IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Phillip S. Figa

Civil Action No. 03-cv-02320-PSF-MJW

MARK JORDAN,

Plaintiff,

v.

ROBERT A. HOOD, Warden, ADX Florence,
MARY H. SOSA, Acting ISM, ASX Florence, in their official capacities,
and FEDERAL BUREAU OF PRISONS,

Defendants.

ORDER AND JUDGMENT

I. BACKGROUND

Plaintiff Mark Jordan commenced this action on November 20, 2003, seeking declaratory relief, injunctive relief and damages arising out of alleged violations of his First and Fifth Amendment rights. A one-day trial was held on Monday, June 12, 2006. Defendant Mary Sosa gave testimony by video, as did John Loftness, the Assistant Correctional Services Administrator for the Bureau of Prison's North Central Region. Plaintiff also submitted the deposition of John Lee, the former Inmate Systems Manager. The parties submitted joint exhibits numbered one through seven, consisting of the administrative record, plaintiff's administrative exhaustion documentation, and information about the prison regulation that plaintiff alleged violated his constitutional rights. The following is the Court's Final Order and Judgment in this matter.

Mr. Jordan, an inmate at the United States Penitentiary, Administrative Maximum

facility in Florence, Colorado ("Florence ADX"), claims his First and Fifth Amendment rights are being violated as a result of 28 C.F.R. § 540.71(a)(2), which prevents inmates from receiving soft cover publications unless sent directly from the publisher, a bookclub, or a bookstore. As a result of the regulation, defendants (named as Robert Hood, Florence ADX Warden, Mary Sosa, Florence ADX Acting Inmate Systems Manager, and the Federal Bureau of Prisons ("BOP")) refused to deliver to Mr. Jordan a 120-page internet essay series, mail containing photocopies of two magazine articles, and mail containing clippings from articles. None of these materials contained pornography, helpful hints on how to escape from prison, inflammatory gang communications or race-based literature, nor other hate-inducing propaganda.

It is undisputed that Mr. Jordan exhausted his administrative remedies in connection with each case. Plaintiff filed a motion for summary judgment, seeking an order from the Court holding that 28 C.F.R. § 540.71(a)(2) at least as applied to internet printouts, news clippings and copies and tear-outs from magazines fails the applicable constitutional standards and therefore fails to qualify as a regulation reasonably related to legitimate penological interests. This motion was orally denied by the Court at the Final Trial Preparation Conference, and the case proceeded to trial.

II. APPLICABLE LEGAL STANDARDS

To prevail on his claim, Mr. Jordan must meet the criteria set forth by the Supreme Court in *Turner v. Safely*, 482 U.S. 78, 89-90 (1987). In *Turner*, the Supreme Court established a "reasonableness standard" for analyzing the interaction between prison regulations and constitutional rights. The Court provided four relevant factors

for determining reasonableness:

(1) whether there is a valid rational connection between the regulation and a legitimate and neutral interest put forward to justify it;

(2) whether there are alternative means of exercising the asserted constitutional right that remain open to inmates, with judicial deference to the correction officials' expertise;

(3) whether and the extent to which accommodation of the asserted right will have an impact on prison staff, on inmates' liberty, and on the allocation of the limited prison resources, again with particular deference to correction officials where there will be a significant effect on inmates and staff; and

(4) whether the regulation represents an exaggerated response to prison concerns; the existence of a ready alternative that fully accommodates the prisoner's rights is evidence that the regulation is unreasonable. *Id*.

III. ANALYSIS

Following a trial to the Court, plaintiff and defendants filed Proposed Findings of Fact and Conclusions of Law (Dkts. ## 102 and 103, respectively). The Court has reviewed these, as well as the trial transcript and submitted documents.

A. Findings of Fact

1. Effective January 16, 2003, the BOP amended 28 C.F.R. § 540.71 to include the following language:

> At medium security, high security, and administrative institutions, an inmate may receive soft-cover publications (for example, paperback books, newspaper clippings, magazines, and other similar items) only from the publisher, from a book club, or from a bookstore.

28 C.F.R. § 540.71(a)(2).

2. The regulation's stated purpose for adopting the regulation was "to reduce the amount of contraband introduced into Federal prisons through materials sent by mail." Joint Ex. 1 at 741.[1]

3. Pursuant to this regulation, defendants rejected and refused to deliver to Mr. Jordan the following incoming mail: 120 pages of an internet-published series of essays entitled "Justice Denied;" photocopies of two magazine articles of unknown length; and clippings.

4. Mr. Jordan exhausted his administrative remedies with respect to the denial of the materials described in paragraph III.A.3., above, and received no explanation for the rejection other than application of 28 U.S.C. § 540.71 and its implementing Program Statement.

5. The BOP's Rules Administrator, on or about July 31, 2002, defined "softcover materials" for purposes of then-proposed 28 C.F.R. § 540.71(a)(2) as "magazines, softcover books, clippings, items in paper folders, pamphlets, catalogs, brochures, and other items of a similar nature." According to the BOP's Rules Administrator, "[w]e prefer to leave a specific definition out of the rule so that we may expand the definition as necessary to encompass new forms of incoming publications that we may not have originally contemplated." *See* Joint Ex. 1 at 669.

---

[1]Although two other justifications were set forth during litigation–interdiction of coded gang communications and reduction of the impact of mail processing upon prison staffing and resources–such justifications were not set forth in defendants' Proposed Findings of Fact and Conclusions of Law (Dkt. # 103). Regardless, these two additional justifications do not affect the legal conclusions in part B of this Order.

6. According to the testimony of Defendant Mary Sosa, pursuant to the regulation as applied at the Florence ADX facility, paperback books, magazines, newspapers, articles torn out of or photocopied from a magazine, a clipping or photocopy of a clipping from a newspaper, or a printout off of the internet, mailed to an inmate from a source other than a publisher, book club, or bookstore, would be rejected for delivery to the inmate.

7. Also according to the testimony of Ms. Sosa, there are no page limits on letters that an inmate may receive, nor are there any limits on the number of pieces of individual mail that an inmate may receive. Limitations on the size of a particular piece of mail are based on thickness, such as one inch.

8. According to the testimony of John Lee, it is no more likely that contraband would be included in a one-page internet printout or news clipping than in a one-page letter, nor would it take longer to search for contraband in a one-page printout than in a one-page letter.

9. On January 23, 2006, the Warden at Florence ADX (then R. Wiley) issued a memorandum advising that "guidance was received from Regional Director Nalley stating that due to unsettled judicial issues concerning the receipt of materials from other than commercial sources, the institution was encouraged to consider implementing changes in the processing of incoming correspondence." Under this guidance, the following policy change was implemented and has been in effect since that time:

> (1) Inmates will be permitted to receive incoming correspondence containing newspaper or magazine clippings from non-commercial

> sources if, after analysis, it is determined the newspaper or magazine clipping poses no threat to institution security. Inmates will be permitted to receive such clippings in quantities which will not adversely affect the ability of mail room staff to effectively monitor incoming correspondence; and
>
> (2) Until additional guidance is provided by Central Office, materials printed directly from the internet will be treated as general correspondence, subject to rejection for content unless and until it is determined that the volume of such materials adversely affects staff ability to effectively monitor incoming correspondence for contraband and other threats to institutional security and good order.

Joint Ex. 7.

10. No policy change or directive similar to the one issued at the Florence ADX facility on January 23, 2006 has been issued by the BOP's North Central Regional Office, nor has the BOP suggested or offered any evidence to suggest that the policy reflected in the January 23, 2006 Florence ADX directive is, or is intended to be, in any way a permanent policy change by or within the BOP.

B. Conclusions of Law

1. Mr. Jordan's case has not been rendered moot by the January 23, 2006 adoption of the policy set forth in Joint Ex. 7. The policy states that it reflects guidance received from the Regional Director "due to unsettled judicial issues," which defendants' counsel indicates refers to this case. A comparable policy statement has not been issued by the Regional Office itself, nor by the BOP's Central Office, nor is there any evidence that a similar policy is in effect at any other facility in the federal prison system. Further, the policy set forth in Joint Ex. 7 is at least in part directly inconsistent with the regulation, 28 C.F.R. § 540.71(a)(2) itself. Defendants themselves have not argued for a finding of mootness. Under such circumstances, the

Court cannot conclude that "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 190 (2000).

2. The First Amendment "embraces the right to distribute literature . . . and necessarily protects the right to receive it." *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). Materials on the internet, as well as those in print, are included in the First Amendment's protections. *Cf. Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997) ("no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]").

3. However, prison regulations that restrict the receipt of mail by inmates do not violate the First Amendment if they are reasonably related to legitimate penological interests. *Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989).

4. As noted above, several factors are relevant in determining the reasonableness of such a regulation. There must be a valid rational connection between the regulation and the reason for it, and the governmental objective must be legitimate and neutral. A second factor is whether inmates have alternative means of exercising their First Amendment rights. A third consideration is the impact that accommodating the constitutional right will have on other inmates, guards and the allocation of prison resources. Finally, the absence of ready alternatives is evidence of a prison regulation's reasonableness. Conversely, the existence of other easy alternatives may be evidence that the regulation is unreasonable. *Turner*, 482 U.S. at 89-90. All four of these factors must be considered. *Jacklovich v. Simmons*, 392 F.3d

420, 427 (10th Cir. 2004).

5. Application of these four factors demonstrates that 28 C.F.R. § 540.71(a)(2) violates the First Amendment and is facially invalid as applied to unbound pages, including internet printouts and clippings.

6. Specifically, Mr. Jordan has met his burden of refuting the defendants' contention that a valid, rational connection exists to justify 28 C.F.R. § 540.71(a)(2)'s source restrictions as to unbound items such as newspaper or magazine clippings, photocopies of newspaper or magazine articles, and printouts from the internet to the extent that these items do not exceed limitations on volume otherwise applicable to general correspondence to inmates. The evidence presented establishes that such items are no more likely to serve as vehicles for the introduction of contraband into the prison than handwritten letters of similar length.

7. With respect to the second *Turner* factor, the Court finds that reasonable alternative means are not available to inmates to receive items described in paragraph 6, above. The testimony of Ms. Sosa indicates that the internet is not available to Mr. Jordan and other inmates at the ADX facility. Further, as observed by the Second Circuit, application of a publishers-only rule to news clippings "is . . . tantamount to a complete prohibition" as "[n]ewspaper publishers generally do not run clipping services." *Allen v. Coughlin*, 64 F.3d 77, 80 (2d Cir. 1995). Subscribing to publications is not an adequate substitute, as "subscribing requires inmates to anticipate which papers might have articles that they like to read and to subscribe to all such papers." *Id*. Moreover, copies of articles from publications provided by a professional clipping

service has not been shown to be permissible under the regulation. Finally, essentially requiring a sender to rewrite articles and printouts into personal letters to a prisoner serves no penological or security interest and is not an adequate substitute. *See supra* paragraph III.A.8. (no substantive difference between an internet printout or a personal letter of the same length).

8. Under the third *Turner* criterion, there is no basis upon which to conclude that accommodating receipt of unbound items such as newspaper or magazine clippings, photocopies of newspaper or magazine articles, and printouts from the internet will have any material impact upon guards, other inmates, or the allocation of prison resources generally. In fact, testimony by Ms. Sosa and John Loftness, the Assistant Correctional Services Administrator for the BOP's North Central Region, indicates that 28 C.F.R. § 540.71(a)(2) has had no material effect on the operation or staffing of the mailroom at the Florence ADX facility. Further, if problems arose due to too many pages for mailroom staff to monitor, a constitutionally permissible policy would be to set a reasonable page limit rather than limit the form of communication.

9. Finally, the Court finds that under the fourth *Turner* factor, a ready, easy alternative exists to the regulation–namely, the January 23, 2006 interim policy at the Florence ADX facility itself. The policy highlights 28 C.F.R. § 540.71(a)(2)'s overbreadth by exempting from the regulation such items as newspaper or magazine clippings, photocopies of newspaper or magazine articles, and internet printouts.

10. The conclusions above are supported by case law in this circuit and elsewhere. For example, the Ninth Circuit upheld a district court's *sua sponte* grant of

summary judgment in favor of a state inmate in a § 1983 action challenging enforcement of a policy that prohibited inmates from receiving mail containing material downloaded from the internet. *Clement v. Cal. Dep't of Corr*., 364 F.3d 1148, 1150 (9th Cir. 2004). As in the instant case, inmates in *Clement* did not have access to the internet. *Id*. at 1151. The district court had evidence before it that several nonprofit groups such as Stop Prisoner Rape publish information only on the internet, and many legal materials are accessible only on the internet. *Id*. The Ninth Circuit upheld the district court's finding that the policy was not rationally related to the legitimate interests of reducing mail volume and lessening security concerns over coded messages. *Id*. at 1152. The court upheld the statewide injunction on enforcement of the internet mail policy. *Id*.

The Seventh Circuit held that application of a publishers-only rule—which stated that inmates may only receive publications directly from the publisher—to publication clippings or photocopies of clippings violated an inmate's First Amendment rights. *Lindell v. Frank*, 377 F.3d 655, 659-60 (7th Cir. 2004). *Lindell* upheld the district court's granting of injunctive relief, finding that no alternative means of exercising his rights existed for the inmate, accommodation would not unduly burden staff, and "defendants are already screening personal mail, which could just as easily contain hidden messages." *Id*. *See also Allen*, 64 F.3d at 80 (evidence did not establish that "news clippings are as a matter of law so much more threatening to prison security than ordinary correspondence that clippings should be essentially prohibited while correspondence goes largely unread"); *Jacklovich*, 392 F.3d at 431 ("[T]he ability to

listen to the radio or watch television is not an adequate substitute for reading newspapers and magazines. The issue here is whether the regulations and policies here still 'permit a broad range of publications to be sent, received, and read.") (quoting *Thornburgh*, 490 U.S. at 418) (internal citation and quotation marks omitted). Here, a "broad range of publications" are essentially foreclosed.

11. The Court notes that plaintiff and defendants disagree over the proper scope of review in this case. Defendants contend that this Court is limited to a review of the administrative record, and must process this case as an appeal pursuant to *Olenhouse v. Commodity Credit Corp*., 42 F.3d 1560, 1579-80 (10th Cir. 1994). Such a review, according to defendants, requires this Court to determine whether the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). On the other hand, Mr. Jordan argues that this Court is not confined to a review of the administrative record, as the waiver of sovereign immunity under the Administrative Procedure Act ("APA") is not limited to only suits under the APA and this Court has jurisdiction pursuant to 28 U.S.C. § 1331. *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1233, 1236 (10th Cir. 2005). Without deciding, the Court finds that even under the arguably narrower level of review claimed by defendants to apply here, the regulation still does not meet the *Turner* factors and is thus arbitrary and capricious based on the administrative record. Specifically, the administrative record does not demonstrate that a valid rational connection exists between the regulation and preventing contraband where the regulation is applied to unbound pages such as clippings, photocopies and printouts and not to other personal

mail received by inmates. Further, the administrative record does not support a finding of reasonable alternative means under the challenged regulation for inmates to receive such materials. The Court finds that the January 23, 2006 change in policy represents an acceptable and constitutional policy, and apparently meets the BOP's needs as well.

12. For the reasons set forth above, the Court concludes that 28 C.F.R. § 540.71(a)(2) is overbroad and fails to satisfy any of the four criteria set forth in *Turner*, *supra*, as applied to unbound pages such as newspaper or magazine clippings, photocopies of newspaper or magazine articles and internet printouts, to the extent that these items do not exceed other reasonable length or volume limitations or other restrictions applicable to general inmate correspondence and mail. Such materials should be treated the same as personal letters and other permissible mail received by inmates.

13. The Court notes the guidance of the Supreme Court in *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961, 967-68 (2006), which holds that a district court may, and should, tailor its remedies to "unconstitutional applications" or a defective statute or regulation even in the context of a facial challenge. With this guidance in mind, the Court concludes that 28 C.F.R. § 540.71(a)(2) is unconstitutional to the extent it is applied specifically to unbound printed pages such as newspaper or magazine clippings, photocopies of newspaper or magazine articles, and internet printouts to the extent that these items do not exceed reasonable length or volume limitations or other reasonable restrictions otherwise applicable to inmate correspondence and mail.

14. Pursuant to and as required by 18 U.S.C. § 3626(a)(1), the Court specifically finds and concludes that the prospective relief granted herein is narrowly drawn, extends no further than necessary to correct the violations of the federal constitutional right asserted by Mr. Jordan, and is the least intrusive means necessary to correct the violation of the federal constitutional right. The Court has, additionally, given substantial weight to any adverse impact on public safety and the operation of the federal criminal justice system caused by the relief.

IV. CONCLUSION AND JUDGMENT

Based upon the Findings of Fact and Conclusions of Law set forth above, the Court enters judgment:

1. Declaring 28 C.F.R. § 540.71(a)(2) to be unconstitutional as to Mr. Jordan as applied specifically to unbound printed pages such as newspaper or magazine clippings, photocopies of newspaper or magazine articles, and internet printouts to the extent that these items do not exceed reasonable length or volume limitations or other reasonable restrictions otherwise applicable to inmate correspondence and mail; and

2. Permanently enjoining defendants from applying and enforcing 28 C.F.R. § 540.71(a)(2) in such a manner as to prevent Mr. Jordan from receiving such items from sources other than publishers, book clubs or bookstores.

It is SO ORDERED.

DATED: October 26, 2006.

BY THE COURT:

s/ Phillip S. Figa

Phillip S. Figa
United States District Judge