IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD YOUNG	**:**	**CIVIL ACTION**
	:	
v.	**:**	**NO. 04-2211**
	:	
JEFFREY BEARD, et al.	**:**	

Diamond, J. January 31, 2007

MEMORANDUM

Plaintiff Richard Young alleges that officials running the State Correctional Institution at Graterford -- where Mr. Young is incarcerated -- violated his First Amendment rights when they limited the circumstances in which prisoners could perform in "independent" music ensembles. Having held a three day non-jury trial, I conclude that the limitations are constitutional. Accordingly, I enter judgment for Defendants and offer my supporting factual findings and legal conclusions. Fed. R. Civ. P. 52.

PROCEDURAL HISTORY

For years, Graterford Prison had in place an "Independent Band Program," allowing inmates to form inmate-led musical groups that rehearsed and performed at the prison. Plaintiff was a member of one such group -- "Dark Mischief" -- which was featured in a "reality-style" television show aired in 2002 by cable network VH-1. The broadcast provoked a wave of public and media criticism of the prison, the Program, and the officials running the prison. At the direction of then-Governor Mark Schweiker, Graterford immediately suspended all its music activities while it considered changes to its programs. Although bands performing music at

religious services were eventually allowed to continue as before the VH-1 controversy, "secular" bands were not.

In June 2004, Plaintiff filed a *pro se* civil rights complaint against some eighteen individuals involved in the operation of Graterford Prison, including: Pennsylvania Department of Corrections Secretary Jeffrey Beard; Graterford Superintendent Donald Vaughn; and Graterford Deputy Superintendents David DiGuglielmo, John Murray, and Thomas Stachelek. On January 23, 2006, I appointed counsel to represent Plaintiff, whose Third Amended Complaint now pends. Mr. Young alleges that the changes to the Independent Band Program worked a number of constitutional wrongs:

> Count I - violation of the First Amendment's establishment clause;
>
> Count II - violation of Plaintiff's First Amendment right to free expression;
>
> Count III - unlawful retaliation against Plaintiff for exercising his First Amendment right to free expression;
>
> Count IV - violation of the Fourteenth Amendment's equal protection clause; and
>
> Count V - violation of the Fourteenth Amendment guarantee of procedural due process.

I dismissed Count V (procedural due process) for failure to state a claim. (Order of December 8, 2005, Doc. No. 34.) At summary judgment, I dismissed Counts III (First Amendment retaliation) and IV (equal protection). (Order of August 21, 2006, Doc. No. 72.) I also dismissed Plaintiff's claims against all Defendants other than Jeffrey Beard, Donald Vaughn, and David DiGuglielmo. (Id.) Shortly before trial, Plaintiff withdrew his claim for money damages and voluntarily dismissed with prejudice all claims against Donald Vaughn.

(Stipulation and Order of October 30, 2006, Doc. No. 96.) In his remaining claim for equitable relief, Plaintiff contends that under the First Amendment's free expression and establishment provisions I am obligated to: (1) declare the present Graterford Music Program unconstitutional, and (2) order the prison to reinstate the Independent Band Program exactly as it existed before the VH-1 controversy.

I conclude that Graterford's Music Program does not violate the Constitution, and that Plaintiff is not entitled to the injunctive relief he seeks.

FINDINGS OF FACT

Richard Young is serving a life sentence for first degree murder at SCI Graterford, where he has been incarcerated since 1996. (*N.T. of November 1, 2006 at 65*.) He participated in Graterford's Independent Band Program from 1994 to 2002, when the VH-1 controversy caused the Program's suspension. (*N.T. of November 1, 2006 at 66*.)

A. The Prison and Its Security Designations

Graterford is a maximum security prison, housing approximately three thousand inmates. (*N.T. of November 2, 2006 at 11*.) The Department of Corrections reasonably believes that the prisoners at Graterford are unpredictable, potentially quite dangerous, and in need of close supervision. (*N.T. of November 2, 2006 at 13, 17*.)

To use its limited resources effectively and to enhance security, Graterford designates a "Custody Level" for each prisoner, indicating the degree of supervision and the kinds of privileges the prisoner should be afforded. (*N.T. of November 2, 2006 at 13, 17*.) These

designations range from Custody Levels 2 through 4. Level 4 inmates require the highest degree of supervision and have limited job opportunities at the prison. Level 3 inmates may perform a variety of jobs with appropriate supervision, and may participate in various prison programs. Level 2 inmates, believed to be non-problematic, enjoy considerably greater work and recreational activities. (*N.T. of November 2, 2006 at 13*.) Unfortunately, these designations do not always accurately predict a prisoner's behavior: Level 2 inmates have committed acts of great violence at Graterford. (*N.T. of November 2, 2006 at 17-18.*) Accordingly, the prison requires close supervision of Level 2 inmates as well as all others. (*N.T. of November 2, 2006 at 12- 15.*)

Only inmates at Custody Levels 2 and 3 were permitted to participate in the Independent Band Program that is the subject of this litigation. (*N.T. of October 31, 2006 at 118.*)

B. The Music Program Before the VH-1 Incident

Mark Ehnot was Graterford's Music Instructor at the time of the VH-1 incident. Then, as now, the General Activities Department ran the Music Program. (*N.T. of October 31, 2006 at 99*; Plaintiff's Exhibit 3 at 2.) When Mr. Ehnot arrived at Graterford in 1983, four or five inmate bands were supervised by General Activities staff. (*N.T. of October 31, 2006 at 99*.) Mr. Ehnot developed a comprehensive Music Program, offering courses ranging from instrumentation to music theory. He obtained music equipment the prison would lend to inmates. Perhaps most significantly, he afforded the inmates participating in the Music Program a significant degree of autonomy. (*N.T. of October 31, 2006 at 102-103*.) Mr. Ehnot supervised "institutional" bands, which he conducted as structured learning and performance classes. (*N.T. of October 31, 2006 at*

104.) He also allowed the formation of "independent," inmate-led bands like Dark Mischief. (*N.T. of October 31, 2006 at 106*.)

There were two types of independent bands: "regular" and "recreational." These bands selected their own leaders, music, and performers; the ensemble size varied from three to twelve members, depending on the music genre. (*N.T. of October 31, 2006 at 106, 108, 115-117*.) Mr. Ehnot designated as "regular" those bands he deemed to be more firmly established, with more accomplished members. Mr. Ehnot allowed each "regular" band one or two weekly practice sessions. (*N.T. of October 31, 2006 at 109*.) Mr. Ehnot designated as "recreational" the "up and coming" bands, and allowed them a rotating rehearsal schedule that emphasized flexibility. (*N.T. of October 31, 2006 at 109*.) Mr. Young was also a member of one such recreational band: Runnin' With Scissors. (Joint Stipulated Facts at ¶ 14.)

Mr. Ehnot required the "regular" bands to perform for the inmate population two or three times a year. (*N.T. of October 31, 2006 at 107*.) If Mr. Ehnot deemed the performances adequate, he would allow the ensembles to continue as "regular" bands. (*N.T. of November 1, 2006 at 78*.) Each band had an inmate leader -- selected by the band members -- who was responsible for assembling the group, obtaining the music, scheduling rehearsals and performances, and generally ensuring that his band stayed together. (*N.T. of October 31, 2006 at 115, 117, 194.*) Although Mr. Ehnot reviewed the actions of the band leaders, he did not directly supervise the bands themselves. (*N.T. of October 31, 2006 at 106, 115-117*.)

Graterford has a single auditorium on the first floor of the main prison building. (*N.T. of October 31, 2006 at 88.*) Mr. Ehnot allowed independent bands to rehearse in the prison auditorium area. At the time of the VH-1 incident, there were approximately ten independent

bands at Graterford. (*N.T. of October 31, 2006 at 108.*) Thus, virtually every weekday, up to sixty inmates practiced simultaneously throughout the auditorium area: on the auditorium stage, in other parts of the auditorium, or in adjacent offices. (*N.T. of October 31, 2006 at 99, 121, 122*.) Still other inmates rehearsed in the basement area below the auditorium or on the second floor above the auditorium. (*N.T. of October 31, 2006 at 121-122; N.T. of November 1, 2006 at 60*.)

Although Mr. Ehnot or another staff member made rounds during practice, the multi-floor, multi-room layout of the rehearsal area made it impossible for them directly to supervise the dozens of rehearsing inmates more often than once every twenty or thirty minutes. (*N.T. of October 31, 2006 at 124*.) Indeed, Mr. Ehnot was sometimes the only staff member present during practice, making direct supervision of the inmates even more sporadic. (*N.T. of October 31, 2006 at 128*.) Eric Battestelli, Mr. Ehnot's successor as Graterford's Music Instructor, was not comfortable with inmate activities occurring simultaneously on three separate floors; he felt that the lack of supervision was not safe. (*N.T. of November 1, 2006 at 60-61*.) As I describe below, this inadequate supervision of inmate-led ensembles would ultimately compel Secretary Beard to change the Music Program.

C. The VH-1 Incident

In 2002, VH-1 sought permission from the DOC to film "Music Behind Bars" -- a show about Graterford's Music Program. (Joint Stipulated Facts, ¶ 17.) Although Secretary Beard allowed VH-1 to film, he did not know the details of either the show or Graterford's Music Program. (Joint Stipulated Facts, ¶ 18.) Nonetheless, both Secretary Beard and Superintendent

Vaughn believed that the Program offered inmates a creative outlet, and that the show would portray the inmates and the prison favorably. (*N.T. of November 1, 2006 at 113, 117, 206-209.*)

The VH-1 crew filmed at Graterford from June 3 to June 7, 2002. (*N.T. of October 31, 2006 at 154*.) The show, which aired on October 18, 2002, prominently featured several members of Dark Mischief, a five-person band that performed heavy metal and rock music. (*N.T. of November 1, 2006 at 67*.) Although Mr. Young himself appeared only briefly, VH-1 identified several Dark Mischief members by name, disclosed their crimes and sentences, and included their own descriptions of prison life. (Plaintiff's Exhibit 10.) Other inmates were shown playing instruments in their cells, discussing the racial composition of various inmate bands, and preparing the prison auditorium for Dark Mischief's concert performance. (Plaintiff's Exhibit 10.) Christopher Bissey -- one of the Dark Mischief members featured on the show -- was serving a life sentence at Graterford, having been convicted of the 1995 murders of two teenage girls during a drive-by shooting in Allentown. (Plaintiff's Exhibit 8.)

The show's final segment was Dark Mischief's performance before a raucous crowd of inmates. The band included a "guest" performer: "Diaper Man" (as he was known at Graterford), a prisoner dressed -- with Mr. Ehnot's permission -- only in a garment resembling a diaper. (Plaintiff's Exhibit 10; *N.T. of October 31, 2006 at 70, 80*.)

About ten days before "Music Behind Bars" aired, Mary Orlando, the mother of one of Christopher Bissey's murder victims, saw Mr. Bissey on a VH-1 promotion for the show. She immediately contacted her State Representative to protest Mr. Bissey's "glorification" in the media. (Plaintiff's Exhibit 8; *N.T. of November 1, 2006 at 109*.) A public outcry followed. The Pennsylvania House of Representatives passed a resolution urging VH-1 to donate the show's

proceeds to the Commonwealth's Office of Victim Advocates. (*N.T. of November 1, 2006, at 112*; Plaintiff's Exhibit 7.) Numerous Pennsylvania legislators and citizens wrote to Secretary Beard, questioning and condemning the decision to allow inmates to perform music on television. Public criticism was so vehement that the DOC issued a press statement defending the Music Program and the decision to allow VH-1 to film at Graterford. (*N.T. of November 1, 2006 at 117-118;* Plaintiff's Exhibit 64.)

In October 2002, Mrs. Orlando and her State Representative appeared on the Fox Network television show, "The O'Reilly Factor." Once again, the Graterford Music Program and the decision to allow inmates to perform on television were condemned. (Plaintiff's Exhibit 8.) Two days later, Governor Schweiker appeared on The O'Reilly Factor, stating that Secretary Beard and Superintendent Vaughn "ought to have their heads examined." (Plaintiff's Exhibit 9.) He also announced that he had taken steps to stop the performance of music at Graterford. (Plaintiff's Exhibit 9.) He appeared to agree with Mr. O'Reilly, who stated that those convicted of murder and other serious crimes should not be permitted to play music in prison. (Plaintiff's Exhibit 9.)

D. The Decision to Suspend All Music at Graterford

Secretary Beard met with Governor Schweiker shortly before the Governor's television appearance. (*N.T. of November 1, 2006 at 122.*) The Secretary testified that he did not remember whether the Governor explicitly ordered him to suspend the Music Program. (*N.T. of November 1, 2006 at 136.*) During his appearance on The O'Reilly Factor, however, the Governor stated that he had done just that. (Plaintiff's Exhibit 9.) Moreover, in letters Secretary

Beard wrote responding to public criticism of the Music Program, he stated that he had suspended the Music Program "[a]t the direction of the [G]overnor and in light of the VH-1 issue." (*N.T. of November 1, 2006 at 124*; Plaintiff's Exhibit 72.) It is, thus, evident that in reaction to the public backlash, the Governor ordered Secretary Beard to stop the performance of music at the prison.

On October 18, 2002, Secretary Beard suspended the performance of all music at Graterford pending an investigation. (Joint Stipulated Facts, ¶ 34-35.) The Secretary explained the reason for the suspension: "[W]e had just had something bad happen and I didn't want something else bad to happen while we were taking a look at things." (*N.T. of November 1, 2006 at 187*.) Thus, music performance was prohibited in all prison departments: the General Activities Department (which ran the Music Program -- including the Independent Band Program); the Chaplaincy (which ran the Religious Music Program); and the Mental Health and Special Needs Units (which ran music programs for mental health and special needs purposes). (Joint Stipulated Facts, ¶ 34-35, 44.)

After ordering the suspension, Secretary Beard convened a committee to study music programs at all DOC institutions, including Graterford, Green, Somerset, and Camp Hill. (*N.T. of November 1, 2006 at 138*; Joint Stipulated Facts at ¶ 36; Plaintiff's Exhibit 15.) The committee concluded that when properly administered, "music programs help to control inmates by allowing them an alternative, productive outlet [that] enhances security." (Plaintiff's Exhibit 15.) Based on what he learned for the first time from the committee's investigation, however, Secretary Beard believed that Graterford's Independent Band Program actually undermined

prison security because it was not properly administered. (*N.T. of November 1, 2006 at 165-166.*)

The Secretary has extensive experience in the Pennsylvania prison system, and is especially familiar with Graterford. He has a Ph.D. in counseling and began work with the DOC in 1972 as a Psychologist at SCI Rockview. He has worked for the DOC continuously for the last thirty-four years, serving as a Deputy Superintendent at Rockview, Superintendent at SCI Crescent and SCI Camp Hill, Deputy Secretary of Corrections and, in 2001, Secretary of Corrections. (*N.T. of November 1, 2006 at 180.*)

As a Deputy Secretary of Corrections in 1995, Mr. Beard was instrumental in reforming Graterford, which was long thought to be "an institution that was unsafe for staff and inmates and ... out of control." (*N.T. of November 1, 2006 at 168-172*.) Excessive inmate autonomy substantially contributed to these difficulties. (*N.T. of November 1, 2006 at 168-172*.) Illegal drug use was widespread, as was inmate violence. Inmate organizations routinely conducted activities without adequate supervision, leading to hostage situations, assaults, and smuggling of alcohol, drugs, pornographic movies, and women for sexual activity. (*N.T. of November 1, 2006 at 168-172*.)

To rectify this highly dangerous situation, Secretary Beard helped organize a security sweep of Graterford in October 1995. Some two hundred fifty State Troopers and two hundred fifty Correctional Officers from other institutions conducted the sweep. They confiscated substantial quantities of weapons, drugs, and other contraband. The DOC transferred fifty of the most violent and dangerous inmates to other prisons -- some in other states. The DOC imposed new management and supervision regimens intended to enhance prison security. (*N.T. of November 1, 2006 at 170-172.*)

Secretary Beard viewed the Independent Band Program as a relic of the "old," pre-1995 Graterford, and was determined to change it as he had changed other unsafe pre-1995 programs. (*N.T. of November 1, 2006 at 172-173*.) He was particularly troubled by the inmate rehearsals: well over sixty prisoners in inmate-led bands largely without supervision simultaneously practicing on three different floors and throughout the auditorium and adjacent areas. He felt strongly that this was highly dangerous:

> [W]ith the music program, we saw that the conditions that were being established where you let inmates be in charge of other inmates, where you don't provide them with proper supervision, those kinds of conditions are conditions that we know from past experience in other institutions and at Graterford, lend [themselves] to potential problems and if we don't deal with [them], then we're not doing our job to maintain safe and secure institutions for staff and for inmates.

(*N.T. of November 1, 2006 at 175*.) Thus, although the Secretary initially suspended the performance of music at Graterford in reaction to the VH-1 controversy, he subsequently made changes to the Independent Band Program because Mr. Beard believed that the Program as run by Mr. Ehnot was not safe.

E. The Music Program After the VH-1 Incident

Shortly after the suspension of all music performance, Graterford again allowed the playing of music during religious services and in the Mental Health and Special Needs Units, which used music for therapeutic purposes. (*N.T. of October 31, 2006 at 168*.) These religious, mental health, and special needs programs operated independently of the Activities Department, whose Music Program was also permitted to resume. (*N.T. of October 31, 2006 at 216, 222*; Joint Stipulated Facts at ¶44; Plaintiff's Exhibit 37.)

In August 2003, the DOC implemented a new music policy at all State Correctional Institutions, including Graterford. (Joint Stipulated Facts at ¶ 41; Plaintiff's Exhibit 29.) The new policy was intended to ensure that prison staff -- not inmates -- supervised music ensembles and band activities. Thus, under the new policy, Graterford permitted instructional music classes that included institutional bands -- those that formed and rehearsed as part of a structured, supervised class. (*N.T. of October 31, 2006 at 177*.) These bands initially were not permitted to perform outside class. (*N.T. of October 31, 2006 at 177*.) In December 2003, Graterford again changed the policy to permit music performances by the institutional bands and by other groups at the annual Talent Show and Special Events as approved by the Superintendent. (*N.T. of October 31, 2006 at 179*; *N.T. of November 1, 2006 at 45, 165, 177*; Plaintiff's Exhibit 36.) The December 2003 policy -- which is still current -- makes no provision for "independent" bands as Mr. Ehnot had conceived them. (*N.T. of October 31, 2006 at 48*; Joint Stipulated Facts at ¶ 49; Plaintiff's Exhibit 36.) Nonetheless, under the current policy, any inmate may apply to perform at the Talent Show, individually or as part of a group. (Joint Stipulated Facts at ¶ 53.) Inmates who will be performing at the Talent Show receive approximately three hours of practice time before the Show. (*N.T. of November 1, 2006 at 94-96*.) These rehearsals take place in the auditorium area under the constant supervision of a staff member. (*N.T. of November 1, 2006 at 167, 176-177*.)

Special Events are convened at the discretion of the Superintendent; they are usually held on holidays or during inmate organization events. (*N.T. of October 31, 2006 at 86; N.T. of November 2, 2006 at 22-23*.) Inmates wishing to perform at Special Events, either individually or as part of a band, must be nominated by an inmate organization. (*N.T. of October 31, 2006 at*

48-49; *N.T. of November 1, 2006 at 63*; Plaintiff's Exhibit 77.) The General Activities Department can also designate its two institutional bands to perform at Special Events. (*N.T. of November 1, 2006 at 44.*) Inmates scheduled to perform at Special Events receive up to five supervised rehearsals of several hours each. (Plaintiff's Exhibit 77, at 14.)

Since he began as Graterford's Music Instructor in 2002, the General Activities Department -- through Mr. Battestelli -- has requested and received approval for two Special Events which would have allowed Graterford's two institutional bands to perform for the inmate population. Both approvals were subsequently rescinded because of scheduling conflicts, although Secretary Beard expects that such band performances will in fact occur in the near future. (*N.T. of November 1, 2006 at 31-32, 44-45, 165, 177.*)

The inmate chapter of the NAACP has sponsored a number of Special Events, including a Thanksgiving 2006 Event expected to feature the Mighty Gospel Messengers -- a band that usually participates in the Religious Music Program -- and a Christmas 2006 Event called Just Jazz. (*N.T. of November 1, 2006 at 50-53.*) Just Jazz was to feature a performance by a band assembled for the show. (*N.T. of November 1, 2006 at 52.*) Mr. Battestelli believed that Just Jazz would include some members of the Mighty Gospel Messengers, as well as other inmates, but did not know what type of music they would play. (*N.T. of November 1, 2006 at 51-52.*)

F. The Music Program and Prisoners' Continuing Access to Music

Under Graterford's present policy, rock bands may form, rehearse, and perform publicly at the Talent Show and Special Events. Thus, in 2005, Mr. Young and several former members of Dark Mischief performed at the Talent Show. (*N.T. of November 1, 2006 at 94.*) They have

not performed more frequently in part because -- as Mr. Young testified -- they feel that they are not given as much rehearsal time as they would like. (*N.T. of November 1, 2006 at 94-96, 102.*) Mr. Young has not participated in any music classes because he believes that he already plays the guitar proficiently. (*N.T. of November 1, 2006 at 97*.) He refuses to play in Mr. Battestelli's institutional bands because they do not play the music he prefers to play and because he believes (incorrectly) that they may not perform for the other inmates. (*N.T. of November 1, 2006 at 97*.) It appears that Mr. Young and the other members of Dark Mischief have made no effort to secure inmate sponsorship of the band to perform at a Special Event because they believe (again, incorrectly) that performances at Special Events are limited to religious bands. (*N.T. of November 1, 2006 at 97-98.*) Indeed, Mr. Young testified that he has never even attended a Special Event. (*N.T. of November 1, 2006 at 91*.) Mr. Young has no desire to perform religious music or attend religious services, as he would be required to do if he wished to join one of the religious bands. (*N.T. of November 1, 2006 at 90*.) Under the current policy, he may play his guitar (which he owns) in his cell whenever he desires. (*N.T. of November 1, 2006 at 93*.) He may also borrow other instruments from the General Activities Department. (*N.T. of October 31, 2006 at 57.*)

Three Graterford inmates testified during the trial in this matter: Plaintiff and Troy Spencer, both members of Dark Mischief, and Luis Gonzalez, a member of another independent band. From their testimony and the testimony of prison officials and staff, it became clear that inmates who had belonged to independent bands deeply resent the new music policy. They have made little or no effort to learn the policy's details or to perform at Special Events. Indeed, both Mr. Gonzalez and Mr. Spencer belong to inmate organizations that could sponsor their bands at

Special Events, but neither has tried to secure such sponsorship. (*N.T. of October 31, 2006 at 49, 96.*) They appear to feel that if Graterford will not reinstate Mr. Ehnot's Music Program, there is no point in trying to work within the new policy.

Significantly, ensemble music performance at Graterford was never "guaranteed": the Independent Band Program's operation was entirely a function of Mr. Ehnot's discretion. Thus, rehearsal time and concert performances were "guaranteed" only if Mr. Ehnot allowed them. Under Graterford's current music policy, that discretion is exercised by the Superintendent, who approves Special Events and requests to perform at the Talent Show. (*N.T. of October 31, 2006 at 179*; Plaintiff's Exhibit 36.)

The only significant change effected by Graterford's new music policy is the reduction of ensemble rehearsal time. Mr. Ehnot, in his discretion, could allow each "regular" band one or two weekly practice sessions totaling no more than three hours, thus creating the unsafe conditions I have described. (*N.T. of October 31, 2006 at 133.*) Secretary Beard explained that the prison did not have the resources adequately to supervise the rehearsals of these "independent" bands. (*N.T. of November 1, 2006 at 155.*) Under the current policy, bands that are to perform at the Talent Show are allowed three hours of practice time before the Show; bands that are to perform at Special Events receive up to five practice sessions of varying lengths. (Plaintiff's Exhibit 77, at 14.) All practice sessions are conducted under constant supervision. (*N.T. of November 1, 2006 at 164-165.*)

Thus, Mr. Young continues to have substantially the same access to music as he did before the VH-1 incident, even if he chooses not to avail himself of the many options. He can play music in his cell, take music classes, join an institutional band, or perform with other

inmates at the Talent Show or at Special Events.

G. Religious Music at Graterford

Graterford's Chaplaincy operates the prison's Religion Music Program -- a program that is entirely separate and independent from the Activities Department's Music Program. (*N.T. of October 31, 2006 at 222*.) The prison allows religious bands not for entertainment or recreation, but to participate in those religious services where music is an integral part of worship. (*N.T. of October 31, 2006 at 215, 220*.) These bands are not open to anyone who simply wishes to play music. (*N.T. of October 31, 2006 at 215*.) Rather, inmates must be members of the congregation and actively participate in religious services. (*N.T. of October 31, 2006 at 215*.) Reverend Neiderhiser, Graterford's Chaplaincy Program Director, was initially concerned that the elimination of independent bands would cause inmates to join the Religious Music Program, even if they had no interest in religion or religious music. (*N.T. of October 31, 2006 at 222*.) This has not occurred, however: the number of inmates participating in the Religious Music Program has remained constant since the implementation of Graterford's current music policy. (*N.T. of October 31, 2006 at 222*.)

At the time of the VH-1 incident, Graterford had approximately twice as many independent bands as religious bands. (*N.T. of October 31, 2006 at 108, 214*.) At present, one Catholic music group and four Protestant groups exist at Graterford: the Mighty Gospel Messengers, the Mighty Way Gospel Ensemble, the True Divine Gospel Ensemble, Keepers of the Faith, and the Gospel Choir. (*N.T. of October 31, 2006 at 214*.) Although each group selects its own music and repertoire, they do not have inmate leaders. (*N.T. of October 31, 2006 at 218-*

219.) If these groups rehearse or perform music inappropriate for the religious services, the Chaplaincy will direct them to change their repertoire, or can simply refuse to let them rehearse or perform. (*N.T. of October 31, 2006 at 219*.)

Inmates who wish to participate in the Religious Music Program may speak to a Chaplain and the religious music group about joining the ensemble for a trial period. (*N.T. of October 31, 2006 at 219*.) Religious band membership tends to be temporary: members may move from group to group, or are transferred to other institutions and replaced by new members. (*N.T. of October 31, 2006 at 220*.)

The religious music groups practice about two hours a week, usually in a conference room next to the chapel, where they are supervised by one of the prison's six Chaplains at all times. (*N.T. of October 31, 2006 at 217*.) A Correctional Officer is stationed directly outside the door to provide additional security. (*N.T. of October 31, 2006 at 217-218*.) The door has a glass window that allows the Correctional Officer to monitor the inmates during rehearsals. (*N.T. of October 31, 2006 at 221*.)

Religious music groups are allowed two hours of rehearsal time regardless of whether they are scheduled to perform during the upcoming Sunday service. (*N.T. of October 31, 2006 at 223*.) The groups perform on a rotating schedule. Typically, three religious music groups perform each Sunday. (*N.T. of October 31, 2006 at 224*.)

Inmates who perform at religious services may also perform at non-religious gatherings such as the Talent Show or a Special Event. (*N.T. of October 31, 2006 at 221; N.T. of November 2, 2006 at 24*.) The music they perform on these occasions may be either religious or secular; the Mighty Gospel Messengers have practiced both in preparation for Special Events. (*N.T. of*

November 1, 2006 at 58.) When a religious band performs at the Talent Show or Special Event, the ensemble may include members other than those who perform during a Sunday worship service. (*N.T. of November 1, 2006 at 52*.) Religious Music Program members planning to perform on these occasions are allowed the same practice time as that given to secular groups. (*N.T. of November 1, 2006, at 44*.) All rehearsals for the Talent Show or Special Events take place in the auditorium -- where the inmates are directly supervised -- rather than the chapel area. (*N.T. of November 1, 2006 at 55-56*.)

Because religious bands are permitted to rehearse only religious music in the chapel area, should they elect to perform secular music at the Talent Show or Special Events, they will do so with only the same number of rehearsal sessions allowed secular bands. If the religious groups perform their usual religious music repertoire, they will likely have already rehearsed these selections when preparing for their religious services. (*N.T. of November 1, 2006, at 44*.)

Both religious and secular musicians may perform at Special Events only if they have the required inmate organization sponsorship. (*N.T. of November 1, 2006 at 63*.) To date, the inmate branch of the NAACP has sponsored the Gospel Messengers at least once. (*N.T. of November 1, 2006 at 14-15*.) The NAACP has also sponsored Just Jazz. (*N.T. of November 1, 2006 at 57*.) The General Activities Department may sponsor only its two institutional bands to perform at Special Events. (*N.T. of November 1, 2006 at 44*.) The prison itself does not sponsor or direct sponsorship of any other band, however, including any religious band, at Special Events.

CONCLUSIONS OF LAW

Plaintiff brings this action pursuant to 42 U.S.C. § 1983, which entitles individuals to sue

for constitutional violations committed by persons acting under color of state law. W. v. Atkins, 487 U.S. 42, 48 (1988). As employees of Pennsylvania's Department of Corrections, Defendants acted under color of state law in their operation of Graterford. Id. at 50 ("a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law").

Plaintiff's constitutional claims are based almost entirely on the rehearsal time afforded music ensembles. In Plaintiff's view, the prison violates the First Amendment's free expression provision by limiting secular bands to three hours of rehearsal time before the Talent Show, and five practice session before Special Events. Plaintiff also contends that allowing religious bands two hours a week of practice time before Sunday services violates the establishment clause. I disagree.

A. Alleged Violation of the Right to Free Expression

Prison inmates retain constitutional protections, including First Amendment protection, although their rights may be more restricted than those of non-inmates. Beard v. Banks, 126 S. Ct. 2572, 2578 (2006); Thornburgh v. Abbott, 490 U.S. 401, 407 (1989). Restrictive prison regulations do not violate the Constitution if they are "reasonably related to legitimate penological interests." Beard, 126 S. Ct. at 2578; Turner v. Safley, 482 U.S. 78, 89 (1987). Turner sets forth a four-part test for determining whether the prison has met this standard. Before I apply the Turner test, however, I must first determine whether there is a constitutionally protected right at issue. Jones v. Brown, 461 F.3d 353, 358 (3d Cir. 2006).

The First Amendment Right to Musical Expression

Musical expression falls within the First Amendment's guarantee of free expression. Tacynec v. Philadelphia, 687 F.2d 793, 796 (3d Cir. 1982), cert. denied, 459 U.S. 1172 (1983). As a form of expressive entertainment, band performances are protected under the First Amendment. Id. See also Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (in the context of a band concert, music is protected under the First Amendment as a form of expression and communication). But see Kimberlin v. United States DOJ, 318 F.3d 228, 232 (D.C. Cir. 2003) (prison regulations under the Zimmer Amendment prohibiting federal prisoners from using or possessing electronic instruments do not implicate First Amendment rights).

Under this controlling authority, Mr. Young has a First Amendment right to express himself through music, either individually or with a band. I must therefore apply the Turner test to determine whether Graterford's new music policy violates this right. Jones, 461 F.3d at 358.

The *Turner* Test

In determining whether Graterford's music policy is "reasonably related to legitimate penological interests," I must consider:

> (1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it;
> (2) whether there are alternative means of exercising the right that remain open to prison inmates;
> (3) what impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally; and
> (4) whether an alternative is available that would accommodate the prisoner's rights at *de minimus* cost to valid penological interests.

Turner, 482 U.S. at 89-91.

In conducting this analysis, I must afford substantial deference to the professional

judgment of the prison administrators. Beard, 126 S. Ct. at 2578 (citing Overton and Turner). Although the prison administrators must advance a valid, rational connection to a legitimate governmental interest as required by the first Turner prong, Plaintiff bears the overall burden of persuasion. Overton v. Bazzetta, 539 U.S. 126, 132 (2003).

As I have found, Graterford's present music policy and Mr. Ehnot's Music Program are, in most respects, the same. As before the VH-1 incident, inmates may: take various music classes; join institutional bands; perform at the Talent Show or at Special Events; and perform music individually in their cells. Mr. Ehnot, at his discretion, could allow "regular" bands to perform for other inmates up to three times a year. The Superintendent, at his discretion, can allow inmates to perform at the Talent Show, and at Special Events.

Plainly, the only significant change respecting secular ensembles at Graterford is a reduction in rehearsal time that independent bands enjoyed under Mr. Ehnot. Defendants have offered the following reasons for this restriction: enhancing prison security and properly allocating prison resources. Deferring to the judgment of prison officials -- and as a matter of common sense -- I find that these are legitimate governmental interests. See Overton v. Bazzetta, 539 U.S. 126, 133 (2003) (maintaining internal prison security is a legitimate governmental interest). See also Thornburgh v. Abbott, 490 U.S. 401, 416 (1989) (same). Accordingly, the burden now shifts to Plaintiff to persuade me that Defendants fail the four-prong Turner test.

Plaintiff contends that Defendants suspended and altered the Music Program solely as a "knee-jerk reaction" to public and political pressure generated by the VH-1 controversy. As I have found, however, this is not what occurred. Although Secretary Beard initially suspended all

music performance at Graterford in response to the VH-1 controversy, his subsequent decision to limit ensemble rehearsals was based entirely on his deep concern for prison safety. Although the Secretary was unaware of any violent incidents occurring during rehearsals, he reasonably concluded that the inadequate supervision and control over the dozens of inmates simultaneously rehearsing on three different floors of the auditorium area created grave risks. The Constitution did not require him to wait for a tragedy to occur before he could limit inmate rehearsals to those that the prison could directly supervise. Accordingly, changing the Music Program was a valid and rational effort to address his security concerns with the limited resources available to him.

Moving to the second prong of the test, I find that alternative means exist for Graterford inmates to exercise their free expression rights. As I have found, they may join an institutional band, perform at the Talent Show and Special Events, and play individually in their cells or as a part of a music class. If religiously inclined, they may perform religious music during services, or both religious and secular music at the Talent Show or Special Events.

The third prong of the Turner test requires me to consider the effect accommodating Plaintiff's right would have on guards, inmates, and prison resources. I have no doubt that requiring Graterford to reinstate Mr. Ehnot's Independent Band Program would significantly undermine safety because the prison does not have the resources to supervise the Program adequately.

Finally, I must consider whether an available alternative would accommodate Plaintiff's rights at *de minimus* cost to valid penological interests. Plaintiff has proposed no such alternative: he asks me to order Graterford to reinstate the Independent Band Program exactly as it existed before the VH-1 controversy. Mr. Ehnot's conception of "regular" bands with

"guaranteed" rehearsal time is not enshrined in the Constitution, however. Accordingly, deferring to Secretary Beard's professional judgment that Mr. Ehnot's dispersed, multi-story rehearsal routine of inmate-led bands compromised prison security, I must conclude that no such alternative exists. Beard, 126 S. Ct. at 2578.

In sum, under the Turner test, because Graterford's new music policy -- with its limited ensemble rehearsal time -- is reasonably related to legitimate penological interests, I conclude that Defendants have not violated Plaintiff's First Amendment right to free expression.

B. Alleged Violation of the Establishment Clause

Plaintiff also contends that allowing religious bands two hours of rehearsal time before Sunday services violates the First Amendment's establishment clause, which prohibits the Commonwealth from promoting or affiliating itself with any religion or discriminating on the basis of religion. County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 590 (1989).

When considering establishment clause claims, courts have traditionally applied the three-prong test set forth in Lemon v. Kurtzman. See 403 U.S. 602 (1971). Plaintiff urges me to apply instead the newer "endorsement" test. See Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (adopting the endorsement test). The Third Circuit has applied this test to religious displays on government property and religious observance in public schools. See, e.g. Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. D., 386 F.3d 514 (3d Cir. 2004) (applying both tests in the context of private evangelism in public schools); Modrovich v. Allegheny County, 385 F.3d 397, 401 (3d Cir. 2004) ("the 'endorsement' test modifies Lemon in

cases involving religious displays on government property"); Freethought Soc'y v. Chester County, 334 F.3d 247 (3d Cir. 2003) (applying both the endorsement test and the Lemon test to a religious display); Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002) (adopting the endorsement test to evaluate a claim of selective discrimination against religious displays). As Graterford's music policy involves neither a tangible religious display nor public schools, I do not believe that the endorsement test is applicable.

To pass constitutional muster under Lemon, government action must:

> (1) have a secular purpose;
> (2) have the primary effect of neither advancing nor inhibiting religion; and
> (3) not foster excessive government entanglement with religion.

Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). The parties here addressed primarily the second prong, but I will consider each in turn.

Graterford created its Religious Music Program to permit music during religious services in which music is an integral part of worship. This desire to accommodate the practice of religion is a secular purpose under Lemon. See County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 601 (1989) ("government efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion"); Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987) (the goal of minimizing governmental interference with religious decision-making processes does not violate the "secular" prong of the Lemon test); Williams v. Bittner, 285 F. Supp. 593, 600 (M.D. Pa. 2003) (same); Brown v. Gilmore, 258 F.3d 265, 276 (4th Cir. 2001) ("... the accommodation of religion is itself a secular purpose in that it fosters the liberties secured by the Constitution."). Indeed, to do otherwise would risk violating

the free exercise clause. See Cutter v. Wilkinson, 544 U.S. 709 (2005) (holding that the Religious Land Use and Institutionalized Persons Act, which directs prisons to accommodate religious free exercise where possible, does not conflict with the establishment clause); Hobbie v. Unemployment Appeals Com., 480 U.S. 136, 144 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the establishment clause.").

Graterford's accommodation of religious groups has the "primary effect of neither advancing nor inhibiting religion." The prison does not limit musical expression to religious music or religious contexts. I have described the many music choices available to non-religious prisoners. Although the religious groups may perform only religious music at worship services, they may practice and perform both religious and secular music at Talent Shows and Special Events. Moreover, when performing on such occasions, they frequently include members who do not ordinarily perform with the group during religious services. Finally, although Plaintiff contends that only religious groups have performed at Special Events, the selections of those bands were made by inmate organizations, not by the prison (whose sponsorship is limited to Mr. Battestelli's secular institutional bands). Thus, if a Special Event features religious music, the sponsoring inmate organization, not the prison, has made this choice.

In determining whether Graterford's accommodation of religious groups fosters excessive government entanglement with religion, I must examine "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." Lemon, 403 U.S. at 615; see also Agostini v. Felton, 521 U.S. 203, 232 (1997). Agostini further directs that I should treat

entanglement "as an aspect of the inquiry into a [regulation's] effect." Agostini, 521 U.S. at 233.

Permitting inmates to rehearse and perform religious music during worship services clearly benefits inmate religious institutions, which would otherwise be unable to conduct traditional services. The nature of the prison aid that Plaintiff finds objectionable is not great, however: two hours of rehearsal time before Sunday services. The prison does not direct or monitor the operations of religious music, other than to require constant supervision for reasons of safety. Reverend Neiderhiser made clear that the differences between the General Activities Department and Chaplaincy Music Programs have not caused inmates to join the Religious Music Program. The prison does not select performers for Talent Shows and Special Events based on religious content. In these circumstances, I do not believe that the current music policy fosters excessive government entanglement with religion.

In sum, I conclude that Graterford's music policy satisfies the Lemon test. Accordingly, Defendants have not violated the establishment clause.

C. Alleged Equal Protection Violation

This case has been made more difficult by the parties' inability up through summary judgment to take consistent positions with respect to myriad material facts. This is well-illustrated by the parties' contentions respecting the claim in Plaintiff's Third Amended Complaint that the differences between the Religious and General Activities Music Programs violated the Fourteenth Amendment's equal protection clause.

At summary judgment, both sides agreed that the Chaplaincy allowed inmates to participate in the Religious Music Program regardless of whether or not they were religiously

observant. Accordingly, during oral argument at summary judgment, I dismissed Plaintiff's equal protection claim. See City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 196 (2003) (upholding the dismissal of an equal protection claim where there was no evidence of intentional discrimination). After I announced this ruling, however, Plaintiff for the first time questioned the accuracy of his own representation -- suggesting that the record might show that only observant inmates could participate in the Religious Music Program. (*N.T. of August 10, 2006 at 46*; Order of August 21, 2006, Doc. No. 72.) Accordingly, I indicated that my dismissal of the equal protection claim was without prejudice, and ruled that if Plaintiff wished to contend that the prison allowed only observant inmates to participate in the Religious Music Program, Plaintiff could renew his equal protection claim. (Order of August 21, 2006, Doc. No. 72.)

Plaintiff has never revived his equal protection claim, which remains dismissed without prejudice. Nonetheless, the trial evidence underscored that the parties' initial agreement was mistaken: in fact, Graterford limits participation in its Religious Music Program to observant inmates. In these circumstances, even though Plaintiff has not renewed his equal protection claim, I feel obligated to address it.

The equal protection clause requires states to treat similarly situated persons alike. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). The Turner test applies to alleged violations of equal protection. Williams v. Morton, 343 F.3d 212, at 21 (3d Cir. 2003). I must therefore first determine whether Plaintiff has stated an equal protection claim, and if so, apply the Turner test.

To prevail here, Mr. Young must show both that he was treated differently from persons who are similarly situated, and that this discrimination was purposeful or intentional rather than

incidental. City of Cleburne, 473 U.S. at 439; Wilson v. Schillinger, 761 F.2d 921, 929 (3d Cir. 1985). Graterford treats similarly situated inmates differently. See Samad v. Horn, 913 F. Supp. 373, 376 (E.D. Pa. 1995) (religious and secular groups are similarly situated for equal protection analysis purposes). As I have described, religious bands may rehearse more frequently than secular ensembles. The prison engages in this disparate treatment intentionally, to accommodate inmates' free exercise of religion. In thus showing intentional, disparate treatment of similarly situated persons, Plaintiff has stated an equal protection claim. Under Turner, however, this disparate treatment does not violate the Constitution. Turner requires me to apply the same analysis to Plaintiff's equal protection and free exercise claims. Thus, there is no equal protection violation if Defendants can show that a penologically valid reason rationally relates to their disparate treatment of Graterford inmates. Turner, 482 U.S. at 89-91.

As I have found, unlike the General Activities Department, the Chaplaincy has been able closely to supervise religious bands. Mr. Ehnot allowed over sixty largely unsupervised prisoners to rehearse in dispersed areas on three different floors. Secretary Beard's response to this dangerous situation was to limit the inmates rehearsing at any one time to a number that could be closely supervised. By thus limiting inmate assemblages to structured music classes and practice time before the Talent Show or a Special Event, the prison is able constantly to supervise inmate bands during their rehearsals. In addition, as I have already discussed, the restrictions on secular bands meet the other three prongs of the Turner test: (1) inmates have other means to exercise their right to play music; (2) accommodating Plaintiff's right would undermine prison safety; and (3) there is no alternative available to accommodate Plaintiff without serious risk to prison security.

Accordingly, I conclude that under Turner, the different treatment of religious and secular bands is reasonably related to the legitimate penological interest of maintaining prison safety, and that Defendants have not violated the equal protection clause. See DeHart v. Horn, 227 F.3d 47, at *39 (3d Cir. 2000) ("[Plaintiff] cannot obtain relief if the difference between the defendants' treatment of him and their treatment of Jewish inmates is 'reasonably related to legitimate penological interests.'") (internal cites omitted).

VERDICT

I agree with Mr. Young that the embarrassment over the VH-1 incident caused the initial suspension of all music performance at Graterford. Plaintiff's request for injunctive relief is not directed at that suspension, however, which ended years ago. Rather, Plaintiff asks me to eliminate changes that Secretary Beard made to the Independent Band Program for valid reasons that do not violate the Constitution. Accordingly, I return a verdict in favor of Defendants.

BY THE COURT.

/s Paul S. Diamond, J.

_____

Paul S. Diamond, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD YOUNG	**:**	**CIVIL ACTION**
	:	
v.	**:**	**NO. 04-2211**
	:	
JEFFREY BEARD, et al.	**:**	

ORDER

AND NOW, this 31st day of January, 2007, Judgment is hereby entered in favor of Defendants Jeffrey Beard and David DiGuglielmo and against Plaintiff Richard Young.

The Clerk's Office shall close this case for statistical purposes.

BY THE COURT:

/s Paul S. Diamond, J.

Paul S. Diamond, J.