

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CLERK'S OFFICE U.S. DIST. COURT
AT CHARLOTTESVILLE, VA
FILED
OCT 08 2009
JOHN F. CORCORAN, CLERK
BY: *H. Wheeler*
DEPUTY CLERK

.....
PRISON LEGAL NEWS, INC.,

Plaintiff,

vs.

GENE M. JOHNSON, JOHN M. JABE,
W.D. JENNINGS, BENJAMIN WRIGHT,
JOHN DOE 1-5, SUSAN WHEELER,
TONI COX, SAMUEL PRUETT, and R.W.
JAMISON,

Defendants.
.....

**COMPLAINT
AND JURY DEMAND**

Civil Action No. 3:09cv 00068

INTRODUCTION

1. This is a civil action brought pursuant to 42 U.S.C. § 1983 to vindicate the Plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution. Plaintiff seeks declaratory and injunctive relief to order Defendants to cease their unconstitutional conduct as outlined below. Plaintiff also seeks nominal, compensatory and punitive damages, and an award of reasonable attorney's fees and costs.
2. Defendants have engaged in censorship of the publication "Prison Legal News" ("PLN") even though the publication contains non-sexual and non-violent articles and advertisements that do not implicate legitimate security concerns. Additionally, Defendants' censorship policy and practices do not provide for timely and adequate notice and a meaningful opportunity for the publisher to provide comments before a final decision to ban an issue of PLN from entry into the Virginia prison system. These

policies and practices deprive Plaintiff and its subscribers of their First and Fourteenth Amendment rights and serve no neutral, legitimate penological purpose.

3. Defendants also currently prohibit prisoners from receiving gift books and gift subscriptions to magazines from Plaintiff and other publishers, requiring instead that payment for these items comes from prisoners' prison accounts and that orders be placed through prison staff. Under Defendants' policies and practices, prisoners, many of whom are indigent, may not receive purchases on their behalf by family members, friends, or charitable organizations. This policy and practice deprives Plaintiff, as well as its subscribers, of its First Amendment rights and serves no neutral, legitimate penological purpose.
4. Defendants have also prohibited receipt by prisoners of PLN information packets, which contain information about subscriptions, renewals and other publications and books that may be of interest to its subscribers and other prisoners. This policy and practice deprives Plaintiff of its First Amendment rights and serves no neutral, legitimate, penological purpose.

JURISDICTION

5. This action arises under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. This Court has jurisdiction over this action under 28 U.S.C. §§1331 and 1343(a)(3) and (a)(4) and 28 U.S.C. §§2201 and 2202.

VENUE

6. Venue properly lies in this District pursuant to 28 U.S.C. §§ 1391(b)(2) because of the more than 35 prison institutions in Virginia, Plaintiff has narrowed and directed the focus

of a number of its specific factual claims to two institutions as representative of their grievances; both prison institutions are located in the Charlottesville Division of the Western District of Virginia.

PARTIES

7. Plaintiff Prison Legal News (“PLN”) is a project of the Human Rights Defense Center (“HRDC”), a Washington State 501(c)(3) non-profit corporation. Plaintiff is headquartered in the State of Washington, located at 2400 NW 80th Street, PMB #148, Seattle, Washington 98117. PLN publishes a monthly journal entitled “Prison Legal News” which reports on criminal justice news and issues. PLN also publishes, sells and distributes books on a variety of criminal justice, human rights and self-help issues. PLN also operates a website (www.prisonlegalnews.org) containing an extensive database of case law, verdicts, settlements, commentary, and other material related to these topics.
8. Defendant Gene M. Johnson is the Director of the Virginia Department of Corrections (“VDOC”). He is responsible for the implementation and enforcement of all VDOC policies and procedures. At all times relevant to this Complaint, he was acting under color of state law. He is sued in his individual and official capacities.
9. Defendant John M. Jabe is the Deputy Director, Division of Operations of the Virginia Department of Corrections and has been so at all times relevant to this complaint. Appeals from the decisions of the Publication Review Committee disapproving publications are taken to his office. At all times relevant to this Complaint, he was acting under color of state law. He is sued in his individual and official capacities.
10. Defendant W.D. Jennings has been, at times relevant to this Complaint, Chairman of the

Publications Review Committee (“PRC”), which committee is responsible for making final decisions to disapprove publications sent to prisoners within the Virginia Department of Corrections. He has also been, at times relevant to this Complaint, the person within the Office of the Deputy Director of Operations to hear appeals from the final decisions of the Publication Review Committee. At all times relevant to this Complaint he was acting under color of state law. He is sued in his individual and official capacities.

11. Defendant Benjamin A. Wright has been, at times relevant to this Complaint, Chairman of the Publication Review Committee, which as noted above, is responsible for making final decisions to disapprove publications sent to prisoners within the Virginia Department of Corrections. At all times relevant to this Complaint, he was acting under color of state law. He is sued in his individual and official capacities.
12. Defendants John Doe 1 through 5 have been, at times relevant to this Complaint, members of the Publication Review Committee. Each of them is a voting member of the Committee for the purpose of approving or disapproving publications sent to prisoners at VDOC facilities. At all times relevant to this Complaint, they were acting under color of state law. Each is sued in his individual and official capacities.
13. Defendant Susan Wheeler has been, at times relevant to this Complaint, the Warden at Fluvanna Correctional Center. As such she is charged with the responsibility to make initial decisions to disapprove publications sent to prisoners at that facility. At all times relevant to this Complaint, she was acting under color of state law. She is sued in her individual and official capacities.

14. Defendant Toni Cox is the Operations Officer at Fluvanna Correctional Center. At times relevant to this Complaint, she has been delegated the authority to make initial decisions to disapprove publications sent to prisoners at that facility and has exercised authority to deny prisoners possession of publications to which they have subscribed. At all times relevant to this Complaint, she was acting under color of state law. She is sued in her individual and official capacities.
15. Defendant Samuel Pruett has been, at all times relevant to this Complaint, the Warden at Coffeewood Correctional Center. As such he is charged with the responsibility to make initial decisions to disapprove publications sent to prisoners at that facility. At all times relevant to this Complaint, he was acting under color of state law. He is sued in his individual and official capacities.
16. Defendant R.W. Jamison is the Operations Officer at Coffeewood Correctional Center. At times relevant to this Complaint, he has been delegated the authority to make initial decisions to disapprove publications sent to prisoners at that facility. At all times relevant to this Complaint, he was acting under color of state law. He is sued in his individual and official capacities.

FACTS

17. PLN is a legal journal that reports on news and litigation concerning detention facilities.
18. PLN has published monthly since 1990 and has approximately 7, 000 subscribers in all 50 states and abroad. PLN's subscribers include lawyers, journalists, judges, courts, public libraries, universities and prisoners. The estimated actual readership is 70,000 per month. PLN also maintains a website that receives more than 100,000 visitors a month.

19. PLN currently has, and at all times relevant to this Complaint, has had, numerous paid subscribers who are prisoners in the custody of the VDOC, including subscribers at Fluvanna Correctional Center and Coffeewood Correctional Center.
20. PLN engages in protected speech on matters of public concern.
21. Defendant Johnson has promulgated and all of the Defendants have implemented VDOC Operating Procedure 803.2, "Incoming Publications" ("OP 803.2").
22. Pursuant to OP 803.2, all prisoners must secure permission from the VDOC Facility Unit head or his or her designee prior to ordering, subscribing to or otherwise receiving a publication.
23. OP 803.2 also contains a list of criteria for disapproving receipt of a publication. Some of the criteria are specific, such as the criteria for disapproving publications with sexual content, while other criteria are vague such as "Material whose content could be detrimental to the security, good order, discipline of the facility, or offender rehabilitative efforts or the safety or health of offenders, staff, or others."
24. Prisoners may only receive publications from a "legitimate source" and publications must be prepaid from the prisoner's prison account. "Gift" subscriptions are prohibited. For example, Christine Acker, a prisoner incarcerated at Fluvanna Correction Center, was advised by Defendant Cox that she could no longer receive PLN because it was paid for by a third party, even though she had been receiving PLN as a result of that third party payment. Ms. Acker was able to secure a short subscription from the limited funds available to her in her prison account, even though her friend had already paid for a two year subscription for her.

25. Each permitted publication received at a VDOC facility is reviewed prior to distribution to the prisoner.
26. The Warden at each facility or his or her designee may disapprove a publication.
27. No notice is provided to the publisher that disapproval is being considered and therefore, Plaintiff has no opportunity to oppose the proposed ban.
28. If disapproved by the facility, the prisoner to whom the publication is addressed receives notice of disapproval. No notice is provided to the publisher.
29. For example, Thomas Littek, who is a subscriber to PLN and incarcerated at Coffeewood Correctional Center, received notice from Defendant Jamison that he had disapproved possession of the April and May 2009 issues of PLN pending review by the PRC. The notice to Littek simply identified OP 803.2, Section L 12, "Material whose content could be detrimental to the security, good order, discipline of the facility, or offender rehabilitative efforts or the safety or health of offenders, staff, or others." However, neither Mr. Littek, nor other prisoners, receive any information as to the content of the article(s) and/or advertisement(s) that prompted the decision to disapprove the publication or an explanation of how the article(s) and/or advertisement(s) at issue meet the criteria identified.
30. Unless waived by the prisoner to whom it is addressed, the disapproved publication is submitted to the Publication Review Committee ("PRC") for final decision.
31. When a publication is disapproved at the facility level, the warden is required to make a record of his/her reasons for disapproving the publication, which record is forwarded to the PRC. At no time is the publisher provided with this record.

32. The PRC need only meet quarterly to review publications submitted to it from the various facilities within the VDOC. No limit is placed on the Committee as to the time within which it must consider a particular publication or make a decision with respect to that publication.
33. If the PRC makes a final decision to disapprove a publication, only then is the publisher notified. Such notifications include only the page(s) disapproved without specifying the article(s) and/or advertisement(s) which prompted the disapproval. In some instances, Plaintiff has received notice that the content of the entire publication is disapproved. Thus, for example, the notice received by PLN with respect to disapproval of the March 2009 issue states that the entire publication violates criteria #12 in that it “could be detrimental to the security and good order of the institution and the rehabilitation of offenders.” No other information is provided.
34. The notice merely identifies by number the criteria upon which the disapproval is based, typically, as noted above, “Materials whose content could be detrimental to the security, good order, discipline of the facility, or offender rehabilitative efforts or the safety or health of offenders, staff, or others.” No information is given as to how the disapproved material meets the criteria identified by the Committee.
35. The only time Plaintiff PLN received specific information as to why a particular publication was disapproved came in response to an appeal to Defendant Jabe in which he upheld a PRC decision because the material in question “presents information geared toward a negative perception of law enforcement that could be deemed detrimental to the security of the facility or offender rehabilitation efforts.”

36. Notices to publishers are often delayed and therefore a publisher, such as PLN, may only receive notice months after the publication was disapproved at the facility level and, in some instances, months after a final disapproval decision was made by the PRC. For example, the May 2009 issue was disapproved by the PRC on April 24, 2009, yet notice was not received by PLN until August 19, 2009.
37. In some instances, Plaintiff has received no notice of decisions by the PRC to disapprove one of its publications.
38. OP 803.2 provides that a publisher may appeal the decision of the PRC to the Deputy Director for Operations. All of the appeals filed by Plaintiff have been denied.
39. Since 2007, approximately fourteen issues of PLN have been disapproved by the PRC. The censorship decisions are statewide and serve to ban PLN from all VDOC facilities.
40. Since 2007, even more issues were disapproved by facilities within VDOC.
41. From time to time, Plaintiff sends information packets to its subscribers and other prisoners, which include instructions on how to subscribe and describing books and other printed materials that are available for sale. Defendants have banned such information from distribution asserting that prisoners must seek pre-approval of all such material.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

(Lack of Timely and Adequate Notification to Publisher)

42. Plaintiff realleges and incorporates by reference paragraphs 1-41 herein.
43. Neither the publisher nor the subscribing prisoner is given notice that a facility head or his or her designee is considering disapproval of a publication.

44. The subscribing prisoner is given notice that the facility has disapproved the publication. However, a prisoner has no right to provide any information to the PRC, is not informed as to the article(s) and/or advertisement(s) at issue, and does not have a copy of the censored publication. Thus, only the publisher could make a meaningful challenge to a decision to censor a publication.
45. However, no notification is provided to the publisher that its publication has been disapproved until after a final decision has been made by the PRC. Thus PLN is prevented from providing information or otherwise contesting a disapproval decision before the PRC. The publication is effectively banned without input until a decision is made by the PRC. This is a binding, statewide decision that results in the publication being banned in all VDOC facilities.
46. As noted, no notice was received by Plaintiff as to some of the decisions of the PRC to disapprove a publication and when Plaintiff does receives notices, it is often months after the final decision has been made.
47. Moreover, if the PRC upholds the disapproval decision of the facility, the Notice sent to publishers does not specify the article(s) and/or advertisement(s) upon which the disapproval decision was made nor does the notice state how the article(s) and/or advertisement(s) violate the identified criteria.
48. Thus, Plaintiff PLN is prevented from being able to meaningfully refute or otherwise rebut any decision of the PRC in its appeal to the Deputy Director for Operations.
49. The failure to provide timely notification and adequate reasons for disapproval decisions, without adequate penological justification, violates Plaintiff's First Amendment and due

process rights.

50. As a direct and proximate result of the conduct of Defendants, Plaintiff has suffered financial injury.

SECOND CAUSE OF ACTION
(Lack of Timely Decision)

51. Plaintiff realleges and incorporates by reference paragraphs 1-50 herein.
52. OP 803.2 does not set any limit on when a review of a facility censorship decision must be considered and completed by the PRC.
53. In addition, the delay in providing notice to the publisher of the decisions of the PRC further delays the ability of the Plaintiff to take the limited appeal available to it and effectively bans the publication even longer.
54. The failure of Defendants to expeditiously consider and resolve the proposed ban of a publication, especially without notice to the publisher and without adequate penological justification, violates Plaintiff's First Amendment and due process rights.

THIRD CAUSE OF ACTION
(Arbitrary and Capricious Decisions)

55. Plaintiff realleges and incorporates by reference paragraphs 1-54 herein.
56. Since 2007, Defendants have disapproved numerous issues of PLN. On information and belief, some of these issues were censored based on advertisements, such as an advertisement allowing a prisoner to purchase items by the use of postage stamps for currency.
57. Similar advertisements have been included in every issue of PLN since approximately 1995 and Defendants have not censored all of the issues that contain such advertisements.

58. Defendants have also disapproved issues of PLN based on the assertion that some of the articles put law enforcement in a negative light and that these articles therefore “could be detrimental to the security and good order of the institution and the rehabilitation of offenders.”
59. Most of these articles are summaries of reported court decisions or of the public record of the court proceedings taken from court records or mainstream newspapers. However, while censoring PLN, Defendants have not banned the public source materials for those articles.
60. Moreover, Defendants have not provided a rationale for concluding that truthful reporting of court proceedings and decisions “could be detrimental to the security and good order of the institution and the rehabilitation of offenders,” thus preventing Plaintiff from responding to such claims.
61. The vague criteria described above has led to arbitrary and capricious decisions at the facility level as well as the at PRC, particularly since the practice of the PRC has not provided adequate guidance on the meaning of that criteria.
62. The arbitrary and capricious conduct of Defendants as described above, without adequate penological justification, violates Plaintiff’s First Amendment and due process rights.
63. As a direct and proximate result of the aforesaid conduct of Defendants, Plaintiff has suffered financial injury.

FOURTH CAUSE OF ACTION
(Censorship of Constitutionally Protected Speech)

64. Plaintiff realleges and incorporates by reference paragraphs 1-63 herein.

65. Defendants have disapproved publications that contain constitutionally protected speech. For example, issues have been disapproved based on articles about court proceedings merely because the proceeding or decision puts law enforcement in a negative light. Thus, issues of PLN that contain articles based upon court decisions related to law enforcement officials engaging in illegal and unconstitutional acts will likely result in that issue being banned from receipt by any prisoner confined in facilities under the direction and control of Defendants.
66. Other issues have been disapproved because of an article that describes the conditions of prisons and the daily drudgery and cruelties of prison life.
67. The aforesaid conduct by Defendants, without adequate penological justification, violates Plaintiff's First Amendment rights.
68. As a direct and proximate result of the aforesaid conduct of Defendants, Plaintiff has suffered financial injury.

FIFTH CAUSE OF ACTION
(Refusal to Allow Gift Subscriptions)

69. Plaintiff realleges and incorporates by reference paragraphs 1-68 herein.
70. OP 803.2 and the practice of Defendants prohibits prisoners in facilities under their direction and control from receiving gift subscriptions and gift books.
71. The policy and practice of Defendants in refusing to allow gift subscriptions and gift books, without adequate penological justification, violates Plaintiff's First Amendment rights.
72. As a direct and proximate result of the conduct of Defendants, Plaintiff has suffered

financial injury.

SIXTH CAUSE OF ACTION
(Refusal to allow information packets)

- 73. Plaintiff realleges and incorporates by reference paragraphs 1-72 herein.
- 74. Prohibiting the receipt by Plaintiff's subscribers and others of information on how to subscribe to the magazine and about books and other publications for sale by Plaintiff, without adequate penological justification, violates Plaintiff's First Amendment rights.
- 75. As a direct and proximate result of the conduct of Defendants, as described above, Plaintiff has suffered financial injury.

WHEREFORE, Plaintiff requests the following relief:

- a. Declaratory judgment that the failure to provide adequate and timely notice of decisions to disapprove a publication and to provide Plaintiff a timely and adequate opportunity to be heard violates Plaintiff's First Amendment and due process rights;
- b. Preliminary and permanent injunction requiring that facilities under the control and direction of Defendants provide notice to the Plaintiff of any proposed decision to disapprove a PLN publication prior to a decision and that the notice indicate what specific article(s) and/or advertisement(s) are at issue and if a book, what pages, and an explanation of how the article(s) and/or advertisement(s) or pages in question may violate the criteria listed in OP 803.2;
- c. Preliminary and permanent injunction requiring that facilities under the control and direction of Defendants provide notice to the Plaintiff of any facility decision to

disapprove a PLN publication, that the notice indicate what specific article(s) and/or advertisement(s) are disapproved and if a book, what pages, and an explanation of how the article(s) and/or advertisement(s) or pages in question violate the criteria listed in OP 803.2;

- d. Preliminary and permanent Injunction directing that the Publications Review Committee consider any and all information submitted to it by Plaintiff prior to deciding whether to uphold a facility decision to disapprove or ban a PLN publication;
- e. Preliminary and permanent injunction directing that the PRC determine whether to uphold a ban imposed by a facility under the control of Defendants within 10 business days of receiving a publication that has been disapproved at the facility level;
- f. Preliminary and permanent injunction requiring that the PRC provide notice to the Plaintiff of any decision to uphold a facility decision to disapprove a publication within 7 days of that decision and to provide notice as to the specific article(s) and/or advertisement(s) at issue and if a book, what pages, and an explanation of how the article(s) and/or advertisement(s) or pages in question violate the criteria listed in OP 803.2;
- g. Declaratory judgment that an article that presents a negative perception of law enforcement without more cannot be the basis of a censorship decision either by a facility under the direction and control of Defendants or the Publication Review Committee.
- h. Declaratory judgment that the policy that prohibits prisoners in facilities under the direction and control of Defendants from receiving gift subscriptions and gift books violates the First Amendment;
- i. Preliminary and permanent injunction prohibiting Defendants from enforcing the policy prohibiting gift subscriptions to PLN and the purchase of gift books by third parties;

- j. Declaratory judgment that the policy that prohibits prisoners from receiving information packets (or comparable information) in facilities under the direction and control of Defendants violates the First Amendment;
- k. Preliminary and permanent injunction prohibiting Defendants from enforcing its policy prohibiting prisoners from receiving information packets (or comparable information) from PLN;
- l. Awarding Plaintiff nominal, compensatory and punitive damages;
- m. Awarding attorney's fees and costs to Plaintiff;
- n. Awarding such other and further relief as the Court may deem just and proper.

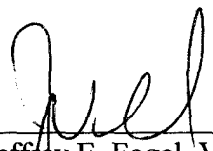
JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

Respectfully submitted,

PRISON LEGAL NEWS, INC.

By Counsel



Jeffrey E. Fogel, VSB #75643
Attorney at Law
913 E. Jefferson Street
Charlottesville, VA 22902
434-984-0300 (Tel)
Email: jeff.fogel@gmail.com

Steven D. Rosenfield, VSB #16539
Attorney at Law
913 E. Jefferson Street

Charlottesville, VA 22902
434-984-0300 (Tel)
Email: attyrosen@aol.com

Daniel E. Manville
General Counsel for the Human Rights Defense Center
P.O. Box 20321
Ferndale, MI 48220
248-890-4720 (Tel)
Email: daniel.manville@gmail.com
Application to proceed *pro hac vice* to be filed

Attorneys for Plaintiff