

Via mail and facsimile

September 24, 2003

Commissioner Devon Brown
State of New Jersey
Department of Corrections
Whittlesey Road
PO Box 863
Trenton, NJ 08625

Re: National Prison Project Journal

Dear Commissioner Brown:

Our office represents the National Prison Project (“NPP”), a project of the ACLU Foundation. NPP seeks to create constitutional conditions of confinement and strengthen prisoners’ rights through class action litigation and public education. NPP publishes a journal, which it sends out to, among others, prisoners. NPP was subjected to illegal violation of its First Amendment right to free speech by Mountainview Youth Correctional Facility (“MYCF”) when MYCF officers confiscated an incoming NPP Journal that was supposed to be delivered to Michael Vance, inmate #201259C. MYCF objected to an article which described a lawsuit in Texas in which an inmate alleged abuse by prison guards. MYCF confiscated the NPP Journal because the article allegedly “portrayed officers in a very bad light.” Such a policy of confiscating publications based on negative portrayal of prison officials violates the federal Constitution’s First Amendment right to free speech, the Fourteenth Amendment’s guarantee of due process, and the New Jersey Administrative Code, N.J.A.C. 10A:18-4. We therefore request the following so as to avoid the need for further legal action: (1) that the confiscated NPP Journal issue be given to Mr. Vance immediately in its entirety; (2) that a procedure is in place where there are objective criteria for content-based censorship; (3) that there is a process by which the sender of a publication is given prompt and direct notice of the confiscation, the reasons for the confiscation, and a response within 72 hours of receipt of a written appeal from the sender of the publication, as outlined in N.J.A.C. 10A:18-4.13(d); and (4) that there be an appeal system in which the censorship decision is reviewed by someone other than the person making the original decision.

Facts Involved

In early 2003, the NPP sent out its Summer/Fall 2002 issue of the NPP Journal. The publication contained a short, one page article titled “Ignored by Officials, Texas Prisoner

Secretly Collected DNA Evidence of Guard Who Raped Him.” The article stated that a lawsuit was filed alleging that a prison guard, who repeatedly raped a prisoner, was not punished until after the prisoner provided DNA evidence of the rape. The article also briefly mentioned another lawsuit filed on behalf of another Texas prisoner who had been sexually enslaved and repeatedly raped by prison gangs, and whose pleas and allegations of rape were allegedly ignored by prison administrators and never seriously investigated. Finally, the article briefly highlighted the introduction of Congressional legislation aimed at reviewing and collecting statistics on prisoner rape. (Copy of article attached as Exhibit A).

Upon receipt of the publication, mailroom staff at MYCF considered the publication as contraband because of the article. As a result, the publication was confiscated. On May 14, 2003, Sergeant Velekei informed Mr. Vance of the decision to confiscate the publication. (Copy of the confiscation notice attached as Exhibit B). The NPP was not informed at all by the prison officials regarding the confiscation.

On May 15, 2003, Mr. Vance appealed Sergeant Velekei’s decision by filing an administrative remedy, and writing a letter to Sergeant Velekei, with a copy to Administrator Rizzo. (Copy of the appeal and letter attached as Exhibit C).

On May 16, 2003, Mr. Vance received a response memorandum from Associate Administrator Bartkowski. In the memorandum, Mr. Bartkowski affirmed the decision of the mailroom staff, and informed Mr. Vance that the particular issue of the publication was “detrimental to the safety/security of the Institution.” (Copy of the memorandum attached as Exhibit D).

On May 19, 2003, Mr. Vance informed the NPP about the confiscation and requested assistance.

On May 22, 2003, Mr. Vance spoke with Administrator Rizzo briefly informing him of the matter. Mr. Vance also lent Mr. Rizzo a back issue of the NPP Journal so that he may obtain a general sense of the publication’s content. Mr. Rizzo promised a quick resolution on the matter and to return the back issue within the following week.

On May 28, 2003, the NPP wrote a letter to Assistant Administrator Bartkowski requesting a detailed explanation of the confiscation. (Copy of the letter attached as Exhibit E). Having not received a response from Mr. Bartkowski, the NPP called Mr. Bartkowski on June 30, 2003. Mr. Bartkowski informed NPP that the matter has been referred to Director William Plantier of the New Jersey Department of Corrections. After several unreturned calls, the NPP wrote a letter dated July 8, 2003, to Mr. Plantier again requesting a detailed explanation of the confiscation. (Copy of the letter attached as Exhibit F).

Meanwhile, having not received a response from Mr. Rizzo regarding the confiscation, nor the return of the back issue from Mr. Rizzo, Mr. Vance wrote a letter to Mr. Rizzo to this effect on June 9, 2003. Several days later, Mr. Vance received the letter back with a

notation stating that Mr. Rizzo “will get a response to [him] when he has it.” (Copy of the letter with notation attached as Exhibit G). On July 29, 2003, Mr. Vance again wrote a letter to Mr. Rizzo regarding the confiscation and the back issue lent to Mr. Rizzo by Mr. Vance.

Finally, in a letter dated July 17, 2003, Mr. Bartkowski responded to the NPP’s request for a detailed explanation. In the letter, Mr. Bartkowski stated that the article in question “portrayed officers in a very bad light, and it was my opinion that the inmates did not need this type of image of a correctional officer. It is hard enough to get the inmates to respect the officers in their daily prison life and we didn’t need to provide the inmates with more anger and hostility that I believe this article could have festered.” (Copy of the letter attached as Exhibit H).

On August 21, 2003, Mr. Bartkowski informed Mr. Vance that the confiscated publication was lost, and that the NPP may send Mr. Vance another copy of the issue, provided however, that the article in question is cut out from the issue. On August 29, 2003, Mr. Bartkowski also informed the NPP that Mr. Vance may receive another copy of the confiscated issue if the article is cut out from the issue. (Copy of the letter sent by the NPP confirming the conversation between the NPP and Mr. Bartkowski attached as Exhibit I).

MYCF’s *ad hoc* policy and confiscation of the NPP journal on the basis that the article portrays officers in a negative manner violates not only the federal Constitution’s First Amendment right to free speech and the Fourteenth Amendment’s guarantee of due process, but also New Jersey laws regarding incoming publications to inmates, and the appeals process for the withholding of publications.

MYCF violated the NPP’s First Amendment right to free speech when MYCF withheld delivery of the Summer/Fall 2002 issue the NPP Journal in its entirety from Mr. Vance.

The First Amendment of the U.S. Constitution protects the rights of publishers to send and prisoners to receive publications. Thornburgh v. Abbott, 490 U.S. 401, 408 (1989); Crofton v. Roe, 170 F.3d 957, 959 (9th Cir. 1999); Procunier v. Martinez, 416 U.S. 396, 407-11 (1974). Because the NPP Journal deals with corrections policy and other social and political issues of public concern, it “occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection.” Connick v. Myers, 461 U.S. 138, 145 (1983) (internal quotations marks omitted).

The United States Supreme Court has held that restrictions upon the right to express one’s view to prisoners are permissible only upon a showing that they are “reasonably related to legitimate penological interests.” Thornburgh, 490 U.S. at 409; Turner v. Safley, 482 U.S. 78, 89 (1987). Moreover, “a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational,” Turner, 482 U.S. at 89-90, or is an “exaggerated response” to prison concerns in light of available alternatives. Id. at 89-91; Thornburgh, 490 U.S. at 414-18; see also Crofton, 170 F.3d at 959.

MYCF has not articulated, and cannot show, that its policy to confiscate the NPP Journal is rationally related to a legitimate government interest. In fact, MYCF's reasoning in confiscating the publication, as evidenced by the letter written by Mr. Bartkowski, is solely based upon MYCF's fears that "the journal is detrimental to the safety/security of the institution." In fact, there are currently 1,547 subscribers to the NPP Journal, the vast majority of whom are prisoners in state and federal prisons throughout the United States. In New Jersey, approximately 40 prisoners in 7 prisons subscribe to the NPP Journal. There has been no other facility in New Jersey or in other states that confiscated the Summer/Fall 2002 issue of the NPP Journal. Indeed, no issue of the NPP Journal has ever been rejected by any state or federal prison due to its content. Therefore, MYCF has not articulated, and will be unable to argue, the justification of "serving a legitimate penological purpose" as an appropriate basis for depriving the NPP of its First Amendment right to send publications, and the inmate of his First Amendment right to receive such publications. MYCF's anticipated claims that legitimate penological purposes are accomplished by protecting the safety and security of the institution by preventing delivery of the NPP Journal must fail.

Indeed, Mr. Bartkowski's concern that "this one particular article portrayed officers in a very poor light," and "that the inmates did not need this type of image of a correctional officer," is not a legitimate penological interest that can override the most fundamental right to free speech of the First Amendment.

As one court has stated:

Case history is replete with examples of correctional officers banning publications which do not advocate criminal behavior or prison disruption, are not obscene, and do not instruct bomb-building, liquor-brewing, lock-picking, escape-planning or other clandestine activities which would be injurious to a prison's security and safety. Instead, the censored materials have expressed the points of view of religious minorities, people of color and political third parties, or contained information and opinion negatively reflecting on authority figures or prison officials. Nichols v. Nix, 810 F.Supp 1448, 1461-62 (S.D. Iowa 1993), *aff'd*, 16 F.3d 1228 (8th Cir. 1994).

This is an accurate description of the present case.

The confiscation of the Summer/Fall 2002 issue of the NPP Journal is clearly an "exaggerated response" to prison concerns on the part of MYCF. There is an absence of facts to support the concern that the publication will be "detrimental to the safety/security of the institution." MYFC is the only prison in the nation that prevented its inmate subscriber from receiving the issue. The fact that no violence or unrest has been attributed to the dissemination of the issue in other prisons discredits any anticipated justification for this censorship.

Case law demonstrates that when incoming publications do not counsel violence, and in fact have already been received without evidence of disruption, courts take a considerably dimmer view of this purported justification by prison officials. See Williams v. Brimeyer, 116 F.3d 351, 354 (8th Cir. 1997); Abdul-Wali v. Coughlin, 754 F.2d 1015, 1035 (2d Cir. 1985). The NPP Journal has been admitted into state and federal prison systems for the past 16 years, and no issue of the NPP Journal has ever been confiscated by prison officials. Except for MYCF, all other prisons accepted and delivered the Summer/Fall 2002 issue of the NPP Journal. This clearly demonstrates that the censorship of this particular issue of the NPP Journal was an “exaggerated response.”

Indeed, the reasons given for the confiscation go beyond the acceptable reasons for confiscation of a publication set forth by the Department of Corrections, and as such, violate the Department of Correction’s own administrative code.

The Summer/Fall 2002 issue of the NPP Journal does not fall within any of the categories stated in the New Jersey Administrative code to warrant the disapproval and the confiscation of the publication. In finding that the Summer/Fall 2002 issue of the NPP Journal is a detriment to the safety/security of the institution, MYCF has violated its own law because MYCF did not follow the policy of ascertaining appropriate publications to withhold from inmates. Rather, MYCF applied an *ad hoc* policy that it would confiscate any incoming publication if it feels that it would portray “officers in a very poor light.” The application of this policy is a subjective standard that violates the NPP’s right to send publications to inmates, and the inmate’s right to receive such information.

MYCF violated the New Jersey Administrative Code when MYCF failed in ascertaining publications to withhold from inmate subscribers, and when MYCF failed to follow the procedure of appeal and final disposition when a publication is withheld from an inmate subscriber.

The New Jersey Administrative Code sets forth the relevant law regarding ascertaining a disapproved incoming publication for inmates in N.J.A.C. 10A:18-4.9(a). No subsection of 10A:18-4.9(a) supports confiscation of the publication at issue. Only subsections 1 and 5 come close to supporting a confiscation of the publication at issue. However, under close analysis, subsections 1 and 5 would not provide valid reasons for the confiscation of the NPP Journal.

Subsection (1) states that a publication may be withheld if it is “detrimental to the security and/or order of the correctional facility because it incites violence based upon race, religion, creed or nationality and a reasonable inference can be drawn, based upon the experience and professional expertise of correctional administrators, that it may result in the outbreak of violence within the facility,” N.J.A.C. 10A:18-4.9(a)(1). However, the Summer/Fall 2002 issue of the NPP Journal does not even address issues of race, religion, creed or nationality, and no reasonable inference can be made by MYCF that it incites violence. Indeed, no

other prison in New Jersey or in any other state which received the issue and delivered it to inmates has experienced an outbreak of violence.

Subsection (5) states that a publication may be withheld if it “incites violence, or destructive or disruptive behavior toward: law enforcement officers; Department of Corrections personnel; or correctional facility inmates, visitors, and/or volunteers; or correctional facility programs or procedures,” N.J.A.C. 10A:18-4.9(a)(5). However, the publication does not incite violence, or destructive or disruptive behavior toward the police or prison officials. Other prison inmates, both in New Jersey and in other prison systems, received the issue without inciting violence or exhibiting destructive or disruptive behavior toward the police or prison officials as a result of the article.

The New Jersey Administrative code also states that when a written appeal from the sender of the publication or inmate is filed due to a confiscation of a publication, prison officials shall issue a written decision on the appeal and respond to the sender or inmate within 72 hours of receipt of the written appeal. N.J.A.C. 10A:18-4.13(d). Moreover, “[i]f the decision is to withhold the publication from the inmate, the decision shall contain a specific finding that the publication violates the category indicated in the report of the staff member and a notification that the publication is being returned to the sender.” Id.

In this case however, although the prison officials issued a written decision on the appeal and responded to Mr. Vance within 72 hours of the receipt of Mr. Vance’s written appeal, the decision did not contain a specific finding that the publication violates the category indicated in the report of the staff member. Further, the prison officials did not respond to the NPP within 72 hours of the receipt of the written appeal from the NPP, as outlined in N.J.A.C. 10A:18-4.13.

MYCF violated its own law in ascertaining appropriate publications to withhold from inmates. MYCF also violated its own law regarding the appeals process and the final disposition when a correctional institution withholds a publication from an inmate.

MYCF violated the NPP’s Fourteenth Amendment right of due process when MYCF did not provide the NPP notice regarding the censorship of the NPP Journal.

As part of their First Amendment protections, publishers are entitled to due process protections when prison officials prevent subscribers from receiving their publications. See Montcalm Pub. Corp. v. Beck, 80 F.3d 105, 109-10 (4th Cir. 1996) (holding that publishers were entitled to written notice and opportunity to respond when their publications were disapproved for receipt by inmate subscribers); Prison Legal News v. Cook, 238 F.3d 1145, 1152-53 (9th Cir. 2001) (holding that prisoner has a “constitutionally protected right” to receive nonprofit organization’s newsletter); Miniken v. Walter, 978 F.Supp. 1356, 1363 (E.D.

Wash. 1997) (holding that due process rights were violated when prisoner's issues of *Prison Legal News* were withheld without notification to either prisoner or publisher); Krug v. Lutz, 329 F.3d 692, 697 (9th Cir. 2003) (holding that prisoner "has a constitutional right to two-level review"). Because MYCF did not give the NPP notice regarding MYCF's confiscation of the Summer/Fall 2002 issue of the NPP Journal, MYCF has violated the NPP's Fourteenth Amendment right to due process.

MYCF's *ad hoc* policy of confiscating publications from inmates whenever it decides that the publication may "portray[] officers in a very poor light," clearly constitutes a violation of the NPP's and Mr. Vance's First Amendment rights to free speech and Fourteenth Amendment's guarantee of due process, and the New Jersey Administrative Code. As a result of these violations, NPP and Mr. Vance have suffered a direct violation of their rights to free speech and due process.

As a redress for the violation, NPP seeks the following:

- that Mr. Vance immediately receive the Summer/Fall 2002 issue of the NPP Journal in its entirety;
- an agreement by New Jersey Department of Corrections (NJ DOC) to follow a procedure whereby objective criteria are followed for content-based censorship;
- an agreement by NJ DOC to follow a process by which the sender of a publication is given prompt and direct notice of the confiscation, the reasons for the confiscation, and a response within 72 hours of receipt of a written appeal from the sender of the publication, as outlined in N.J.A.C. 10A:18-4.13(d); and
- an agreement by NJ DOC to follow a process by which the censorship decision is reviewed by someone other than the person making the original decision.

Please respond to our demands within ten (10) days from receipt this letter. If our demands are not met within the allotted time, we will pursue legal action to redress these violations.

We look forward to hearing from you.

Sincerely,

Ed Barocas
Legal Director

Enclosures: (Exhibit A-I)