

plaintiff should be granted as a voluntary dismissal under Fed. R. Civ. P. 41(a); and that all other plaintiffs who have a sincerely held belief in the Church of the New Song should be allowed to participate in the Celebration of Life banquet food . Finally, Judge Walters recommended to deny defendants' counterclaim which sought to establish that all of the plaintiffs were insincere in their religious belief. Defendants filed objections to the Report and Recommendation.

I. STANDARD OF REVIEW

Title 28 U.S.C. § 636 provides the applicable standard of review.

A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

Objections are to be liberally construed to assure that the district court maintains substantial control over the ultimate disposition of the referred case. Hudson v. Gammon, 46 F.3d 785, 786 (8th Cir. 1995). A district court must conduct a de novo review of any portion of a report and recommendation to which an objection has been lodged, and that review is independent of and applies no presumption of validity to the objected-to findings and recommendations.

II. DEFENDANTS' OBJECTIONS

Defendants object to the findings that any of the plaintiffs are sincere with respect to their religious beliefs. They also object to the finding that there was any evidence that these defendants prevented any plaintiffs who were in lock-up status from participating in the Celebration of Life food.

As stated by Judge Walters, the sincerity of a person's religious beliefs is "difficult to judge." Report at 3. Although some factors are strong indicators of a sincerely held belief, the absence of one or more of these same factors does not necessarily mean one's belief is insincere.

Id. For each plaintiff, Judge Walters considered whether the plaintiff attended services when not in lock-up status, whether the plaintiff studied the religion, each plaintiff's basic understanding of theology and doctrine, and considered his overall impression with testimony given at the hearing.

After a de novo review of the hearing transcripts, this court finds that the record supports Judge Walters' findings and conclusions regarding religious sincerity. Certainly the record, both open and sealed, contains examples of illegal and dangerous incidents participated in by each plaintiff. Nonetheless, the fact that plaintiffs have a history of criminal behavior does not necessarily discredit the sincerity of their religious beliefs. Defendants' objections on this issue are overruled, and the court adopts the findings made by Judge Walters regarding the sincerity of the plaintiffs.

Defendants' second objection is that "there is no evidence in this record to support a finding that any of these Defendants precluded food to lock-up for a Celebration of Life." Objections at paragraph 3. This appears to be the first time defendants have made this assertion. This court previously ruled that the denial of banquet food to church members in lock-up during the Celebration of Life violated the First Amendment rights of those plaintiffs who sincerely believed in Ecclatarianism. See Order of January 29, 2001. In his second Report and Recommendation, the parties do not request and Judge Walters does not address the issue of whether these particular defendants were responsible for the denial of banquet food trays to lock-up inmates. Thus, it is inappropriate to raise the issue now in the form of an objection to the Report and Recommendation.

Even if the argument were timely raised, the court notes that defendants were sufficiently aware of and participated in the decision and implementation of the policy to deny banquet food trays to lock-up inmates. For example, defendant Maschner, as the acting warden of the institution, was responsible for all policies created and implemented at the facility. Defendant Eaves, the treatment director, stated in an April 1, 1997 memorandum that "inmates in lockup will not be provided trays." Defendant Helling at the time was the deputy warden when discussing changes in the Celebration of Life festival. See Hearing Transcript at p. 458-60. The court is satisfied that these defendants were responsible for the denial of banquet food to members in lock-up during the Celebration of Life. Defendants' argument on this issue is overruled.

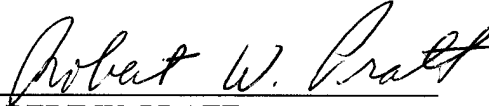
III. RULINGS AND ORDERS

For the forgoing reasons, the court adopts the Report and Recommendation of Judge Walters. The Motion to Dismiss on Grounds of Mootness (Pleading #217) is **GRANTED** with respect to the claims of plaintiffs Goff, Gunn, King, Tanner, Cupples, and Archer. The Second Motion to Dismiss filed after the Report and Recommendation (Pleading #230) is **GRANTED** with respect to the claims of plaintiffs Ragland and Yargas. Barbee's motion to voluntarily dismiss his claims pursuant to Fed. R. Civ. P. 41(a)(1) (Pleading #222) is **GRANTED**.

Plaintiffs Dorsey, O'Donnell, Winters and Poyner are entitled to injunctive relief from defendants' practice of denying Celebration of Life banquet food to CONS members in lockup. The counterclaims of defendants and all other claims of plaintiffs are denied and dismissed.

IT IS SO ORDERED.

Dated this ___27th___ day of December, 2001.



ROBERT W. PRATT
U.S. DISTRICT JUDGE