

The Post and Courier

Berkeley jail's lawyer disputes Bible case

ACLU, Department of Justice say prisoners' First Amendment rights denied

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Sunday, May 1, 2011

A lawsuit filed in U.S. District Court against Berkeley County Sheriff Wayne DeWitt and six other officials that claims the county jail's Bible-only policy is unconstitutional prompted the U.S. Justice Department to file a request last month to intervene in the case.

The complaint was brought against the jail in October by the American Civil Liberties Union on behalf of magazine publisher Prison Legal News, a publication geared specifically for inmates.

Those involved in the case said they were surprised by the Justice Department's move. "We had no idea it was coming," said Susan Dunn, the ACLU's local counsel.



Provided

Inmates at the Hill-Finklea Detention Center sometimes make improvised tattoo needles using pencils, pen ink and staples, according to attorney Sandra Senn.

The Justice Department apparently was concerned by news articles and the ACLU complaint, said Sandra Senn, lawyer for the Berkeley County Detention Center. But the lawsuit doesn't have all the facts straight, and some of the jail's policies have since been revamped, she said.

"We're definitely anxious to meet with them," Senn said. "They did not speak with us first; we are happy to speak with them now."

In its filing, the Justice Department cited the county's practice of prohibiting "receipt and possession of virtually all mail and other expressive materials" by inmates at the Hill-Finklea Detention Center.

Prisoners have been denied books, magazines, newspapers and other materials delivered through the mail, whether sent directly by publishers, individuals or organizations, the intervention request states.

The problem is compounded by the absence of a prison library, according to the Justice Department. "These practices violate prisoners' rights secured by the Speech Clause of the First Amendment to the Constitution."

Additionally, "a wide range of

religious materials" are prohibited, the filing states, echoing the original ACLU complaint.

"Indeed, the only book, magazine, newspaper or religious publication that defendants consistently permit prisoners to possess is the Bible," the Justice Department states, referring to testimony from one Jewish and one Muslim inmate. "These practices discriminate against non-Christian prisoners in violation of the First Amendment's Establishment Clause."

But Senn said the jail's policy does not forbid publications other than the Bible. "We conceded way before the complaint that other materials can come in," she said. "Other religious materials have been coming in for a long time."

Typically, such materials are delivered by family members visiting the detention center, she said. But a new policy change now allows prisoners to order certain magazines, newspapers and soft-cover books that are mailed directly from the publisher.

What's more, the word "Bible" likely was used by jail officials as a generic term for all religious texts, she said, raising the possibility that the lawsuit was founded on a misunderstanding.

Safety and security

Though to some it might seem unreasonable to deny inmates certain publications, including Prison Legal News, jail officials have legitimate concerns, Senn said.

Staples have been used as tattoo needles, causing health and safety problems, she said. Staples also have been used to jam toilet mechanisms, pick locks (often ruining them) and generate electrical currents that create a fire hazard and cause intercoms and locking mechanisms in electrical jail doors to fail, she said.

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Newspapers pose another danger, Senn said. They have been used to cover lights and clog toilets. "However, we understand inmates need access to news," so the jail's new policy permits a daily exchange of newspapers, she said. To get a new one, an inmate must first return the previous day's paper.

Damage to lights, plumbing and locks has cost the jail thousands of dollars each year, she said.

While Berkeley County officials cite safety concerns, the ACLU and Justice Department say it's the First Amendment that's imperiled by jail policies.

Dunn said there are many examples of "mini-fiefdoms" throughout the country that impose rules based on personal ideology. It's possible that the Berkeley County jail's alleged Bible-only policy wasn't meant to be malicious and was the result of laziness, she said.

"Whenever you're in a situation where you rely on people with certain tendencies, you adopt rules that are easy to enforce," she said. "But those things that are the simplest are the things that often deny due process."

Religious favoritism is certainly an issue, but access to reading materials in general is an even bigger issue, Dunn said. The safety defense is a stretch, she said. Many jails have libraries or procedures that permit broad access to magazines and books, including nonreligious texts and Prison Legal News.

"There is no reason why an atheist in jail shouldn't be able to read," she said.

A question of staples

Senn said Prison Legal News is problematic for two reasons: staples and content.

Some of the advertisements in the magazine are pornographic, showing naked women whose private parts are obscured; other ads peddle sex catalogs, magazines and pictures, she said.

Paul Wright, editor of Prison Legal News, said none of the ads are illegal.

"Post-hoc rationalization is what really comes to mind here," Wright said. Only now that Berkeley County officials face a lawsuit are they scrambling to justify their actions with evidence and a rationale, he said.

Initially, the jail offered no such excuses, Wright said. Last July, he emailed the jail to ask why his magazine was banned. Copies had been returned stamped "Books Not Allowed" and "Publications Not Allowed" with no explanation.

The detention center's 1st Sgt. K. Habersham wrote back: "Our inmates are only allowed to receive soft back bibles in the mail directly from the publisher. They are not allowed to have magazines, newspapers, or any other type of books."

The claims that pornography (or ads for it) and staples represent threats to safety at the jail are recent, Wright said. They were never mentioned before as a reason for the magazine's prohibition.

Wright said his magazine, which is black and white and printed on inexpensive newspaper stock, is concerned with the rights of prisoners, providing how-to information about legal claims, health issues, news about specific cases and more.

It's distributed to about 3,000 jails, including a number of maximum-security prisons. "They're getting Prison Legal News with staples, no problem," Wright said. "But somehow the staples are a problem in the Berkeley County jail."

Arguing for change

Armand Derfner, a constitutional law professor at the Charleston School of Law, said the burden is on the jail to defend its policies.

First Amendment restrictions have to be well-justified and clearly stated, he said. Justifications that arise after the fact are "less credible" than those firmly in place and presented early in a case, he said.

"With the First Amendment, the shoe is on the other foot," Derfner said. "They have to show that the restriction they have is no broader than necessary. The restriction has to be narrowly tailored to meet the specific need." For example, a jail cannot deny all books just because some books might be a problem.

Senn said the detention center houses around 200 pretrial inmates. Many are there for only a day or two, awaiting bail or a court hearing -- not long enough to receive anything in the mail. Others are detained for weeks, months or longer, she said.

The jail is working on an improved mail tracking and management system, Senn said. Bins are now provided to inmates in which they can keep a limited inventory of materials.

The case is still in the discovery phase, when evidence is gathered and a defense is built. Dunn said the ACLU and Prison Legal News hope that jail policies can be changed without resorting to expensive trials.

Wright echoed the sentiment.

"The taxpayers of Berkeley County have been very poorly served by this whole thing," he said. "The amount of money being spent defending the indefensible is pretty outrageous."

Senn has tried to clarify existing policy, amend some rules and argue that safety remains an essential concern at the jail.

"Some of their claims are going to bring about good change, positive change, but some are going to be argued," she said.

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