prior to this Court issuing the summons in this case. Thus, it does not appear that the change was made to merely avoid this Court's jurisdiction. *See id*. (asserting the timing of the change is another consideration). Moreover, there is no evidence in the record that the jail has

failed to consistently apply this new policy or to adhere to this new course of conduct. *See id*. Finally, Major Simcox stated in his sworn affidavit that the jail had no intention of returning to the postcards-only policy. *See Ammex*, 351 F.3d at 705 (discussing *Picrin-Peron v. Rison*, 930 F.2d 773, 775-76 (9th Cir. 1991), where sworn statement of INS official regarding a change was sufficient for government to carry the burden of mootness).

To be sure, the Court has considered PLN's argument regarding changes made by legislative bodies versus executive actors. The argument is without merit. The cases cited by PLN for support do not clearly support PLN's position, although they do discuss the voluntary cessation exception in terms of the legislative action. *See* [Doc. 23, pgs. 2-3]. Instead, this Court relies upon the *per curiam* opinion in *Northern Ohio Chapter of Associated Builders & Contractors, Inc., v. Metrohealth System*, 280 Fed. App'x 464, 466-67 (6th Cir. 2008). In that opinion, the Sixth Circuit summarizes several cases dealing with the mootness issue after a voluntary change in policies or laws. *Id*. Ultimately, the court found claims moot even though the policy had been changed by the Board of Trustees of a public teaching hospital. *Id*. at 467. Thus, the court applied the exception even though the change did not come from a legislative body.

As noted above, the Court has considered the cases cited by PLN and finds these nonbinding authorities distinguishable. PLN relies upon *Prison Legal News v. Columbia County*, No. 3:12-CV-00071-SI, 2012 WL 1936108, at *6 (D. Oregon May 29, 2012). In that case, the court failed to find issues moot after the defendant changed the mail policy "because several areas of dispute remain unresolved [by the change and] . . . the postcard-only mail policy [which was being challenged] remains in effect." *Id.* Likewise, the court in *Prison Legal News v. Chapman*, No. 3:12-CV-00125, 2013 WL 1296367, at *3 (M.D. Ga. Aug. 26, 2014)

(*Chapman I*), declined to find issues moot because "several areas of dispute remain[ed] unresolved" despite changes to the mail policy. *Id*. at *3. Finally, in *Prison Legal News v. County of Ventura*, No. CV 14-773-GHK (Ex)., 2014 WL 2519402, at *9 (C.D. Cal. May 29, 2014), the court found that the voluntary cessation exception applied because defendants failed to satisfy their burden that the conduct would not start up again. The court stated that "[m]ere promises" were insufficient to meet the burden considering that defendant admitted that mail staff had failed to comply with policy directives that were in place in the past. *Id*. There was evidence that, even after the change in policy, the new policy was not being followed. *Id*. Finally, there was little assurance the mail situation had been rectified in light of defendants' admission that staff had previously rejected mail for "random reasons." *Id*.

Here, the exact policy that was in effect is the one that was changed; the postcards-only policy was changed to a regular-mail policy. Thus, that portion of Policy I is not left unresolved in Policy II. In addition, there are no allegations in this case that the mail staff was failing to adhere to the mail policy or mailings were being rejected for random reasons. The allegation in this case is that the postcards-only portion of Policy I, which mail staff was following, violates the First Amendment. There is no evidence in the record that the mail staff is failing to adhere to the regular-mail policy of Policy II. For these reasons, the instant case is distinguishable from cases cited by PLN.

For all of these reasons, the defendants have carried their burden in showing that the issues surrounding the postcards-only portion of Policy I are moot. *See Ultimate Smoke, LLC v. City of Kingsport, Tenn.*, No. 2:12-CV-13, 2013 WL 6713513, at *2 (E.D. Tenn. Dec. 19, 2013) (finding issue moot where Tennessee legislature had subsequently changed the law and nothing

in record to indicate the prior offending city ordinances would be reenacted). The request by PLN for a preliminary injunction regarding the postcards-only policy is denied as moot.

III. Due Process Portion of Policy I

In PLN's Memorandum, PLN seeks to enjoin the jail to establish due process procedures regarding censorship because Policy I's procedures violate the Fourteenth Amendment. This issue was not raised in the actual Motion. However, the Court will address it briefly.

The sections of Policy I and Policy II which deal with due process notice requirements are identical. Those sections state in pertinent part:

> . . . .
>
> B. A prisoner will be notified in writing if any mail is rejected.
>
> C. The inmate will have a chance to appeal this rejection; by filing a grievance with the commissary officer.
>
> D. If the inmate is no longer in our custody the officer will mark out our address, mark "not at this address" and stamp "return to sender" and place back in the mail.

[Doc. 15-1, pg. 2 and Doc. 15-3, pg. 2].

It is unclear whether the defendants claim that the Fourteenth Amendment due process issue is moot. It is unclear because the defendants state, "In as much as Defendants have abandoned their post-card only policy, and in as much as Defendants' post-card only policy is the only action for which Plaintiffs seek injunctive relief, this issue is no longer live and this court cannot affect the matter at issue." [Doc. 13, pgs. 5-6].

However, PLN moves for an injunction regarding the due process issue based on Policy I. Because Policy I is no longer in effect, this Court assumes that the defendants have raised the mootness issue. The defendants did not voluntarily cease the alleged due process wrongs when the jail implemented Policy II because these sections are identical. Therefore, the voluntary

cessation exception to the mootness doctrine does not apply. As such, the due process issue is potentially still a live controversy.

This creates an odd practical problem in terms of an injunction, however. PLN did not originally move to enjoin the jail based on Policy II, although it argues in its Reply that Policy II still violates the Fourteenth Amendment. [Doc. 19, pgs. 4-7]. Nevertheless, PLN has neither amended the Complaint to allege that Policy II violates the Fourteenth Amendment nor to seek injunctive or declaratory relief in this regard. Thus, how does the Court issue an injunction on a policy that technically is no longer in place but still is in place for all practical purposes? It could be that this Court should have found that Policy I in its entirety is not moot. However, based on this Court's review of the case law, and based on the facts of this case, the postcards-only policy issue is moot. Importantly, this Court cannot decide an issue that is no longer live.

Based on the foregoing, the Court must resort to a practical solution. On the current record, the Motion for Preliminary Injunction on this due process issue is DENIED, for the issue is not properly before the Court. However, PLN shall have 10 days from the entry of this Memorandum Opinion and Order to move to amend its Complaint and allege violations based on Policy II. PLN is then free to file another Motion for Preliminary Injunction on this issue.

In the meantime, the Defendants may choose to implement a new policy which fully complies with the principles set forth in *Martin v. Kelley*, 803 F.2d 236 (6th Cir. 1986). Prison officials must provide minimal procedural safeguards for confiscation of inmate mail. *Martin v. Kelley*, 803 F.2d 236 (6th Cir. 1986) (citing *Procunier v. Martinez*, 416 U.S. 396, 417–19 (1974), *overruled in part on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989)). Specifically, three things must be done. They include: "(1) notice be given to the inmate of the rejected letter; (2) a reasonable opportunity be given to the author of the letter to protest the rejection

decisions; and (3) complaints concerning the rejection be reviewed by someone other than the individual who originally rejected the letter." *Martin*, 803 F.2d at 241-42.

Here, these minimal procedural safeguards do not appear to be satisfied by Policy II. As such, PLN is likely to succeed on the merits that the defendants have violated its Fourteenth Amendment rights. Regarding the remaining factors, they all weigh in favor of PLN. PLN would continue to suffer irreparable harm by the violation of its Fourteenth Amendment rights if no proper policy is implemented to provide the minimal procedural safeguards. In addition, drafting and implementing a new policy is not burdensome to the defendants. Finally, the public has an interest in the free flow of information and a system to appeal decisions of censorship is of vital importance.

IV. Conclusion

For the reasons stated above, the motion, [Doc. 4], is DENIED.

ENTER:

s/J. RONNIE GREER
UNITED STATES DISTRICT JUDGE