



to be nearer to his sister and take part in the practice of Christian Science with other practitioners at SCI-Graterford. Jerry is also a follower of the Nation of Islam.

Jerry's transfer request was approved, and he arrived at SCI-Graterford on July 2, 2002. Several months later, on November 25, 2002, he was charged with a misconduct for self-mutilation. He incurred a second misconduct on March 1, 2003, for his presence in an unauthorized area, and a third misconduct on September 28, 2003, for fighting with another inmate, Chris Washington. He was placed in disciplinary custody for 30 days. On October 22, 2003, Jerry appeared before a Program Review Committee, which consisted of defendants Feild and Wenerowicz, among others. The committee recommended that Jerry be transferred back to SCI-Greene based on his having received three Class I misconducts and that he be placed in administrative custody pending the transfer after the expiration of his 30-day disciplinary custody period.

Jerry addressed a letter to Governor Edward G. Rendell on October 28, 2003. He expressed his belief that Washington was being treated more favorably than he because Washington had been given less time in disciplinary custody, was not placed in administrative custody, and was not recommended for transfer out of SCI-Graterford. Jerry also referenced an earlier letter to Governor Rendell in which he proposed "ways to cut monies directed to the [Department of Corrections]" and foreshadowed that "the [Department of Corrections] would retaliate." He

requested that the Governor have him released from administrative custody, have him placed back into the general prison population, and stop his transfer back to SCI-Greene.

On November 5, 2003, Feild, Wenerowicz, Unit Manager Sobotor, and Counselor Christopher Taylor held a staff meeting. They unanimously voted to transfer Jerry back to SCI-Greene in accordance with the recommendation of the Program Review Committee. On their vote sheet, the committee members noted that since his transfer to SCI-Graterford, Jerry had received two Class I misconducts and one Class II misconduct. The classification of these misconducts conflicted with the description in the Program Review Committee's recommendation, which stated that Jerry had received three Class I misconducts. On November 12, 2003, DiGuglielmo approved the decision to transfer Jerry to SCI-Greene.

Wayne Cole, Department of Corrections Staff Assistant, sent a letter to Jerry on November 26, 2003, which informed him that his October 28, 2003 letter to the Governor had been referred to the Department of Corrections for a response. Cole explained that Jerry needed to discuss his concerns with the Program Review Committee and his Unit Management Team and that "[t]his office will not intervene regarding your custody and transfer status." A copy of the letter from Cole was forwarded to DiGuglielmo. A transfer petition was prepared by Counselor Christopher Taylor, and on December 17, 2003, it was approved by Williamson.

On December 26, 2003, Jerry wrote to the Governor again. He reiterated the concerns expressed in his October 28, 2003 letter and doubted that the Department of Corrections was going to address his claims. Jerry was transported back to SCI-Greene on January 16, 2004. Subsequently, he was transferred to SCI-Somerset, and currently he is incarcerated at SCI-Cresson.

Pursuant to § 1983, Jerry brings claims against the defendants for retaliation, religious discrimination, and due process violations. In his prayer for relief, Jerry requests to be transferred back to SCI-Graterford and returned to his employment position in the Special Needs Unit. He also requests punitive and compensatory damages.

Section 1983 provides a remedy for any person who has been deprived of federal constitutional or statutory rights by a person acting under color of law. Kalina v. Fletcher, 522 U.S. 118, 123 (1997). Jerry argues that Feild and Wenerowicz retaliated against him by transferring him to SCI-Greene because he wrote a letter to Governor Rendell suggesting that their positions be eliminated in order to reduce the state deficit. He states that guards paid inmate Washington to fight him so that they could use this misconduct as a pretext for transferring him back to SCI-Greene.

To prevail on a First Amendment retaliation claim, Jerry must prove that: (1) he engaged in constitutionally protected activity; (2) the defendants took action against him "sufficient to deter a person of ordinary firmness from

exercising his [constitutional] rights;" and (3) his protected activity was a "substantial or motivating factor" in the defendants' decision to take adverse action against him. Rausser v. Horn, 241 F.3d 330, 333 (3d Cir. 2001) (citations omitted) (brackets in original). Even if these facts are established, however, "the prison officials may still prevail by proving that they would have made the same decision absent the protected conduct for reasons reasonably related to a legitimate penological interest." Id. at 334.

The Department of Corrections Reception and Classification Procedures Manual provides:

5. Demotional Transfers

a. An inmate who displays poor behavior or was previously an incentive based transfer, but failed to maintain the incentive based criteria shall be processed for a demotional transfer away from his/her committing county.

(Def.'s Mot. for Summ. J., Ex. 1, Department of Corrections Reception and Classification Procedures Manual, § 8 ¶ E(5)(a)). One criterion for an incentive-based transfer is that "the inmate shall be free of Class I misconducts for one year and shall have no more than one Class II misconduct in the past year." Id. § 8 ¶ E(3)(b)(9).

After his incentive-based transfer to SCI-Graterford, Jerry was charged with and found guilty of three misconducts. Although the record contains discrepancies as to which ones were Class I or II, the Reception and Classification Procedures Manual authorizes an inmate to be transferred out of a facility for

displaying "poor behavior," regardless of the classification of the misconduct.

In any event, Jerry testified he wrote his letters to Governor Rendell "in about November or December 2003." The first letter was actually dated October 28, 2003. There is no evidence in the record that those prison officials involved with Jerry's transfer back to SCI-Greene had any knowledge of his letters to Governor Rendell before the transfer decision was made. Indeed, Jerry's December 26, 2003 letter was written after the final approval of the transfer took place.

In sum, there can be no genuine dispute that Jerry was transferred back to SCI-Greene because of his misconducts. The safety and security of prisons are grounds reasonably related to a legitimate penological interest. Overton v. Bazzetta, 539 U.S. 126, 132 (2003).

Jerry argues that the guards paid Washington to fight him so that they could use this misconduct as a pretext for transferring him back to SCI-Greene. His misconduct charge for fighting, however, was not necessary to his transfer. He received two earlier misconduct charges for self-mutilation and presence in an unauthorized area. Although he contests the validity of his self-mutilation charge in his brief, he does not contest the validity of the charge for his presence in an unauthorized area. Again, once he displayed "poor behavior," regardless of the classification, he was subject to a demotional transfer. Finally, even if he displayed model behavior, he would

not have a right to be housed in any particular prison facility. 37 Pa. Code. § 93.11; see also Olim v. Wakinekona, 461 U.S. 238, 245, 249-50 (1983).

Accordingly, the motion of the defendants for summary judgment on Jerry's claim of First Amendment retaliation will be granted.

Jerry next asserts that his separation from SCI-Graterford deprives him of his ability to participate in Sunday morning Christian Science instructional services, conducted by outside volunteers, that teach spiritual healing techniques for arthritis, bone-spur pain, and hepatitis-C. It is undisputed that Christian Science is a religion. The Department of Corrections allows community volunteers, or "readers," to provide specialized religious instruction, including Christian Science, to inmates. The availability of such instruction at each institution depends upon the number of volunteers in the vicinity.

There are two outside volunteer readers for approximately six inmates who seek instruction in Christian Science at SCI-Graterford. The defendants concede that no volunteer Christian Science readers visit SCI-Somerset, the correctional facility where Jerry was incarcerated when this pending motion was being briefed.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..." U.S. CONST. AMEND. I. While inmates

retain protections afforded by the First Amendment, the fact of incarceration and the existence of valid penological objectives justify limitations on their exercise of these constitutional rights. DeHart v. Horn, 227 F.3d 47, 50-51 (3d Cir. 2000) (citing O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987); Pell v. Procunier, 417 U.S. 817, 822-23 (1974)).

In Turner v. Safley, 482 U.S. 78, 89 (1987), the Supreme Court explained that "[w]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Only those beliefs that are sincerely held and religious in nature are entitled to constitutional protection. DeHart, 227 F.3d at 51. For the purpose of this motion, the defendants do not dispute the sincerity and religious nature of Jerry's desire to participate in Christian Science instructional services with a volunteer reader.

Turner directs us to assess the reasonableness of an impingement upon an inmate's constitutional rights by weighing four factors:

First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it .... A second factor relevant in determining the reasonableness of a prison restriction ... is whether there are alternative means of exercising the right that remain open to prison inmates .... A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally .... Finally, [a court must

consider whether there is an] alternative  
that fully accommodates the prisoner's rights  
at *de minimis* cost to valid penological  
interests ....

482 U.S. at 89-91 (emphasis in original) (brackets added).

Shortly after the issuance of Turner, the Supreme Court, in O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), had occasion to consider a challenge to New Jersey prison regulations which prevented a number of Muslim inmates from attending Jumu'ah, a weekly Muslim congregational service. In Estate of Shabazz, overcrowding in the main prison building prompted the New Jersey Department of Corrections to mandate that inmates with a "gang minimum" or "full minimum" security classification, such as the plaintiff inmates, be assigned work detail outside the main institution. Jumu'ah, however, was held at a particular time during the day inside the main prison building. The movement of prisoners to the main building from outside for various reasons, including the attendance of Jumu'ah, resulted in security risks and administrative burdens. In response, prison officials prohibited inmates assigned to outside work detail from returning to the main prison during the day except for emergencies. This regulation prevented the plaintiff inmates from attending Jumu'ah.

Analyzing the Turner factors, the Court noted that the requirement that gang minimum and full minimum prisoners work outside the main facility was a response to prison overcrowding, and was designed to ease tension and drain on the facilities.

Estate of Shabazz, 482 U.S. at 351. The restrictions were validly connected to the prison's legitimate interest in avoiding congestion and delay. Id. Although there were no alternative means of attending Jumu'ah because the Muslim religion required that it be held at a particular time, the restrictions were reasonable because the prisoners retained the freedom to participate in other religious observances of their faith. Id. at 351-52. For example, inmates remained free to congregate for prayer at times other than during working hours; the state-provided imam, or prayer leader, had free access to the prison; and Muslim prisoners were provided with special meals. Id. at 352. Finally, the Court explained that accommodation of the prisoners' request would negatively impact other inmates, prison personnel, and allocation of prison resources. Id. at 352-53. Inside work detail would be inconsistent with the legitimate interest in avoiding congestion and delay, and special arrangements for Muslim inmates would create an appearance of favoritism in the eyes of other prisoners. Id.

It is against this backdrop that we analyze Jerry's claim. Defendants first assert that Jerry's inability to receive specialized Christian Science instruction is not the result of any prison regulation. Rather, it is simply the result of a lack of volunteers. The Department of Corrections allocates certain of its resources to the employment of chaplains who provide religious services. However, it relies upon volunteers to provide instruction focused upon faiths with fewer adherents,

such as Christian Science. Concerns of cost and allocation of prison resources are legitimate penological concerns and we must refrain from "substitut[ing] our judgment on ... difficult and sensitive matters of institutional administration." Estate of Shabazz, 482 U.S. at 348, 353 (brackets added) (ellipses in original).

While we in no way minimize the importance of these instructional services to Jerry, the record establishes that alternative means of exercising his religion are available. If Jerry is dissatisfied with other services provided, he may receive literature focused upon Christian Science. Moreover, the defendants maintain, and Jerry does not dispute, that he is free to contact the nearest Christian Science community and attempt to find a spiritual advisor willing to meet with him at his place of incarceration.

Turning to the third and fourth Turner factors, the defendants point out that it would be difficult to send each inmate to the institution of his choice for specialized religious instruction, and the Department of Corrections already allocates funds towards the employment of chaplains who administer religious services.

The limitation on Jerry's access to specialized Christian Science instruction is the result of legitimate penological concerns, and he retains alternative means of exercising his religion. Therefore, the motion of the defendants

for summary judgment with respect to Jerry's religious discrimination claim will be granted.

Finally, Jerry claims that each of the defendants violated his Fourteenth Amendment right to procedural due process. To succeed on this claim, he must show that a protected liberty interest was involved, and that the procedural safeguards surrounding the deprivation were inadequate. Board of Regents of State Colleges of N.J. v. Roth, 408 U.S. 564, 568-69 (1972).

Jerry argues that Feild and Wenerowicz violated Department of Corrections policy by conducting a staff meeting regarding his transfer seven days after he was placed in administrative custody instead of within six days, in violation of Department of Corrections policy. Not every deviation from established regulations violates procedural due process. Tolchin v. Supreme Court of the State of N.J., 111 F.3d 1099, 1115 (3d Cir. 1997). "Rather, the Due Process Clause is implicated only when an agency violates regulations mandated by the Constitution or by law; or when 'an individual has reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency.'" Id. (quoting United States v. Caceres, 440 U.S. 741, 752-53 (1979)).

Jerry has pointed to no federal law mandating that a staff meeting regarding inmate transfers be conducted within six days after a prisoner is placed in administrative custody rather than within seven. Moreover, Jerry has not identified a

protected liberty interest. He has produced no evidence that the extra day of administrative custody imposed an "atypical and significant hardship on [Jerry] in relation to the ordinary incidents of prison life" such that due process protection might apply. Sandin v. Conner, 515 U.S. 472, 483-84 (1995).

Jerry's procedural due process claim against Superintendent DiGuglielmo and Williamson must also fail. He claims that these defendants approved of his transfer back to SCI-Greene despite being provided with documentation that provided inconsistent information regarding the classification of his misconducts. He maintains that this was done in violation of Department of Corrections policy.

As has already been noted, to be entitled to due process protection, Jerry must have a protected liberty interest. Board of Regents, 408 U.S. at 568-69. Under Pennsylvania prison regulations, he has no right to be housed in any particular prison facility. 37 Pa. Code § 93.11. Moreover, the Supreme Court has explained that where prison officials have discretion to transfer an inmate, that inmate has no liberty interest entitled to due process protection. Olim, 461 U.S. at 245, 249-50.

Accordingly, the motion of the defendants for summary judgment on Jerry's due process claims will be granted.

In his brief in opposition to the defendants' motion for summary judgment, Jerry raises, for the first time, a claim that he is being denied medication for his ailments. We will not

consider this eleventh-hour argument. Dooley v. City of Philadelphia, 153 F. Supp. 2d 628, 655 n.29 (E.D. Pa. 2001). We also note that it appears to be inconsistent with his adherence to Christian Science.

