UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN,

Plaintiff,

v.

LIVINGSTON COUNTY, BOB BEZOTTE and TOM CREMONTE,

Defendants.
_____/

Civil Action No. 14-11213

Honorable Denise Page Hood

ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER and NOTICE OF SETTING HEARING DATE ON MOTION FOR PRELIMINARY INJUNCTION

I. BACKGROUND

On March 24, 2014, Plaintiff American Civil Liberties Union Fund of Michigan ("ACLU") filed the instant action against Defendants Livingston County, Bob Bezotte and Tom Cremonte challenging the constitutionality of Livingston County Jail's post-card only mail policy. The case was reassigned to the undersigned as a companion case to *Prison Legal News v. Livingston County Sheriff Bob Bezotte,* Case No. 11-13460. The ACLU alleges under 42 U.S.C. § 1983 three counts: Violation of First Amendment (Blocking Mail) (Count One); Violation of First Amendment (Reading

and Publishing Mail) (Count Two); and Violation of Fourteenth Amendment (Due Process) (Count Three).

The ACLU is a not-for-profit 501(c)(3) organization dedicated to protecting the individual rights and liberties that the Constitution guarantees to everyone in this country. (Comp., ¶ 8) The ACLU alleges that the Livingston County Jail severely restricts inmate communication with the outside world through a "postcard only" mail policy, which limits all incoming and outgoing mail to one side a 4 by 6 inch postcard. (Comp., ¶ 2) The policy excepts legal mail, but the ACLU claims Defendants do not allow ACLU attorneys to write letters to inmates regarding the constitutionality of their conditions of confinement, including letters that would address the constitutionality of the postcard-only policy itself. (Comp., ¶ 2) Defendants failed to notify either the ACLU or the inmates to whom the legal mail is addressed that the mail was not being delivered to its intended recipients and opened, read and shared the legal mail sent by an ACLU attorney to an inmate who no longer resides at the jail. (Comp., ¶ 4)

Livingston County Jail is one of a growing number of jails in Michigan and other states to have implemented a controversial "postcard only" policy for inmate mail. (Comp., ¶ 12) The United States Supreme Court has specifically recognized that for the ACLU, litigation is not a technique resolving private differences, but is instead

a form of political expression and political association protected by the First Amendment. (Comp., ¶ 18) The ACLU has long been dedicated to protecting the constitutional rights of prisoners. (Comp., ¶19) In addition to numerous cases the ACLU has participated in involving inmates, ACLU attorneys have previously represented Livingston County Jail inmates in challenging the unconstitutional conditions of their confinement. (Comp., ¶ 22) The ACLU, recognizing that ending Defendants' postcard-only policy may require inmates themselves to take legal action, the ACLU decided to reach out to inmates who are currently detained by Defendants. (Comp., ¶ 27) On February 19, 2014, an ACLU attorney mailed 25 letters in envelopes addressed to individually named inmates at the Livingston County Jail. (Comp., ¶ 28) The envelopes were clearly marked "legal mail," and the attorney's name, Michigan bar number on the envelope, along with the ACLU's logo and address. (Comp., ¶ 28) The ACLU attorney's letters expressed concern that the postcard-only policy is unconstitutional and offered to meet with inmates, upon their request, to provide legal advice or assistance regarding that issue. (Comp., ¶ 30) The letters provided inmates with a form to fill out and return to the ACLU if they wished to request a meeting with an ACLU attorney. (Comp., ¶ 30) The ACLU letters described above were received by Defendants at the jail on or about February 21, 2014. (Comp., ¶ 31)

The ACLU has not received any responses to its letters. (Comp., ¶ 32) The ACLU became aware of deposition testimony by Defendant Cremonte in the related case where he testified that Defendants do not deliver legal mail sent by an attorney to an inmate unless the mail is sent by the inmate's "attorney of record" on an ongoing court case. (Comp., ¶¶ 34-35) Cremonte further testified that Defendants do not deliver legal mail when an attorney from outside the county writes to four or five inmates and they do not deliver legal mail sent by an attorney to an inmate if jail officials conclude that the letter is a "mass mailing." (Comp., ¶¶ 34) Based on this testimony, Defendants believe that the ACLU letters were not delivered to the specific inmates and that the letters remain in Defendants' custody. (Comp., ¶¶ 35-36) The ACLU has not been notified that the letters addressed to specific inmates were not delivered. (Comp., ¶ 37) Defendants have opened a letter addressed to an inmate no longer in their custody, read the contents of the letter, sent a scanned copy of the letter via email to attorneys who represent Defendants in the *Prison Legal News v. Bezotte* case, which Defendants' attorneys filed the letter as a public court document via PACER. (Comp., ¶ 42)

On April 9, 2014, the ACLU filed a Motion for Temporary Restraining Order and/or Preliminary Injunction. The ACLU indicated it has notified defense counsel in the *Prison Legal News v. Bezotte* case of the Complaint and motion, but were told

that defense counsel has yet to be retained as counsel in this lawsuit.

II. ANALYSIS

A. Standard

The ACLU seeks an order requiring Defendants to immediately deliver the ACLU's letters currently in Defendants' possession, which the ACLU had sent to certain inmates, or, if the inmate is no longer in Defendants' custody, return the letter to the ACLU with a suitable explanation for why it is being returned. The ACLU also seeks to enjoin Defendants' policy and practice of refusing to promptly deliver properly marked legal mail sent by an attorney and individually addressed to an inmate, enjoining Defendants from failing to take reasonable steps to provide individualized notice and an opportunity be heard to the intended recipient and to the sender of any mail that is individually addressed to an inmate but not promptly delivered to the inmate, and enjoining Defendants from reading, sharing or publishing the content of legal mail addressed to an inmate without a search warrant or probable cause.

Rule 65(b) of the Federal Rules of Civil Procedure provides the Court with authority to issue a temporary restraining order as follows:

> **Rule 65(b) Temporary Restraining Order.**
>
> **(1)** ***Issuing Without Notice***. The court may issue a temporary restraining order without written or oral notice to the adverse party or its

attorney only if:

> (A) specific facts shown by affidavit or by a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition;
>
> (B) the movant's attorney certifies to the court in writing any efforts made to give the notice and the reasons why it should not be required.

Fed. R. Civ. P. 65(b).

Rule 65(b) is clear that the possibly drastic consequences of a restraining order mandate careful consideration by a trial court faced with such a request. 1966 Advisory Committee Note to 65(b). Before a court may issue a temporary restraining order, it should be assured that the movant has produced compelling evidence of irreparable and imminent injury and that the movant has exhausted reasonable efforts to give the adverse party notice. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Sniadach v. Family Finance Corp.*, 339 U.S. 337 (1969); 11 Wright & Miller, Federal Practice and Procedure § 2951, at 504-06 (1973). Other factors such as the likelihood of success on the merits, the harm to the non-moving party and the public interest may also be considered. 11 Wright & Miller at § 2951, at 507-08; *Workman v. Bredesen,* 486 F.3d 896, 904-05 (6th Cir. 2007).

As to the notice issue, although not yet retained, Defendants' counsel in the related *Prison Legal News v. Bezotte* case have notice of this lawsuit and motion.

Addressing the irreparable injury requirement, it is well settled that a plaintiff's harm is not irreparable if it is fully compensable by money damages. *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992). However, an injury is not fully compensable by money damages if the nature of the plaintiff's loss would make damages difficult to calculate. *Id.* at 511-512.

Reviewing the Complaint, the Court finds that the ACLU has been irreparably harmed by Defendants' failure to deliver the mail sent by an ACLU attorney to specifically named inmates and by publishing at least one letter to the public which letter was intended for a specific inmate. It is well settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976); *Newsome v. Norris,* 888 F.3d 371, 378 (6th Cir. 1989). Correspondence from an attorney is the very essence of "legal mail." *Kensu v. Haigh*, 87 F.3d 172, 174 (6th Cir. 1996). A prisoner may not be required to designate ahead of time the name of the attorney who will be sending him confidential legal mail. *Knop v. Johnson,* 977 F.2d 996, 1012 (6th Cir. 1992). A prisoner's interest in unimpaired, confidential communication with an attorney is an integral component of the judicial process and, mail from an attorney implicates a prisoner's protected legal mail rights. *Kensu*, 83 F.3d at 174. There is no penological interest or security concern that justifies opening such legal mail

outside the prisoner's presence. *Sallier v. Brooks*, 343 F.3d 868, 877 (6th Cir. 2003). The Sixth Circuit has noted that mail from the ACLU is confidential legal mail. *Id.* at 877; *Boswell v. Mayer*, 169 F.3d 384, 389 (6th Cir. 1999).

Based on the ACLU's allegations in its Verified Complaint, the ACLU has shown it has suffered irreparable injury when the legal mail sent by its attorney to specifically-named inmates in Defendants' custody was not delivered or was read, shared and published outside the inmate's presence.

Whether the ACLU will prevail on the merits, based on the Sixth Circuit law noted above and the allegations in its Verified Complaint, the ACLU has shown it may prevail on the merits. The Court issues a temporary restraining order for Defendants to deliver the mail sent by the ACLU to the specifically named inmates.

III. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that Plaintiff's Motion for Temporary Restraining Order **(Doc. No. 11, filed April 9, 2014)** is GRANTED.

IT IS FURTHER ORDERED that Defendants must deliver the mail noted in Plaintiff's Complaint to the specifically-named inmates in Defendants' custody forthwith. If the inmate is no longer in custody, Defendants must return the mail forthwith to Plaintiff indicating same. Defendants are enjoined from not delivering

any legal mail to any inmate from the ACLU.

IT IS FURTHER ORDERED that, although Plaintiff has not addressed the security requirement set forth in Fed. R. Civ. P. 65(c), the Court will not require a security since the matter involves a constitutional issue affecting the public.

IT IS FURTHER ORDERED that the Motion for Preliminary Injunction is set for a hearing on **Monday, May 12, 2014, 3:00 p.m.** Plaintiff must serve Defendants with the Complaint and Motion by **April 15, 2014.** Any response to the motion must be filed by **April 25, 2014**. Any reply to the response must be filed by **May 2, 2014.**

S/Denise Page Hood
Denise Page Hood
United States District Judge

Dated: April 11, 2014

I hereby certify that a copy of the foregoing document was served upon counsel of record on April 11, 2014, by electronic and/or ordinary mail.

S/Julie Owens for LaShawn R. Saulsberry
Case Manager