

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

NORMAN V. WHITESIDE,

Plaintiff,

vs.

Civil Action 2:08-CV-875  
Judge Graham  
Magistrate Judge King

TERRY COLLINS, et al.,

Defendants.

OPINION AND ORDER

The only claims remaining in this action are those of plaintiff Norman V. Whiteside, who is currently incarcerated at the Warren Correctional Institution ("WCI"), against officials and employees of the Madison Correctional Institution ("MaCI") and the Ohio Department of Rehabilitation and Correction ("ODRC"), alleging that certain prison rules, *i.e.*, Ohio Admin. Code. § 5120-9-06(C)(28), (50) and (51), are vague and lack fair notice and therefore violate constitutional notions of due process. *See Opinion and Order*, Doc. No. 66. This matter is before the Court on plaintiff's *Motion for Order to Show Cause*, Doc. No. 153 ("*Motion for Order to Show Cause*") and *Defendants Lambert, Willingham, Terrill, Perry, Stanley, Gossard, Collins, Clark, Lazaroff, Haskins, Workman's Motion to Strike Plaintiff's Reply and/or to File a Response Instanter*, Doc. No. 159 ("*Motion to Strike*").

Plaintiff represents that he has attempted to obtain

"declarations and affidavits" in order to oppose defendants' motion for summary judgment and to support his own motion for summary judgment that he intends to file. *Motion for Order to Show Cause*, p. 1. According to plaintiff, defendants "and or their agents" at Warren Correctional Institution ("WCI") "are unlawfully withholding Plaintiff's mail which contains inter alia, declarations he needs to effectively prosecute his case." *Id.* (quoting *Wilson v. Lane*, No. 95-4185, 1996 U.S. App. LEXIS 11631, at \*2-3 (6th Cir. April 17, 1996) ("The confiscation of Wilson's mail was based on a prison policy that forbade prisoners from possessing the legal documents of other inmates in their cells. . . . [However,] there is no reasonable expectation that Wilson's mail will be confiscated based on the disputed policy in the future, as it has been rescinded.")). In support of this position, plaintiff asserts that he sent a declaration to another inmate, Michael Johnson, in December 2011. *Id.*; *Exhibit A* (unsigned declaration for Michael Johnson's signature that refers to the instant litigation), attached thereto ("the Johnson declaration"). Plaintiff "presumes that Johnson signed and returned" the declaration because WCI issued a notice to plaintiff dated January 4, 2012, advising that plaintiff received an unauthorized item from Michael Johnson. *Motion for Order to Show Cause*, p. 1; *Exhibit B* (describing the contraband as "another inmates [sic] legal paperwork" and advising that plaintiff is "not authorized to do other inmates [sic] legal work") (emphasis in original), attached thereto. Plaintiff seeks an order requiring that defendants "and/or their [WCI] agents" show cause why they are interfering with plaintiff's access to the Court "in contravention of what was held in" *Wilson*. *Id.*

In response, defendants deny that they have interfered with plaintiff's access to the courts, contending that plaintiff incorrectly presumed that defendants seized a declaration signed by Michael Johnson. *Defendants' Memorandum in Opposition to Plaintiff's Motion for Order to Show Cause*, Doc. No. 155, pp. 1-2 ("Memo. in Opp."). In support of their position, defendants offer the sworn declaration of Marty E. Jones, a lieutenant and supervisor of the mail room at WCI. *Declaration of Marty E. Jones*, ¶ 2 ("*Jones Declaration*"), attached as *Exhibit A* to *Memo. in Opp.* Lieutenant Jones avers that on January 4, 2012, Mr. Johnson sent plaintiff a letter seeking legal advice. *Id.* at ¶ 4 (citing to *Exhibit A-1*, attached thereto). Lieutenant Jones further avers that the Johnson declaration attached as *Exhibit A* to the *Motion for Order to Show Cause* "was not part of the letter seized on January 4, 2012." *Id.*<sup>1</sup> On January 4, 2012, plaintiff was sent a notice of an unauthorized item received, *Exhibit A-1. Id.; Exhibit A-2*, attached thereto. Plaintiff had ten days to respond to the notice and could have requested that the material be destroyed or could have asked that the material be sent to another location. *Jones Declaration*, ¶ 5. In addition, if plaintiff believed that the material received was not unauthorized, he could have filed a grievance. *Id.* According to Lieutenant Jones, plaintiff "did not respond to the notice in any manner" even though plaintiff knew of the appropriate procedures to follow because he had previously utilized them. *Id.* at ¶¶ 5-6.

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<sup>1</sup>However, on March 28, 2012, plaintiff's cell was searched because he "was suspected of having a large amount of unauthorized materials" and unsigned copy of the Johnson declaration was removed from plaintiff's cell. *Id.* ¶¶ 4, 9.

Plaintiff, in reply, declares under penalty of perjury that WCI staff or "Defendants' agents" retaliated against plaintiff because they were angry at plaintiff after the Court issued *Order*, Doc. No. 154 (directing defendants to respond, if at all, to the *Motion for Order* by a certain date). *Plaintiff's Reply to Defendants' Document #155 Per Order (Document 154)*, Doc. No. 158 ("Reply"). More specifically, plaintiff avers that WCI staff retaliated against him by searching his cell on March 28, 2012 after the *Order* was issued, confiscating certain materials, charging him with violating Rule 50 and placing him in isolation. *Reply*, pp. 1-3. Plaintiff also insists that the intercepted mail, *Exhibit A-1*, is not a letter from Michael Johnson, but a letter written by inmate Michael Gover, which does not seek legal advice from plaintiff. *Id.* at 3-4. According to plaintiff, "Defendants' agents have been, and still are, unlawfully withholding legal materials" and have blocked plaintiff's "access to legal materials he needs to formulate his summary judgment motion[.]" *Id.* at 5. In addition to seeking a show cause order, plaintiff asks this Court to issue an order staying his "unlawful cell isolation" until the Court rules on the merits of his remaining claims. *Id.*

Defendants have moved to strike the *Reply* and/or for leave to file a response *instanter*, contending that plaintiff's *Reply* is actually a motion for injunctive relief. In responding to the *Motion to Strike*, plaintiff withdraws his request for a stay. *Plaintiff's Memorandum Opposing Defendants' Motion to Strike Plaintiff's Reply and/or to File a Response Instanter (Doc. #159)*, Doc. No. 161 ("*Memo. in Opp. to Motion to Strike*"), pp. 1, 4. Plaintiff also "announces his intent to file a motion for summary judgment and merely states his

need to have affidavits and other evidentiary materials which have been withheld by Defendants' agents. . . . Plaintiff simply wants the documents he is allowed by law to have. . . so that Plaintiff can file a cross motion for summary judgment." *Id.* at 4. In light of plaintiff's withdrawal of his request for injunctive relief as to his cell isolation, the *Motion to Strike* is moot.

Plaintiff alleges that defendants and/or WCI staff have withheld a declaration signed by inmate Michael Johnson. However, defendants have offered sworn testimony that the Johnson declaration was not withheld from plaintiff. *Jones Declaration*, ¶ 4. While plaintiff disputes that the letter offered by defendants was written by Michael Johnson and that it requested legal services for payment to plaintiff, *Exhibit A-1* attached to *Jones Declaration*, he offers no evidence establishing that defendants or WCI staff are withholding a declaration signed by Mr. Johnson. Therefore, as to the Johnson declaration, the *Motion for Order to Show Cause* is without merit.

Other than the Johnson declaration, plaintiff has not specifically identified any other documents necessary to this litigation that have allegedly been withheld by defendants and/or their "agents" at WCI. Instead, he generally refers to declarations, affidavits and "legal materials" that he needs to oppose defendants' motion for summary judgment and to file his own motion for summary judgment. Although the Court has no basis for ordering WCI individuals who are not parties in this case to produce withheld documents and/or to explain the basis for withholding any documents, the allegation that defendants may be withholding documents necessary to summary judgment affects the disposition and progress of this case.

**Therefore, within seven (7) days of the date of this Opinion and Order,** plaintiff is **ORDERED** to identify **under penalty of perjury**<sup>2</sup> as specifically as possible, *i.e.*, by description, date, author, etc., any and all documents that are necessary to oppose defendants' motion for summary judgment and/or necessary to file his own motion for summary judgment that are being withheld by defendants. Plaintiff is **ADVISED** that his declaration or affidavit must explain why the identified documents are material to summary judgment, *i.e.*, what material facts these documents contain. Plaintiff is **FURTHER ADVISED** that conclusory descriptions that do not permit this Court to identify a particular document and/or to understand why that document is necessary to plaintiff's opposition to defendants' motion for summary judgment and/or to the filing of his own motion for summary judgment will not be well-received. **Within five (5) days of the date that plaintiff has identified such documents,** if any, the named defendants are **ORDERED** to respond, **under penalty of perjury**, indicating whether or not the named defendants have withheld documents identified by plaintiff and, if so, to explain the basis for withholding them.

Finally, the *Motion for Order to Show Cause* appears to also seek an order as to documents and issues unrelated to this litigation, *i.e.*, mail/legal materials/college homework/art supplies/individuals who are not parties to this litigation/interpretation and/or confirmation of plaintiff's interpretation of case authority, etc. Such documents appear to be unnecessary to plaintiff's ability to

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<sup>2</sup>Plaintiff may submit either an affidavit witnessed by a notary public or a declaration executed in conformity with 28 U.S.C. § 1746.

respond to defendants' motion for summary judgment or to file his own motion for summary judgment in this case. Separate and independent claims such as these are not properly raised for the first time in the motion presently before the Court. Accordingly, plaintiff's request for an order as to documents, issues, individuals and claims unrelated to defendants' motion for summary judgment or to the filing of plaintiff's own motion for summary judgment is without merit.

**WHEREUPON**, the *Defendants Lambert, Willingham, Terrill, Perry, Stanley, Gossard, Collins, Clark, Lazaroff, Haskins, Workman's Motion to Strike Plaintiff's Reply and/or to File a Response Instanter*, Doc. No. 159, is **DENIED** as moot. Plaintiff's *Motion for Order to Show Cause*, Doc. No. 153, is **DENIED** as to a declaration signed by inmate Michael Johnson and as to documents, individuals and issues unrelated to defendants' motion for summary judgment or to the filing of plaintiff's own motion for summary judgment. To the extent that plaintiff seeks documents necessary to his response to defendants' motion for summary judgment or to the filing of his own motion for summary judgment, plaintiff must supplement his request consistent with the foregoing.

May 18, 2012

s/Norah McCann King  
Norah McCann King  
United States Magistrate Judge

