

JUL 24 1996

JAMES R. LARSEN, CLERK
DEPUTY

1 DONALD W. MINIKEN #975666
2 Airway Heights Corrections Center
3 P.O. Box 2019, K-A-51-L
4 Airway Heights, WA 99001-2019
5 (509) 244-6700

6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON

8 DONALD W. MINIKEN,
9 Plaintiff,
10 vs.
11 KAY WALTER and DAVID BUSS,
12 Defendants.

CS-96-0407 JLC

CIVIL RIGHTS COMPLAINT

13 INTRODUCTION

14 This is a civil rights complaint brought by a pro se
15 prisoner litigant pursuant to 42 U.S.C. § 1983. Plaintiff
16 alleges that defendants have rejected and destroyed copies of the
17 Prison Legal News when they arrived at the Airway Heights
18 Corrections Center, without notice of or reasons given for
19 rejecting the magazines.

20 Plaintiff further alleges that the practical effect of
21 defendants practice is to unilaterally exempt from First
22 Amendment protection all mailings sent by bulk rate, regardless
23 of the mailing's content or effect on the security of the
24 prison. Defendants decision to censor or reject copies of the
25 Prison Legal News, without affording plaintiff any measure of
26 process constitutes irreparable harm. Plaintiff seeks
27 declaratory, injunctive and monetary relief.

28 CIV RIT COM

1 for handling and processing prisoners mail. These defendants
2 acted under color of law.

3 ADMINISTRATIVE REMEDIES

4 8. Plaintiff filed two institutional grievances, which
5 resulted in no corrective action. Plaintiff has no adequate
6 remedy at law other than the relief requested herein.

7 FACTUAL ALLEGATIONS

8 9. On or about December 20, 1995, plaintiff subscribed to
9 the Prison Legal News, a monthly magazine of news and analysis
10 pertaining to legal and political developments affecting those
11 involved in the criminal justice system.

12 10. Because he had not received an issue of the Prison
13 Legal News by April, 1996, plaintiff wrote to that publication
14 inquiring as to why he had not received a single issue.
15 Plaintiff was informed that an issue of the magazine had been
16 sent to him each month since January, 1996.

17 11. On April 12, 1996, plaintiff filed two grievances in
18 connection with the failure of the Airway Heights Corrections
19 Center mailroom's failure to deliver his mail. The first
20 pertained to AHCC FI 450.100, which states: "Bulk mail will not
21 be delivered." Exhibit 1. The second addressed the rejection
22 and destruction of the Prison Legal News without notice to either
23 himself or the publisher. Exhibit 2.

24 12. On April 26, 1996, plaintiff received responses to both
25 grievances. In response to the first complaint the grievance
26 coordinator stated: "There is no postal requirement to deliver
27 the mail further than the facility." Exhibit 1. In response to

1 the second complaint the grievance coordinator stated: "Bulk mail
2 is NOT rejected mail. It is considered 'junk mail' and returned
3 to sender if possible or disposed of properly." Exhibit 2.

4 13. On April 27, 1996, plaintiff appealed both responses.
5 Exhibits 3 & 4. On May 23, 1996, plaintiff received a response
6 to his appeals which are identical. Exhibits 3 & 4.

7 14. On July 9, 1996, plaintiff received the Affidavit of
8 Rollin Wright (with attachments), the publisher and registered
9 business agent of the Prison Legal News. In his Affidavit,
10 Mr. Wright explains why the magazine is mailed via third class
11 non-profit mail, why a subscriber cannot make arrangements to
12 receive the Prison Legal News via first or second class mail, and
13 that he has never been sent any type of notice that plaintiff's
14 issues to the Prison Legal News were being censored at the Airway
15 Heights Corrections Center, nor given an opportunity to appeal
16 that censorship. Exhibit 5.

17 RELIEF REQUESTED

18 15. Plaintiff requests declaratory judgment that defendants
19 rejection of any mail addressed to plaintiff on the sole ground
20 that the mail is sent bulk rate is unconstitutional in that it
21 violates the First Amendment of the United States Constitution.

22 16. Plaintiff requests declaratory judgment that defendants
23 rejection of any mail addressed to plaintiff without affording
24 plaintiff notice of rejection and an opportunity to appeal the
25 rejection is unconstitutional in that it violates the Fourteenth
26 Amendment of the United States Constitution.

27 17. Plaintiff requests injunctive relief from this court

1 enjoining defendants, and their agents, from rejecting mail
2 addressed to plaintiff on the sole ground that the mail is sent
3 bulk rate.


4 18. Plaintiff requests injunctive relief from this court
5 enjoining defendants, and their agents, from rejecting mail
6 addressed to plaintiff without affording him notice of rejection
7 and an opportunity to appeal the rejection.

8 19. Plaintiff requests this court award plaintiff \$250.00
9 for each rejected and destroyed magazine.

10 20. Plaintiff requests an award of costs and attorney fees
11 pursuant to 42 U.S.C. § 1988.

12 21. Plaintiff requests that the court grant any other such
13 relief as the court may deem appropriate and just.

14
15 SIGNED UNDER PENALTY OF PERJURY this 18th day of July, 1996.

16 
17 _____
18 Donald W. Miniken #975666
19 Airway Heights Corrections Center
20 P.O. Box 2019. K-A-51-L
21 Airway Heights, WA 99001-2019



DEPARTMENT OF CORRECTIONS
DIVISION OF OFFENDER PROGRAMS
RESIDENTIAL FACILITIES

INITIAL GRIEVANCE ✓

ROUTINE (01) EMERGENCY (02)

NAME LAST MINIKEN	FIRST DONALD	MIDDLE W.	DOC NUMBER 975666	FACILITY AHCC	UNIT/CELL KA51L	LOG I.D. NUMBER 9607339
REMAND NUMBER	DATE TYPED 4/19/96	REMEDY 03		PART B - OBJTS INFORMATION RESOLUTION 04		PENDING

RESPONSE DUE 5/7/96 PART A - INITIAL GRIEVANCE

I want to grieve the section in Airway Heights Corrections Center (AHCC) Field Instruction 450.100, Page 9, which states that "Bulk mail will not be delivered." Page 1 defines "bulk mail" as any "mail sent without endorsement (i.e., address correction requested, forwarding, postage guaranteed, etc.) as classified by the United States Postal Service." In fact, this definition is not supported by the postal service requirements for nonprofit bulk mail. Nonprofit bulk mail such as the Prison Legal News (PLN) specifically state that postage has been paid. Yet, the PLN has been rejected at AHCC, despite its apparent compliance with postal service bulk mail requirements. The continued rejection and destruction of the PLN violates the state and federal constitutions. This situation has been facilitated by and is the direct result of the deliberate indifference of the superintendent and/or the superintendent's designee.

SUGGESTED REMEDY: Stop rejecting nonprofit bulk mail such as the Prison Legal News.

[Signature] 4/24/96 ✓
GRIEVANCE COORDINATOR DATE

[Signature] 4/24/96
GRIEVANT DATE

PART B - LEVEL I RESPONSE

AHCC Field Instruction #450.100 reads "Bulk Mail will not be delivered."

Mail sent bulk class mail is a low cost postal service which is low cost due, in part, to no guarantee of delivery to the address location. Typically, bulk mail is without "endorsement" for bulk mail. There is no postal requirement to deliver the mail further than the facility. It is then subject to facility rules on delivery of bulk mail as the sender's contract of postal services has otherwise been successfully concluded.

The problem is not the PLN per se. The problem is the selected method of delivery, i.e., unendorsed bulk mail delivery. If the institution accept that method of delivery for any publication, they effectively open the door to all publications delivered in that manner. The costs of processing high levels of junk mail, in terms of staff power, contraband, safety, security and hygiene, clearly represent a legitimate penological cause for rejection.

The obvious answer is to contact the sender and have them send your publication first or second class mail, directly from the publisher and in accordance with the published rules of the institution.

YOU MAY APPEAL THIS RESPONSE BY SUBMITTING A WRITTEN APPEAL TO THE COORDINATOR WITHIN TWO (2) WORKING DAYS FROM DATE THIS RESPONSE WAS RECEIVED

[Signature] 4/25/96
GRIEVANCE COORDINATOR DATE



DEPARTMENT OF CORRECTIONS
DIVISION OF OFFENDER PROGRAMS
RESIDENTIAL FACILITIES

INITIAL GRIEVANCE

ROUTINE (01)

EMERGENCY (02)

NAME: LAST MINKEN	FIRST DONALD	MIDDLE W.	DOC NUMBER 975666	FACILITY AHCC	UNIT/CELL KA51L	LOG I.D. NUMBER 9607340
REMAND NUMBER	DATE TYPED 5/7/96	4/19/96	PART B - OTHER INFORMATION			
			REMEDY 08	RESOLUTION 04	PENDING	

RESPONSE DUE: **PART A - INITIAL GRIEVANCE**
I want to grieve the Mailroom for refusing to deliver to me the January, February, March, and April issues of the publication Prison Legal News (PLN). Indeed, issues of the PLN have been rejected at Airway Heights Corrections Center (AHCC) and destroyed, all without notice to me or to the PLN as the publisher. AHCC Field Instruction 450.100, Page 14, states:

1. If any portion of an inmate's incoming or outgoing mail is restricted for the reasons set forth in this field instruction, written notification will be provided to the inmate and the sender by Mailroom staff utilizing DOC form 5-525. (emphases added).
 - a. The notification shall specify the publication, letter, or package which has been restricted and include the reasons for the action. (emphases added).

The field instruction includes the mandatory language of will and shall. Thus, an Offender Mail Rejection notice was required each time an issue of the PLN was rejected. The continuing rejection of and destruction of the PLN violates the state and federal constitutions. This situation has been facilitated by and is the direct result of the deliberate indifference of the superintendent and/or the superintendent's designee.

SUGGESTED REMEDY: Due to the ongoing violations, a training program should be developed to ensure that the staff personnel responsible for handling inmates mail, understand their obligations and responsibilities to protect an inmate's constitutional rights and the importance of honoring those obligations.

R. Weath 4/24/96 Don Mink 4/24/96
GRIEVANCE COORDINATOR DATE GRIEVANT DATE

PART B - LEVEL I RESPONSE

AHCC Field Instruction policy reads "Bulk Mail will not be delivered."

Mail sent "bulk class" is a low cost postal service which is low cost ~~per~~, in part, to no guarantee of delivery to the address location. Typically, bulk mail is without "endorsement", i.e., address correction, forwarding or return to sender. Absent the purchase provision of "endorsement" for bulk mail, there is no postal requirement to deliver the mail further than the facility. It is then subject to facility rules on delivery of bulk mail as the sender's contract of postal services otherwise have been successfully concluded.

Bulk mail is NOT rejected mail. it is considered "junk mail" and returned to sender if possible or disposed of properly. The logical remedy to your complaint is to contact the publisher of PLN and set up arrangements to have the publication sent to the institution first or second class mail, directly from the publisher and in accordance with institution rules.

No changes to policy will occur.

YOU MAY APPEAL THIS RESPONSE BY SUBMITTING A WRITTEN APPEAL TO THE COORDINATOR WITHIN TWO (2) WORKING DAYS FROM DATE THIS RESPONSE WAS RECEIVED

H. P. ...
GRIEVANCE COORDINATOR

11/25/96
DATE



NAME: LAST MINIKEN	FIRST DONALD	MIDDLE W.	DOC NUMBER 975666	FACILITY AHCC	UNIT/CELL K451L	LOG NUMBER 9607339
REMAND NUMBER	DATE TYPED 5/3/96	PART B - ORBIT INFORMATION		REMEDY 08	RESOLUTION 04	PENDING

RESPONSE DUE 5/24/96 PART A - APPEAL TO LEVEL II

I want to grieve to the next level the response of the Grievance Coordinator dated 4/25/96. I received the response on 4/26/96. I hereby reiterate the complaint and remedy in the initial grievance. The response does not satisfy the factual criteria to be examined in making the determination as to whether the restriction claimed is constitutional. This situation has been facilitated by and is the direct result of the deliberate indifference of the superintendent and/or the superintendent's designee.

[Handwritten signature: H. De...]
 GRIEVANCE COORDINATOR DATE 5/6/96 GRIEVANT DATE

[Handwritten: original]

PART B - LEVEL II RESPONSE

I have reviewed your appeal to Level I, Level I response, and appeal to Level II. We have received further clarification from Headquarters regarding bulk mail. When bulk mail arrives at an institution and has "Returned Postage Guaranteed" written on it, it will be delivered to the inmate if the contents are otherwise in compliance with WAC and DOC mail policy. No other type of bulk mail will be delivered to inmates and rejection notices will not be issued due to the enormous workload that would be generated. You can request publishers to send your mail at postage rates other than bulk mail. DOC Headquarters has stated that the issue of bulk mail will be addressed in both the WAC and DOC policy when they are next revised.

YOU MAY APPEAL THIS RESPONSE BY SUBMITTING A WRITTEN APPEAL TO THE COORDINATOR WITHIN TWO (2) WORKING DAYS FROM DATE THIS RESPONSE WAS RECEIVED.

[Handwritten signature: Ce R...]
 SUPERINTENDENT / ADMINISTRATOR DATE 5/17/96



DEPARTMENT OF CORRECTIONS
DIVISION OF OFFENDER PROGRAMS
RESIDENTIAL FACILITIES

APPEAL TO LEVEL II
SUPERINTENDENT / ADMINISTRATOR

NAME: LAST MINKEN	FIRST DONALD	MIDDLE W.	DOC NUMBER 975666	FACILITY AHCC	UNIT/CELL KASIL	LOG I.D. NUMBER 9607340
REMAND NUMBER	DATE TYPED 5/3/96	PART B - ORTS INFORMATION			RESOLUTION 04	PENDING
		REMEDY 08				

RESPONSE DUE 5/24/96 PART A - APPEAL TO LEVEL II

I want to grieve to the next level the response of the Grievance Coordinator dated 4/25/96. I received the response on 4/26/96. I hereby reiterate the complaint and remedy in the initial grievance. What section of the AHCC Field Instruction 450.100 defines "junk mail"?

[Handwritten Signature] 5/6/96 ✓ -S-
GRIEVANCE COORDINATOR DATE GRIEVANT

PART B - LEVEL II RESPONSE

I have reviewed your appeal to Level I, Level I response, and appeal to Level II. We have received further clarification from Headquarters regarding bulk mail. When bulk mail arrives at an institution and has "Returned Postage Guaranteed" written on it, it will be delivered to the inmate if the contents are otherwise in compliance with WAC and DOC mail policy. No other type of bulk mail will be delivered to inmates and rejection notices will not be issued due to the enormous workload that would be generated. You can request publishers to send your mail at postage rates other than bulk mail. DOC Headquarters has stated that the issue of bulk mail will be addressed in both the WAC and DOC policy when they are next revised.

YOU MAY APPEAL THIS RESPONSE BY SUBMITTING A WRITTEN APPEAL TO THE COORDINATOR WITHIN TWO (2) WORKING DAYS FROM DATE THIS RESPONSE WAS RECEIVED.

[Handwritten Signature] 5/17/96
SUPERINTENDENT / ADMINISTRATOR DATE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DONALD W. MINIKEN,)
)
 Plaintiff,)
)
 vs.)
)
 KAY WALTER; DAVID BUSS,)
)
 Defendants.)
)
 _____)

CASE NO. CS-96-407-JLQ

AFFIDAVIT OF ROLLIN WRIGHT

STATE OF FLORIDA)
) SS
 COUNTY OF PALM BEACH)

I, Rollin R. Wright, after first being duly sworn upon oath, do hereby depose and say:

That I am over 21 years of age, a citizen of the United States and competent to be a witness therein;

That I am the publisher and registered business agent of *Prison Legal News*, a monthly magazine of news and analysis pertaining to legal and political developments affecting those involved in the criminal justice system. In this capacity I respond to *PLN's* mail, answer inquiries, receive mail and issues of the magazine which have been returned by the post office.

No issues of *PLN* addressed to any subscribers at the Airway Heights Corrections Center (AHCC) in Airway Heights, Washington, have ever been returned to *PLN* by the post office or by the prison. The only time I have ever received a notice of mail rejection or censorship from AHCC officials was in march, 1996, when an issue I had sent to AHCC prisoner, and *PLN* subscriber, Billy Blankenship, was censored. I have written to AHCC superintendent Kay Walter and DOC secretary Chase Riveland requesting more information why that issue was censored and as of today's date neither has seen fit to respond to my inquiry.

PLN is a non-profit educational corporation. As such it mails its publications via third class non-profit mail, now called "standard mail" by the post office. The reason for doing so are the non-profit rates are significantly cheaper than first or *second class* mail and has fewer bookkeeping requirements than second class mail. A brief

economic comparison: it would cost at least 55 cents to mail each issue of *PLN* via first class mail, whereas now *PLN* pays 12.1 cents to mail each issue. Because *PLN* is a reader supported non-profit operation our subscription rates are based on mailing each issue via non-profit rates. It is not possible, economically, for *PLN* to send its publications via first or second class mail.

Since AHCC opened in 1994 I have consistently received complaints from our subscribers at that facility stating that they were not receiving their *PLN*. On October 27, 1995, I wrote to Chase Riveland inquiring why *PLN* was not being delivered to AHCC and Washington State Penitentiary subscribers. I sent copies of this letter to AHCC superintendent Kay Walter. (Attachment 1)

In November, 1995, I received a letter dated November 8, 1996, from Tom Rolfs, the Director of the Division of Prisons for Washington state. (Attachment 2) He informed me that AHCC does not deliver "bulk mail" to its prisoners. He claimed there was no requirement that prisons process "bulk mail." At no point have I ever received any type of notice that *PLN* was being censored at AHCC due to its bulk mail status, nor have I been afforded any opportunity to appeal this censorship. It appears *PLN* is simply being destroyed by AHCC officials. None have been returned to me by the post office. To my knowledge no AHCC prisoner has ever received a copy of *PLN* sent to him via third class mail.

Donald Miniken # 975666 subscribed to *PLN* in January, 1996. His subscription does not end until January, 1997. Mr. Miniken has been sent an issue of *PLN* for each month since January, 1996, to his address at P.O. Box 2019, Airway Heights, WA 99001-2019. None have been returned to me by the post office nor have I received any notice whatsoever from prison officials that *PLN* was being censored.

Donald MacFarlane # 981260 has been a *PLN* subscriber since November, 1992. His *PLN* subscription is being sent to him at: P.O. Box 1839, Airway Heights, WA 99001-1839. No issues sent to Mr. MacFarlane have been returned to *PLN* for any reason nor have I received any notice that his subscription is being censored for any reason.

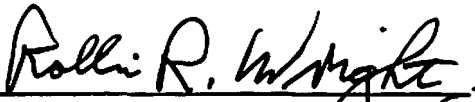
Over the past two years *PLN* has had approximately eight to twenty subscribers at AHCC. This number is continually declining because AHCC prisoners do not renew their subscriptions upon learning they will not receive their copies due to the ban on non-profit bulk mail. All issues are individually addressed to each subscriber and includes their proper address, name of commitment, DOC number and each issue usually requests an address correction if for any reason the post office cannot deliver a given issue.

PLN has prisoner subscribers in all fifty states. The only prisons who do not permit mail sent via third class mail are AHCC and WSP in Washington and the Oregon DOC. I worked for the postal service for thirty years as a bulk mail specialist. I have recently reviewed the Domestic Mail Manual and contacted George Hoyt, U.S. Postal Service Bulk Mail Specialist for the southeastern United States. I have found no mention of any postal rule or regulation that third class mail be treated any differently than first class mail in terms of it being delivered to its addressee.

Contrary to Mr. Rolfs' statement, AHCC subscribers to *PLN* cannot make arrangements to receive *PLN* via first or second class mail. Each issue of *PLN* is printed and mailed via third class mail by our printer. Our entire operation is centered on mailing issues via third class mail as an economic and logistical matter. The Washington Department of Corrections has been unwilling to resolve the matter of bulk mail deliver through administrative or informal means as evidenced by my correspondence with Mr. Riveland and Mr. Rolfs.

Under penalty of perjury I swear that the foregoing is true and correct to the best of my knowledge.

Sworn and Subscribed to on this 25th day of June, 1996.



ROLLIN R. WRIGHT
Publisher, Prison Legal News
P.O. Box 1684
Lake Worth, FLA. 33460

Prison Legal News

P.O. Box 1684 • Lake Worth, FL • 33460 •

October 27, 1995

Chase Riveland
Secretary of Corrections
P.O. Box 41100
Olympia, WA. 98504

RE: Censorship of PLN at WSP and AHCC

Dear Mr. Riveland,

I am the publisher of *Prison Legal News*, a monthly magazine which reports legal and political developments affecting those involved with the criminal justice system. As you may know, we have subscribers across the country, including throughout the Washington DOC.

I am writing because I have received repeated complaints from subscribers at both the Washington State Penitentiary (WSP) and Airway Heights Correction Center (AHCC) that they are not receiving their issues of PLN. The issues are being sent to these subscribers at their correct addresses and they are not being returned by the post office as undeliverable nor have I received any notice of mail rejection stating that PLN is being censored for any reason. This has been a repeated, consistent problem at WSP for the past five years and at AHCC since it opened. These problems do not occur at any other Washington state facilities, nor anywhere else in the country for that matter.

It seems apparent that officials at WSP and AHCC are illegally censoring PLN by destroying the issues without notice to either the subscribers or myself. Needless to say, this violates both state and federal law concerning the delivery of mail in general and the censorship of prisoner mail in particular. Please advise me what steps you plan to take to ensure that PLN is properly delivered to its WSP and AHCC subscribers or in the event of censorship both the affected subscribers and I are notified of the censorship and provided an opportunity to appeal the matter.

Also, please advise me what the procedure is for me, as PLN's publisher, to send unsolicited copies of PLN to prisoners at WSP. If you have any questions please do not hesitate to contact me at the above address or phone. I look forward to your reply and assistance in this matter.

Sincerely,

/s/

Rollin Wright,
Publisher, PLN

cc: Tana Wood, Superintendent, WSP; Kay Walters, Superintendent, AHCC; Michael Gendler, Attorney at Law; John Midgley, Evergreen Legal Services; As Needed

Attachment



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
DIVISION OF PRISONS

P.O. BOX 41123 • Olympia, Washington 98504-1123 • (360) 753-1502
FAX: (360) 586-9055

November 8, 1995

Rollin Wright
Prison Legal News
P.O. Box 1684
Lake Worth, FL 33460

Dear Mr. Wright:

Secretary Chase Riveland asked me to respond to your recent correspondence appealing the alleged censorship of your publication by Airway Heights Corrections Center and the Washington State Penitentiary.

In reference to your question concerning the distribution of *Prison Legal News*, the facilities handle bulk mail differently. Airway Heights Correction Center does not process incoming bulk mail to offenders. The Washington State Penitentiary allows for offenders to receive free publications sent via bulk mail provided it has been approved in advance and the publication does not violate the Department of Corrections policy on mail. The Washington State Penitentiary Field Instruction 450.100, Inmate Use of Mail, outlines the process required.

According to recent court rulings and the United State Post Office, there is no requirement to process incoming bulk mail to offenders since offenders can arrange to have materials sent by first or second class mail. Mail room staff are extremely busy and do not have the time to examine bulk mailings for contraband articles.

Sincerely,

A handwritten signature in black ink that reads "Tom Rolfs".

Tom Rolfs, Director
Division of Prisons

TR:srb.Sec 915

cc: Secretary Chase Riveland
Superintendent Tana Wood, WSP
Mail Room Supervisor, WSP

1 DONALD W. MINIKEN #975666
Airway Heights Corrections Center
2 P.O. Box 2019, K-A-51-L
Airway Heights, WA 99001-2019
3 (509) 244-6700
4


5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 DONALD W. MINIKEN,) No. CS-96-407-JLQ
8 Plaintiff,)
9 vs.) NOTICE OF HEARING
10 KAY WALTER and DAVID BUSS,) NOTE ON MOTION DOCKET:
11 Defendants.) August 5, 1996
12

13 TO: Clerk of the above-entitled court.

14 PLEASE TAKE NOTICE that plaintiff's Motion for Temporary
15 Restraining Order and/or Preliminary Injunction will be brought
16 on for consideration without oral argument on Monday, August 5,
17 1996, and the clerk is requested to note this cause on the motion
18 docket for that day.

19 Respectfully submitted this 18th day of July, 1996.

20
21 
22 Donald W. Miniken #975666
23 Airway Heights Corrections Center
24 P.O. Box 2019, K-A-51-L
25 Airway Heights, WA 99001-2019

1 DONALD W. MINIKEN #975666
2 Airway Heights Corrections Center
3 P.O. Box 2019, K-A-51-L
4 Airway Heights, WA 99001-2019
5 (509) 244-6700


6
7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF WASHINGTON**

9 DONALD W. MINIKEN,) No. CS-96-407-JLQ
10)
11 Plaintiff,)
12)
13 vs.) MOTION FOR TEMPORARY
14) RESTRAINING ORDER AND/OR
15 KAY WALTER and DAVID BUSS,) PRELIMINARY INJUNCTION
16)
17 Defendants.)
18)
19)
20)
21)
22)
23)
24)
25)
26)
27)
28)

29 COMES NOW the plaintiff Donald W. Miniken, appearing pro se,
30 hereby moves this court for an order granting a Temporary
31 Restraining Order and/or Preliminary Injunction: (1) enjoining
32 defendants from rejecting mail addressed to plaintiff without
33 affording plaintiff notice of rejection and an opportunity to
34 appeal the rejection to an impartial third party; and (2)
35 enjoining defendants from rejecting mail addressed to plaintiff
36 on the sole ground that the mail is sent bulk rate.

37 This motion is based upon Rule 65 of the Federal Rules of
38 Civil Procedure, and the attached memorandum of authorities.

39 Respectfully submitted this 18th day of July, 1996.

40 
41 _____
42 Donald W. Miniken #975666
43 Airway Heights Corrections Center
44 P.O. Box 2019, K-A-51-L
45 Airway Heights, WA 99001-2019

1 DONALD W. MINIKEN #975666
2 Airway Heights Corrections Center
3 P.O. Box 2019, K-A-51-L
4 Airway Heights, WA 99001-2019
5 (509) 244-6700

6 **UNITED STATES DISTRICT COURT**
7 **EASTERN DISTRICT OF WASHINGTON**

7 DONALD W. MINIKEN,) No. CS-96-407-JLQ
8)
9 Plaintiff,)
10 vs.) MEMORANDUM OF AUTHORITIES
11) IN SUPPORT OF MOTION FOR
12 KAY WALTER and DAVID BUSS,) TEMPORARY RESTRAINING ORDER
13) AND/OR PRELIMINARY INJUNCTION
14 Defendants.)

15 COMES NOW the plaintiff Donald W. Miniken, appearing pro se,
16 respectfully submits this memorandum in support of his Motion for
17 Temporary Restraining Order and/or Preliminary Injunction.

18 STATEMENT OF THE CASE

19 This is a civil rights complaint brought by a pro se
20 prisoner litigant pursuant to 42 U.S.C. § 1983. Plaintiff
21 alleges that defendants have rejected and destroyed copies of the
22 Prison Legal News - a monthly magazine of news and analysis
23 pertaining to legal and political developments affecting those
24 involved in the criminal justice system - when they arrived at
25 the Airway Heights Correction Center, without notice of or
26 reasons given for rejecting the magazines.

27 In his complaint plaintiff alleges that defendants have
28 violated his First Amendment rights by rejecting a magazine
29 mailed to him solely because it was sent via bulk mail and by

1 failing to afford plaintiff any measure of process in rejecting
2 the magazine. Plaintiff seeks declaratory, injunctive and
3 monetary relief. Plaintiff seeks this Temporary Restraining
4 Order and/or Preliminary Injunction to halt the continuing
5 violation of his constitutional rights. Plaintiff's complaint is
6 sworn under penalty of perjury and supports this motion.

7 DISCUSSION

8 A litigant may be granted a temporary restraining order by
9 the court upon showing that plaintiff is in danger of immediate
10 and irreparable injury, that the adverse party will not be
11 substantially harmed if the temporary restraining order is
12 granted, and that the plaintiff has a strong likelihood of
13 success in his lawsuit. Cassim v. Bowen, 824 F.2d 791, 795
14 (9th Cir. 1987).

15 A party seeking a preliminary injunction ". . . must show
16 either (1) a combination of probable success on the merits and
17 the possibility of irreparable injury, or (2) the existence of
18 serious questions going to the merits and that the balance of the
19 hardships tip sharply in [the movant's] favor." Diamontiney
20 v. Borg, 918 F.2d 793, 795 (9th Cir. 1990).

21 A. Irreparable Injury.

22 The loss of constitutional rights, even for a short period
23 of time, constitutes irreparable injury. Elrod v. Burns, 427
24 U.S. 347, 373, 96 S.Ct. 2673, (1976). In the present case,
25 defendants decision to censor or reject copies of the Prison
26 Legal News, without affording plaintiff any measure of process
27 constitutes irreparable harm.

1 B. No Harm to Defendants.

2 Defendants will suffer no harm if enjoined to deliver the
3 Prison Legal News to plaintiff pending resolution of this action.

4 C. Likelihood of Success on the Merits.

5 Rights secured by the First Amendment are fundamental, and
6 convicted prisoners retain all First Amendment rights not
7 incompatible with their status as prisoners. Thornburgh v.
8 Abbott, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989).
9 Because lawful incarceration legitimately requires the retraction
10 or withdrawal of many rights and privileges, the courts apply a
11 reasonableness test "less restrictive than that ordinarily
12 applied to alleged infringements of constitutional rights."
13 O'Lone v. Estate of Shabazz, 482 U.S. 342, 348, 107 S.Ct. 2400,
14 96 L.Ed.2d 282 (1987). Prison regulations which affect the
15 prisoner's ability to receive a publication are analyzed under
16 the Turner test of reasonableness: "such regulations are valid if
17 they are reasonably related to legitimate penological interests."
18 Thornburgh, 490 U.S. at 414, (citing Turner v. Safley, 482 U.S.
19 78, 89, 107 S.Ct. 2254, 2261, 96 L.Ed.2d 64 (1987)). As applied
20 to the present case, the question is whether the rejection of a
21 magazine sent to plaintiff on the sole ground that it is sent
22 bulk rate is reasonably related to legitimate penological
23 interests. The law is well established that it does not.

24 Under state regulations, there is no limit to the amount of
25 first class mail a prisoner may receive, but the Department of
26 Corrections may limit amounts and types of all other mail (AHCC
27 FI 450.100). Operating pursuant to the regulation, defendants
28 MEM OF AUT IN SUP OF MOT FOR TRO/PI -3-

1 prohibit prisoners from receiving all bulk rate mail. Defendants
2 have articulated no reason, let alone a legitimate penological
3 one, for a blanket prohibition against mail sent by bulk rates.

4 The Sixth Circuit rejected such a distinction. In Brooks
5 v. Seiter, 779 F.2d 1177 (1985), the court held that there is "no
6 principled basis for distinguishing publications specifically
7 ordered by a prison inmate from letters written to that inmate
8 for purposes of first amendment protection." Id. at 1181. The
9 court there rejected any distinction based upon the commercial
10 nature of the publication or the fact that a subscription to a
11 publication constitutes a commercial transaction. Id. (citing
12 Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer
13 Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346
14 (1976)). Courts in the Ninth Circuit have also rejected such
15 distinctions. Harper v. Wallingford, 877 F.2d 728, 733 (9th Cir.
16 1989); Pratt v. Sumner, 807 F.2d 817, 819-20 (9th Cir. 1987);
17 Campbell v. Sumner, 587 F.Supp. 376, 378 (D. Nev. 1984); Martyr
18 v. Mazur-Hart, 789 F.Supp. 1081, 1085 (D. Or. 1992). These cases
19 all support the proposition that interference with a prisoner's
20 incoming mail must be based upon some consideration of prison
21 order, safety, security, or rehabilitation. Prison officials may
22 not enforce blanket prohibitions against classes of incoming mail
23 based on irrelevant considerations such as its bulk rate postage
24 or commercial nature.

25 Likewise, there is no legitimate distinction for First
26 Amendment purposes between first class mail and printed
27 publications sent by bulk rate mail, simply on the basis of the

1 postage rate. Prison officials bear the burden of putting forth
2 "legitimate reasons for interfering with a prisoner's incoming
3 mail." Parrish v. Johnson, 800 F.2d 600, 604 (6th Cir. 1986).
4 In the absence of any legitimate penological interest - either
5 raised by defendants or envisioned by the court - the rejection
6 of plaintiff's magazine solely because the magazine travelled by
7 bulk rate is an unreasonable infringement of plaintiff's First
8 Amendment rights. See Thornburgh, 409 U.S. at 417, (First
9 Amendment protects subscription publications to prisoners);
10 Pepperling v. Crist, 678 F.2d 787 (9th Cir. 1982); Brooks v.
11 Seiter, 779 F.2d at 1181; Guajardo v. Estelle, 580 F.2d 748 (5th
12 Cir. 1978) (prisoners have First Amendment right to receive
13 printed publications by mail order or subscription).¹

14 The practical effect of defendants practice is to
15 unilaterally exempt from First Amendment protection all mailings
16 sent by bulk rate, regardless of the mailing's content or effect
17 on the security of the prison. Although the law accords prison
18 officials wide ranging deference, it does not cede them unilateral
19 authority over constitutional rights. See Ward v. Walsh, 1 F.3d
20 873, 877 (9th Cir. 1993). Prison officials remain free to impose

22
23 ¹Courts have declined to reach the question of the proper
24 treatment to be given to "mass mailings" under the First
25 Amendment. Procunier v. Martinez, 416 U.S. 396, 408 n. 11
26 (1974); Brooks v. Seiter, 779 F.2d at 1180. The present case,
27 like Brooks does not involve mass mailings. Under the Brooks
standard, a "single order of a particular publication more nearly
resembles personal correspondence than a mass mailing." Id.
Accordingly, this court likewise has no need to address the
proper handling of true mass mailing, such as coupon flyers, sale
advertisements, and mail addressed to "occupant".

1 reasonable restrictions upon incoming mail, when either the
2 content of the mail or its packaging presents a threat to the
3 institution. See e.g., Pratt v. Sumner, 807 F.2d at 819-20;
4 ("publisher or bookstore only" rule valid because of threat of
5 smuggling contraband); Harper v. Wallingford, 877 F.2d at 733;
6 (materials advocating homosexuality properly screened from prison
7 because of threat to security). In the present case, defendants
8 have not alleged any colorable reason, based either on
9 substantive content or dangerous packaging, justifying blanket
10 rejection of all bulk rate mail.

11 Furthermore, even if defendants rejection of the magazine
12 were reasonably related to legitimate penological interests,
13 defendants nevertheless violated plaintiff's constitutional
14 rights by failing - seven times - to accord him any notice or
15 appeal in connection with the rejections. The decision to censor
16 or withhold delivery of particular articles of mail must be
17 accompanied by "minimum procedural safeguards." See Procunier
18 v. Martinez, 416 U.S. 396, 417, 94 S.Ct. 1800, 40 L.Ed.2d 224
19 (1974). The following three procedures are required to
20 adequately protect the important First Amendment interests at
21 stake: (1) notice of rejection must be given to the inmate; (2)
22 the author or sender of the materials must be given notice and an
23 opportunity to protest the decision rejecting the materials; and
24 (3) the inmate must have the opportunity to appeal the rejection
25 at a hearing conducted by an impartial third party. Id. at 418.

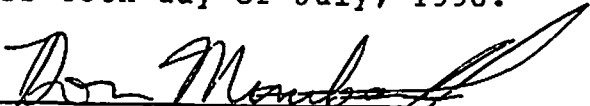
26 Plaintiff did not receive notice or written reasons
27 explaining why his magazines were not being delivered. The

1 publisher of the Prison Legal News states that none of the copies
2 sent to plaintiff have ever been returned, nor has he received
3 any notice whatsoever from defendants that the magazine was being
4 censored. Exhibit 5. Defendants state that no ". . . bulk mail
5 will be delivered to inmates and rejection notices will not be
6 issued due to the enormous workload that would be generated."
7 Exhibits 3 & 4. By their own words defendants seek to exempt
8 certain mail from the coverage of binding Supreme Court and Ninth
9 Circuit authority. Clearly, plaintiff did not receive the
10 minimum procedural safeguards that should have accompanied the
11 decision to reject delivery of the Prison Legal News. Defendants
12 conduct in this regard also constitutes an infringement of
13 plaintiff's constitutional rights.

14 CONCLUSION

15 Based on the facts in this case, the applicable case law and
16 plaintiff's showing of irreparable harm and likelihood of success
17 on the merits, plaintiff respectfully moves this court to Grant
18 the Temporary Restraining Order and/or Preliminary Injunction
19 pending resolution of this action on the merits.

20 Respectfully submitted this 18th day of July, 1996.

21
22 
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