

# Court of Claims of Ohio

The Ohio Judicial Center  
65 South Front Street, Third Floor  
Columbus, OH 43215  
614.387.9800 or 1.800.824.8263  
www.cco.state.oh.us

MARK C. PARISH

Plaintiff

v.

OHIO DEPARTMENT OF  
REHABILITATION AND CORRECTION

Defendant

Case No. 2007-06934-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} On eight separate occasions in November 2006, mailroom personnel at defendant's Madison Correctional Institution ("MaCI"), confiscated a total of ten photographs contained in eight mailed envelopes addressed to plaintiff, Mark C. Parrish, an inmate. The snapshot photographs depicted nudity and thereby constituted "nude photographs" as defined by defendant's internal policy. Inmates under defendant's custody are specifically prohibited from possessing "nude photographs" and consequently the photographs were subject to confiscation as "minor contraband." The confiscated photographs were destroyed by MaCI mailroom personnel.

{¶ 2} Plaintiff has contended he had a right to possess the confiscated photographs and defendant acted improperly in destroying the confiscated property. Plaintiff filed this complaint seeking damages in the amount of \$5.56, the estimated replacement value of ten photographs and eight stamped envelopes used for posting the photographs. Plaintiff submitted the \$25.00 filing fee and requests reimbursement of that cost along with his damage claim.

{¶ 3} Plaintiff also requested this court order defendant "to recognize the law and withdraw this mail policy" of excluding nude photographs from items inmates are permitted to possess. Plaintiff asserted defendant's exclusion policy violates the September 12, 1972 order of the United States District Court for the Northern District of

Ohio, Western Division that enjoined the Department of Rehabilitation and Correction to allow inmates to receive and possess printed matter (photographs included). The court order allowed the Department of Rehabilitation and Correction to exclude or censor printed material which are either obscene under applicable United States constitutional criteria or which constitute a clear and present danger to the security of the institution. See *Taylor v. Perini* (1976), 413 F. Supp. 189. In *Taylor v. Perini*, the Northern District court addressed the findings of a Special Master appointed to ascertain whether or not the Department of Rehabilitation and Correction was complying with the September 12, 1972 order. The Special Master discovered the Department of Rehabilitation and Correction refused to comply with the court order in respect to censorship or exclusion of printed materials. In particular relevance to the instant claim, the Special Master found noncompliance in the area of excluding materials that are not obscene under applicable constitutional criteria “including photographs of wives and girlfriends which would not be obscene if purchased commercially.” Essentially, plaintiff in the present claim has argued his constitutional rights under the First Amendment under the United States Constitution were violated when defendant excluded from his possession the nude photographs sent to him in the mail.

{¶ 4} Defendant maintained that under its policy adopted in 2002 MaCI has the right to exclude nude photographs from any inmate’s possession. Defendant submitted a copy of the Department of Rehabilitation and Correction policy regarding “Printed Material” which includes nude photographs. Defendant’s policy number 75-MAL-02 (effective September 16, 2006) provides the following definition for nude photographs:

{¶ 5} “As used in this policy, the term ‘nude photographs’ refers to snapshots, Polaroid photos, photocopied or digitally produced pictures, etc. of an adult, child, or infant who is nude or partially nude above or below the waist and is displaying breasts, buttocks, or genitals. It does not include magazines, calendars or other professionally produced materials intended for commercial distribution. Such commercial materials do remain subject to review under the procedures for withholding printed materials.”

{¶ 6} Under defendant's policy, a nude photograph is a depiction of any human being of any age and gender where uncovered breasts, buttocks, or genitals are noticeable. The policy strictly prohibits the possession of nude photographs by any inmate. Specifically, in reference to nude photographs, the policy states:

{¶ 7} "[t]he possession of nude photographs constitutes a threat to the security, order and discipline of our institutions; is disruptive to institutional operations, and is detrimental to the objectives of rehabilitation of inmates. Therefore, inmates are not permitted to receive nude photographs.

{¶ 8} "1. Nude personal photographs may be handled as minor contraband pursuant to AR 5120-9-55 Contraband, without the necessity of screening pursuant to AR 5120-9-19 (C) Printed Material."

{¶ 9} Defendant asserted plaintiffs' reliance on the ruling in Taylor v. Perini is misleading regarding his purported right to possess nude personal photographs. Defendant explained that since policy number 75-MAL-02 (effective September 16, 2006) was not adopted until 2002 and Taylor v. Perini was decided in 1976 "the court deciding in the Taylor case did not consider or rule on the current policy and did not apply the law and legal standards applicable today." Defendant contended the ruling in Taylor v. Perini has no effect on any current policy decision made by the Department of Rehabilitation and Correction and particularly is not dispositive of the present issue concerning inmate possession of nude photographs.

{¶ 10} Furthermore, defendant related "this court does not have jurisdiction to review the policy in question." Defendant cited Bell v. Wolfish (1979), 99 S. Ct. 1861, 60 L. Ed. 2d 447, 441 US 420, in support of the argument that courts should allow broad deference to prison administrators in adopting and executing policies in the furtherance of preserving order and maintaining security. Additionally, defendant argued that this court does not have jurisdiction to hear any claim by plaintiff based on violations of his constitutional rights. See Burkey v. Southern Ohio Correctional Facility (1988), 38 Ohio App. 3d 170, 528 N.E. 2d 607. Defendant also argued that prior holdings have

determined the state cannot be sued for making a policy decision characterized by a high degree of official judgment of discretion. See *Reynolds v. State* (1984), 14 Ohio St. 3d 68, 14 OBR 506, 471 N.E. 2d 776. Defendant noted the state is generally immune from liability for claims arising from policy implementation.

{¶ 11} Plaintiff's requests for this court to make a determination on the validity of defendant's policy regarding inmate possession of nude photographs is not a cognizable matter since it is grounded on the alleged violation of a right granted under the constitution. This court is without jurisdiction to consider claims for relief premised upon alleged violations of the United States Constitution. See, e.g., *Graham v. Ohio Bd. of Bar Examiners* (1994), 98 Ohio App. 3d 620, 649 N.E. 2d 282; *White v. Chillicothe Correctional Institution* (Dec. 29, 1992), Franklin App. No. 92AP-1230, unreported. Plaintiff is barred from bringing claims based upon denial of First Amendment rights which constitute actions against the state under Section 1983, Title 42, U.S. Code. These actions may not be brought in the Court of Claims because the state is not a "person" within the meaning of Section 1983. See, e.g., *Jett v. Dallas Indep. School Dist.* (1989), 491 U.S. 701, 109 S. Ct. 2702, 105 L. Ed. 2d 598; *Burkey* (1988), 38 Ohio App. 3d 170, 528 N.E. 2d 607; *White*. Indeed, a claim of denial of First Amendment rights are to be treated as actions for alleged violations of constitutional rights under Section 1983, Title 42, U.S. Code. Thus, this court is without jurisdiction to hear those claims.

{¶ 12} Defendant asserted MaCI staff acted properly in confiscating and subsequently destroying the nude photographs mailed to plaintiff. Defendant noted, "[t]he plaintiff had a reasonable opportunity to avoid destruction of these items." Defendant recalled plaintiff was given the opportunity to authorize the mailing of the confiscated photographs from the institution to the sender. Defendant observed plaintiff refused to authorize the mail out of the photographs and requested MaCI staff store the photographs pending disposition of his internal grievances concerning his purported possession right. Defendant explained plaintiff's request to store the photographs was

not an option available and consequently, after a ten day holding period, the photographs were destroyed. Defendant and plaintiff submitted copies of a document titled Notice of an Unauthorized Item Received (“Notice”) that was filed by MaCI personnel in connection with the seizure of the ten photographs. This Notice references that “10 nude photos collected from 8 different letters” were confiscated on November 19, 2006 and declared “Nuisance Contraband.” The Notice contains the advisement: “This item will be held in the mail office for TEN (10) DAYS ONLY.” Under “Disposition of Unauthorized Item is the checked caption “Destroy the contraband item.” Plaintiff did not sign the disposition section of the Notice. The Notice indicates the photographs were destroyed on or about January 2, 2007 by MaCI staff. Defendant maintained the disposition of the confiscated photographs was conducted with proper authority after plaintiff was given a reasonable opportunity to avoid the destruction process. Defendant contended plaintiff failed to prove he maintained any property right in the photographs once he refused to authorize the mailing out of the declared impermissible property.

{¶ 13} Plaintiff filed a response insisting he had a right to possess nude photographs and the photographs were destroyed by defendant without proper authority. Plaintiff contended defendant failed to follow the mandates of Ohio Administrative Code 5120-9-19<sup>1</sup> in destroying the photographs before screening procedures outlined in Ohio Adm. Code 5120-9-19(D), (E), (F), (G), (H), (I), (J), (K), (L),

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<sup>1</sup> Ohio Adm. Code 5120-9-19 provides in relevant part:

“(A) As used in this rule, ‘printed materials’ means any publication, document or record including, but not limited to, the following: Newspapers, magazines, pamphlets, books, photographs, drawings, and prerecorded magnetic audiotapes.

“(C) Printed material is excludable if it is deemed to be detrimental to, or to pose a threat to the rehabilitation of inmates; the security of the institution; or, the good order or discipline of the institution. Examples of such material include, but are not limited to printed material:

“(6) Which is sexually explicit material that by its nature or content poses a threat to the rehabilitation of inmates, the security, good order, or discipline of the institution, or facilitates, or encourages criminal activity.”

and (M)<sup>2</sup>. Plaintiff asserted defendant failed to follow mandated procedure in the Ohio

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<sup>2</sup> Ohio Adm. Code 5120-9-19(D), (E), (F), (G), (H), (I), (K), (L) and (M) states:

“(D) All printed material is subject to the following screening procedure:

“(1) Initially, printed material shall be screened in the institution mail office.

“(2) The mail office supervisor shall forward to the warden, or the warden’s designee, any printed material which is reasonably believed to be excludable under the provisions of this rule.

“(3) As soon as practicable, the warden, or the warden’s designee, shall review the forwarded printed material and shall decide whether the printed material may be permitted into the institution or should be excluded under the provisions of this rule.

“(4) If the warden or the warden’s designee, determines that the material may be permitted into the institution, then the material shall be promptly forwarded to the inmate.

“(5) If the warden, or the warden’s designee, determines that the material should be excluded from the institution, this decision shall be promptly forwarded to the inmate in writing.

“(6) The written decision shall provide a brief explanation of the reasons for excluding the printed material. The explanation shall be sufficient to inform the inmate of the basis for the decision.

“(7) The written decision shall also advise the inmate that he/she can either make an appropriate disposition of the printed material in accordance with paragraph (M) of this rule or request review by the central office publication screening committee.

“(8) The warden or designee shall maintain a record of such decisions for at least three years.

“(E) The inmate may request that the central office publication screening committee review the warden’s decision. The inmate shall make this request in writing and shall state any specific objections he/she has to the warden’s decision.

“(1) The inmate shall forward this request to the warden or the warden’s designee, within fifteen days after receiving the warden’s decision.

“(2) Failure to timely request review of the warden’s decision shall constitute acceptance of that decision and the printed material shall be disposed of in accordance with paragraph (M) of this rule.

“(F) If the inmate timely requests review by the central office publication screening committee, the warden or designee shall forward the printed material, together with the notice and written decision concerning it, and any written objections submitted by the inmate, to the central office publication screening committee.

“(G) The central office publication screening committee shall consist of the following:

“(1) A screening committee coordinator who shall be a member of the staff of the division of legal services, and

“(2) At least three reviewers, with at least one of the reviewers being from each of the following offices:

“(a) The office of prisons,

“(b) The office of the chief inspector, and

“(c) The division of legal services (who may be someone other than the publication screening coordinator.)

“(H) The central office publication screening committee shall consider the institution’s reasons for excluding the material, the inmate’s objections, and the criteria and standards set forth in this rule in conducting its review of the material. The central office publication screening committee (hereafter referred to as the PSC) shall complete its review within a reasonable time and shall determine whether the material should be excluded or permitted and shall state the basis for that recommendation.

“(I) If the PSC, determines that the printed material should not be excluded, then the material shall be promptly forwarded to the inmate requesting the review, through the warden or the warden’s

Administrative Code for excluding printed material entering MaCI and therefore, defendant did not act with proper authority in destroying the photographs.

{¶ 14} Defendant's internal policy does not require that screening procedures be followed when handling "nude photographs." The Ohio Administrative Code mandates elaborate screening procedures be followed when an attempt is made to exclude "nude photographs." Defendant's internal policy is in direct conflict with the Ohio Administrative code. The court determines the provisions of the Ohio Administrative Code take precedence over defendant's internal policy. The Ohio Administrative code is controlling over policy. Consequently, defendant was required to follow screening procedures to exclude the photographs.

{¶ 15} It has been previously held an inmate plaintiff may recover the value of confiscated property destroyed by agents of defendant when those agents acted without authority or right to carry out the property destruction. *Berg v. Belmont Correctional Institution* (1998), 97-09261-AD. In the instant claim, evidence has shown defendant failed to follow proper procedure when carrying out the disposition of the photographs. Defendant did not have proper authority to destroy the photographs. Defendant is

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designee.

"(J) If the PSC, determines that the printed material should be excluded, that decision and the reasons therefore, shall be forwarded in writing to the warden of the challenging institution along with the reviewed printed material.

"(K) The warden or warden's designee shall notify the inmate requesting the review in writing of the decision and the reasons therefore.

"(L) The director or the director's designee, the regional directors, the warden or the warden's designee may initiate a review by the central office publication screening committee of any printed material for a determination whether the material should be excluded consistent with the provisions and procedures of this rule.

"(M) Printed material which is excluded pursuant to this rule may be disposed of in any of the following manners:

"(1) Upon the inmate's written request, the property may be destroyed or forwarded to an approved visitor at the inmate's expense.

"(2) The property may be returned to the sender or the United States Postal Service.

"(3) The property may be held as evidence.

"(4) The property may be disposed of in accordance with rule 5120-9-55 of the Administrative Code."

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therefore liable to plaintiff for the total value stated for the property loss, \$5.66. Plaintiff is also entitled to recover the \$25.00 filing fee as compensable costs pursuant to R.C. 2335.19. See *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19, 587 N.E. 2d 990.

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Deputy Clerk Daniel R. Borchert

ENTRY OF ADMINISTRATIVE  
DETERMINATION

Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of plaintiff in the amount of \$30.66, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT  
Deputy Clerk

Entry cc:

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Filed 7/17/08

Sent to S.C. reporter 10/2/08