IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sean Pressley, Petitioner	:	
v.	:	
Pennsylvania Department of Corrections, Religious Accommodation Review Committee, Eastern Region Deputy Secretary, Director of the Bureau of Inmate Services, Supt. Kerestes, Deputy Collins, Major Vuksta, Major Beggs, Capt. Gavin, Lt. Malick, Counselor Durand, Food Service Supervisor Yarnell, Ms. Stanitis, FCPD Waddel, SCH-Mahanoy Chaplains, Respondents	:	No. 579 M.D. 2010 Submitted: December 20, 2013

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: May 23, 2014

Before this Court are the motion for summary relief of Sean Pressley (Pressley) and the cross-application for summary relief of the Pennsylvania Department of Corrections (DOC).[1]

I. Background.

[1] In addition to DOC, the other respondents listed in the caption are all employees of DOC.

Pressley is incarcerated at the State Correctional Institution-Mahanoy (SCI-Mahanoy). Pressley alleges that he has been recognized as a Muslim from the time of his incarceration. Pressley alleges that, according to the Muslim faith, there is a precise manner for cleaning dishes, pots, and pans to remove pork impurities. He further alleges that he became aware that SCI-Mahanoy did not follow this procedure which involves washing six times with water and once with water and earth.

On September 2, 2009, Pressley prepared a religious accommodation request (RAR) that addressed the alleged interference with his religious practices. Pressley requests that he be provided a kosher diet, the one provided to Jewish prisoners. Allegedly, the kosher food is not prepared in impure pots and pans and is not served with impure utensils and trays. Pressley asserts that his faith permits him to eat kosher food. DOC denied the RAR on the basis that a kosher diet is not mandated by the Islamic faith. Pressley grieved the denial. The grievance officer denied the grievance.[2]

In his petition for review in this Court's original jurisdiction, Pressley seeks a declaration that "the actions of the Respondents [DOC] in not providing Petitioner [Pressley] with a diet consistent with his faith violated the free exercise of his religion under the United States and Pennsylvania Constitutions, titles 71

[2] The grievance was denied on the basis that the Religious Accommodation Committee of DOC denied the RAR because "a kosher diet is not mandated for inmates of the Islamic faith." Official Inmate Grievance, Initial Review Response, May 28, 2010, at 1.

P.S. § 2404[3], and 42 U.S.C.A. §2000cc." Petition for Review, July 7, 2010, Paragraph No. 34 at 3. He also seeks an injunction to "[i]mmediately institute a practice of cleaning all their pots, pans, utensils serving trays etc. in a manner consistent with Petitioner's [Pressley] faith requirements, or . . . [i]mmediately provide Petitioner [Pressley] with a Kosher diet." Petition for Review, July 7, 2010, Paragraph No. 34 at 3. Pressley also seeks the costs of litigation.

On July 19, 2010, DOC preliminarily objected in the nature of a demurrer and alleged that Pressley failed to meet his burden of demonstrating how only allowing inmates to obtain religious-specific diets in coordination with their indicated faith is unreasonable, given the economic and administrative considerations the DOC must weigh.

In an opinion and order filed January 11, 2011, this Court overruled DOC's preliminary objections because DOC failed at that point to meet the test set forth by the United States Supreme Court in Turner v. Safley, 482 U.S. 78 (1987):

> [S]everal factors are relevant in determining the reasonableness of the regulation at issue. First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it. . . . Thus, 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. Moreover, the governmental objective must be a legitimate and neutral one. We have found it important to inquire whether prison regulations restricting inmates' First Amendment

[3] Section 4 of the Religious Freedom Protection Act, Act of December 9, 2002, P.L. 1701, *as amended*, 71 P.S. §2404.

> rights operated in a neutral fashion, without regard to the content of the expression. . . .
>
> A second factor relevant in determining the reasonableness of a prison restriction . . . is whether there are alternative means of exercising the right that remain open to prison inmates. Where 'other avenues' remain available for the exercise of the asserted right . . . courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.'
>
> A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. In the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order. When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials. . . .
>
> Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation. . . . By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns. This is not a 'least restrictive alternative test': prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. . . . But if an inmate can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard. (Citations omitted).

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

This Court concluded that DOC failed to meet the first prong of the Turner test because DOC failed to establish a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it. Due to conflicting assertions by the parties, this Court was unable to discern whether the second prong was met. This Court determined that DOC failed to establish a negative impact on the guards and inmates. DOC did not address the fourth prong.

DOC answered and denied the material allegations of Pressley. In new matter, DOC asserted that Pressley, as a Muslim, did not require a kosher diet and that if DOC made available a kosher diet to the entire Muslim prison population of approximately 9,800 inmates, DOC would incur a significant expense based on the higher cost of kosher meals as compared to the standard diet. DOC asserted that Pressley did not have a clearly established right to a kosher diet specifically prescribed for members of the Jewish faith. Pressley answered and denied the allegations.

II. Applications for Summary Relief.

On March 11, 2013, Pressley moved for summary relief. On October 17, 2013, DOC applied for summary relief.[4]

[4] "An application for summary relief is properly evaluated according to the standards for summary judgment." McGarry v. Pennsylvania Board of Probation and Parole, 819 A.2d 1211, 1214 n.7 (Pa. Cmwlth. 2003), (citing Gartner v. Pennsylvania Board of Probation and Parole, 469 A.2d 697 (Pa. Cmwlth. 1983)). "In deciding a motion for summary judgment, an application for summary relief may be granted if a party's right to judgment is clear . . . and no issues of material fact are in dispute." (citation omitted). McGarry, 819 A.2d at 1214 n.7.

Rule 1532(b) of the Pennsylvania Rules of Appellate Procedure, Pa.R.A.P. 1532(b), provides, "At any time after the filing of a petition for review in an appellate or original jurisdiction matter the court may on application enter judgment if the right of the applicant thereto is clear."

A. Free Exercise of Religion.

The Third Circuit of the United States Court of Appeals has stated that in order to determine whether particular beliefs are granted First Amendment protection, a court must ascertain whether the beliefs are "sincerely held . . . and religious in nature in the claimant's scheme of things." Africa v. Pennsylvania, 662 F.2d 1025, 1029-1030 (3d Cir. 1981), *cert. denied*, 456 U.S. 908 (1981). The Third Circuit also listed three factors to determine whether a religion exists:

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.

Africa, 662 F.2d at 1032.

In order for religious beliefs to be entitled to protections under the First Amendment to the United States Constitution, the beliefs must be sincerely held and religious in nature. Africa. Pressley asserts that he is an adherent of the Muslim faith and a follower of the Shafi'I Madhhab school of Islamic jurisprudence. Pressley further asserts that from the time of his incarceration in 1994 until the present he has been recognized as a Muslim. He further explains that Shafi'I Madhhab is one four Sunni schools of Islamic jurisprudence. As a

follower of the Islamic faith, Pressley is not permitted to eat or handle pork or pork products. It does not appear that DOC questions either the legitimacy of Pressley's beliefs or the fact that they are religious in nature.

As the basis for his complaint, Pressley learned in August 2009, that the staff at the kitchen at SCI-Mahanoy prepared pork products and that afterward the pots, pans, serving trays, and utensils were not cleaned in a manner prescribed by Pressley's religious beliefs. According to Pressley, the prescribed manner for cleaning items contaminated by pork is to have the article cleaned so that none of the impurity remains and then wash it six times with clean water and once with water and earth. Because that procedure was not followed, Pressley seeks an alternative: to be allowed to eat the kosher meals that are served to those Jewish inmates who desire them. Pressley attaches to his brief the declaration of Marcia Noles (Noles), the Chief of the Food Services Division, Bureau of Health Care Services, Pennsylvania Department of Corrections. In the declaration, Noles states that the cleaning of food preparation equipment "involves removing all food debris and residue from the surface, and then washing the equipment with water and a proper cleaning chemical in the proper concentration. The surface is then rinsed with clean water." Declaration of Marcia Noles, July 21, 2010, (Declaration), Paragraph No. 6 at 2. A sanitizing solution designed for food contact is then applied. Declaration, Paragraph No. 7 at 2. Barry Mallory, another inmate at SCI-Mahanoy, a Muslim, and a dishwasher there, essentially corroborates the Declaration in an unsworn declaration attached to Pressley's brief.

Pressley asserts that forcing him to eat food that has been prepared and/or served in impure pots, pans, and trays and prepared with impure utensils substantially burdens the exercise of his religion.

DOC asserts that it is entitled to summary relief because Pressley has failed to establish a clear right to relief, has not demonstrated that he is entitled to judgment as a matter of law, and a legitimate penological purpose underlies the denial of his requested accommodation.

As with the preliminary objections, this Court must analyze whether DOC infringes on Pressley's exercise of religion based on Turner. Under the first Turner factor, this Court must determine whether there was a legitimate penological interest that was rationally related to the disputed policy. DOC asserts that permitting Pressley to obtain the kosher meal plan which is associated with Jewish inmates would present significant penological difficulties and would be administratively prohibitive to implement. As a result, DOC argues that it has a legitimate governmental interest in ensuring that inmates who identify themselves as an adherent of a particular religious group receive, if requested, the diet determined appropriate for that group.

DOC argues that if Muslims were permitted to simply choose meals deemed appropriate for Jewish inmates, DOC could incur significantly increased costs associated with providing special and more expensive meals to a wider range of inmates. DOC asserts that the cost to provide inmates with three standard meals is approximately $3.49, according to the declaration of Noles. The cost to provide

three kosher meals is $5.95. In her declaration Noles states that the kosher meals represent a nearly seventy percent increase in food costs. Further, according to the Declaration of Reverend Ulrich Klemm, the Religion, Volunteer and Recreational Services Program Administrator in the treatment division of the Bureau of Treatment in DOC, there are over 10,000 inmates who identify themselves as adherents of the Muslim faith. Therefore, DOC argues that a system where Muslim inmates are allowed to "cross-identify" their religious affiliations for the purposes of obtaining the combined benefits of two separate religions could result in millions of dollars of increased costs for food services at state correctional institutions that already suffer from reduced budgets.

Pressley asserts that if DOC allowed him to obtain a kosher diet it would not create administrative and penological difficulties because all of the food items that are served come from the normal and alternate diet menus that are offered to the general population. No food items that are served as part of kosher meals are purchased exclusively for the kosher menu. Also, Pressley argues that the kosher diet would not cost more, and, if it did, those costs would be offset by "the lack of need for the use of utilities in the preparation and serving of the kosher diet meals in contrast to the meals served on the mainline which have to be cooked served and then washing off that service ware used." Pressley's Brief at 7. Pressley also argues that DOC fails to identify what portion of the Muslim inmate population hold the belief that a kosher diet is consistent with their religious beliefs. Pressley asserts that different branches of Islam have different beliefs.

In Shakur v. Schriro, 514 F.3d 878 (9th Cir. 2008), the Ninth Circuit of the United States Court of Appeals addressed a similar situation.[5] Amin Rahman Shakur (Shakur), an inmate of the Arizona Department of Corrections and a Muslim, requested a standard kosher diet both for religious reasons and because the vegetarian diet he had been receiving caused him digestive problems. His request for a kosher meat diet which Shakur claimed was permitted under the Qur'an was denied. Shakur filed a grievance which was denied. He appealed to the Associate Deputy Warden who denied the appeal and then to the Director of the Arizona Department of Corrections who also denied the appeal. Shakur, 514 F.3d at 881-882.

Shakur filed a pro se civil rights complaint in the United States District Court for the District of Arizona. The district court granted summary judgment in favor of the Arizona Department of Corrections (ADOC). One of the issues was whether the refusal to allow Shakur the Kosher diet violated Shakur's free exercise of religion. Shakur appealed to the Ninth Circuit. Shakur, 514 F.3d at 882-883.

Of interest here, the Ninth Circuit Court of Appeals applied the Turner factors to Shakur's case. With regard to the first factor, the ADOC asserted that its dietary policies were related to two legitimate penological interests: the reduction of administrative and budgetary burdens. The Ninth Circuit concluded that while the marginal cost and administrative burden of adding Shakur to the list of kosher-

[5] While this decision is not binding precedent on this Court, the reasoning utilized by the Ninth Circuit is instructive.

diet inmates would be small or even negligible, the court could not conclude that no rational nexus existed between the dietary policies and legitimate administrative and budgetary concerns. The court determined that the first Turner factor weighed slightly in favor of the ADOC. Shakur, 514 F.3d at 885-886.

Similarly, here, although it is unlikely that thousands of Muslim inmates will seek a kosher diet, if permitted, there is the possibility of increased costs which is a legitimate interest of DOC. There is a rational nexus between the policy and the goal to keep costs from increasing. As in Shakur, this factor is slightly in favor of DOC.

In the second prong of Turner, this Court must determine whether Pressley has alternative means to express his religion or if he is denied all means of religious expression. DOC asserts that Pressley is permitted to request several diets which would comport with the teachings of the Islamic faith with respect to the consumption and handling of pork, including an alternative protein source entrée diet that contains no animal flesh or animal by-products, such as pork and a no animal products diet.

Pressley maintains that DOC does not offer a pork-free diet for "adherents of the Islamic faith" because "there is contamination of the food preparation and serviceware." Based on Noles's statement, Pressley asserts that the kosher meals consist of pre-packaged grain products and fruits and vegetables that are served in or on disposable Styrofoam containers with plastic serving trays and utensils.

In Shakur, the Ninth Circuit determined that the second Turner factor weighed in favor of the ADOC because Shakur had numerous other means of practicing his religion such as keeping a copy of the Qur'an in his cell along with a prayer rug and up to seven religious items. Further, he could receive visits from an Imam and could participate in the religious observance of Ramadan. Shakur, 514 F.3d at 886.

Here, it is unclear whether the various diets offered by DOC satisfy Pressley's requirements. However, there is no allegation that Pressley is not allowed to practice his religion in other ways. Though the parties could be more explicit regarding this prong, this Court weighs this factor in favor of DOC.

Under the third prong of Turner, this Court must consider the impact the proposed accommodation would have on guards and other inmates and on the allocation of prison resources in general. DOC asserts that the ability of Pressley to obtain a kosher diet even though he is not Jewish would have a significant and adverse impact on DOC staff and other inmates because it could be perceived as favoritism or special treatment.

In Shakur, the ADOC raised the same argument. The Ninth Circuit discounted the favoritism argument because every case of special accommodation for adherents of a particular religion could be seen as favoritism. This Court agrees with the Ninth Circuit. The possible result of favoritism does not weigh in favor of DOC.

Under the fourth prong of Turner, this Court must consider whether an alternative exists that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests. In a sense this prong appears to be almost a restatement of the controversy itself. DOC argues that Pressley has failed to identify an alternative to the various diets which DOC identifies as suitable for Muslims which would represent a *de minimis* cost to the valid penological interests asserted by DOC. Pressley, of course, has asserted throughout the course of this litigation that if DOC allowed him to receive the kosher diet, he would satisfy the requirements of his religion. An analysis of this prong does not add to this Court's understanding of the controversy at issue. This Court's analysis of the four prongs of the Turner test yields a result in favor of DOC. As a result, this Court grants DOC's application for summary relief as to Pressley's free exercise claim and denies Pressley's application for summary relief as to his free exercise claim.

B. RLUIPA.

Pressley also makes a claim for relief under the Religious Land Use and Institutional Persons Act of 2000 (RLUIPA), 42 U.S.C. §2000cc-1. Section 3 of RLUIPA, 42 U.S.C. §2000cc-1, is designed to provide inmates protection in the exercise of their religion. Specifically, Section 3 of RLUIPA states that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability" unless the government established that the burden on religion furthers a "compelling governmental interest" through the "least restrictive means of furthering that compelling government interest." 42 U.S.C. §2000cc-1(a)(1)-(2).

Pressley argues that his religious exercise under his branch of Islam requires him to receive the special treatment in terms of food preparation that he requests. According to Pressley, the denial of the kosher diet imposes a substantial burden on the exercise of his religion. In Warsoldier v. Woodfird, 418 F.3d 989 (9th Cir. 2005), the Ninth Circuit stated that a prison policy that intentionally puts significant pressure on inmates to abandon their religious beliefs imposes a substantial burden on the inmate's religious practice. In Shakur, the Ninth Circuit addressed a claim under RLUIPA and stated that the extent to which ADOC's policies pressured Shakur to betray his religious beliefs was a factual dispute to be resolved by the district court. Shakur, 514 F.3d at 889.

Here, this Court is the factfinder. Given the stage of the proceedings, there are not sufficient facts of record to determine whether the denial of the kosher diet imposes a substantial burden on Pressley's religious beliefs, whether DOC has a compelling state interest in refusing to permit Pressley to receive the kosher diet and whether that is the least restrictive means to meet a compelling state interest. To the extent Pressley applies for summary relief under RLUIPA, his application for summary relief is denied.

III. Dismissal of Respondents.

DOC also contends that many of the respondents named by Pressley in his petition for review should be dismissed for lack of personal involvement. DOC asserts that many of the respondents including Superintendent Kerestes, Deputy Collins, Major Vuksta, Major Beggs, Captain Gavin, Lieutenant Malick, Counselor Durand, Food Service Supervisor Yarnell, Ms. Stanitis, and SCI-

Mahanoy chaplains are listed on Pressley's petition for review simply because they were copied on a memorandum from Reverend Roben D.R. Waddell of the Religious Accommodations Committee to Pressley which denied his request for a religious diet. This Court agrees that there is no reason for these individuals to be listed on the petition for review even if they are members of the Religious Accommodations Committee. This Court grants the motion to dismiss these individuals from the case.

Accordingly, this Court denies Pressley's application for summary relief, and grants DOC's motion for summary relief as to Pressley's claim that he was denied the right to freely exercise his religion, and grants DOC's motion to dismiss Superintendent Kerestes, Deputy Collins, Major Vuksta, Major Beggs, Captain Gavin, Lieutenant Malick, Counselor Durand, Food Service Supervisor Yarnell, Ms. Stanitis, and SCI-Mahanoy chaplains.

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BERNARD L. McGINLEY, Judge

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v.	:	
Pennsylvania Department of Corrections, Religious Accommodation Review Committee, Eastern Region Deputy Secretary, Director of the Bureau of Inmate Services, Supt. Kerestes, Deputy Collins, Major Vuksta, Major Beggs, Capt. Gavin, Lt. Malick, Counselor Durand, Food Service Supervisor Yarnell, Ms. Stanitis, FCPD Waddel, SCH-Mahanoy Chaplains, Respondents	:	No. 579 M.D. 2010

O R D E R

AND NOW, this 23rd day of May, 2014, this Court denies Sean Pressley's application for summary relief, and grants the Department of Corrections' motion for summary relief as to Pressley's claim that he was denied the right to freely exercise his religion, and grants the Department of Corrections' motion to dismiss Superintendent Kerestes, Deputy Collins, Major Vuksta, Major Beggs, Captain Gavin, Lieutenant Malick, Counselor Durand, Food Service Supervisor Yarnell, Ms. Stanitis, and SCI-Mahanoy chaplains. To the extent the Department of Corrections seeks summary relief on the Religious Land Use and Institutional Persons Act of 2000 claim, the request is denied.

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BERNARD L. McGINLEY, Judge