

1 the First Amendment¹ to the Constitution when they rejected or
2 failed to forward certain items of his mail. Plaintiff alleges
3 Defendants acted unconstitutionally when they (1) failed to forward
4 his second class mail; (2) rejected as undeliverable an Amnesty
5 International catalog addressed to Plaintiff; (3) rejected as
6 undeliverable certain magazines which were gift subscriptions; and
7 (4) rejected as undeliverable certain applications for educational
8 and financial aid. These acts occurred between November 14, 1993
9 and February 9, 1994. (Tr. at 115.) Defendants include Tom Rolfs,
10 Director of Prisons; James Spalding, former Director of Prisons;
11 Tana Wood, Superintendent at WSP; Ron Van Boening, Associate
12 Superintendent at WSP and Supervisor of the Mailroom; and Dennis
13 Potts, Mailroom Supervisor at WSP. Plaintiff seeks compensatory and
14 punitive damages and declaratory and injunctive relief.²

15
16 ¹Plaintiff also alleges a claim under the Fourteenth Amendment
17 to the Constitution. However, since his claims involve the actual
18 taking of property not defined as contraband by the institution,
19 due process is not at issue. See Sizemore v. Elliford, 829 F.2d
20 608, 610-11 (7th Cir. 1987). Therefore, the court confines its
21 discussion to the First Amendment claims.

22 ²At the outset, the court notes Plaintiff's closing argument,
23 submitted as a written memorandum, includes several documents not
24 admitted as exhibits during trial. These documents will not be
25 considered. Admitted exhibits will be referenced by the number
26 assigned to each document at trial.

27 Plaintiff's closing argument also contains claims not raised
28 at trial. (Ct. Rec. 58 and 59.) To the extent any claims were not

1 On July 25, 1995, the court referred the matter to the Federal
2 Judicial Mediator, and stayed the proceedings pending the outcome
3 of mediation efforts. (Ct. Rec. 25.) The stay was lifted on
4 November 20, 1995, and the matter proceeded to trial before the
5 undersigned after waiver of the right to a jury trial.³ (Ct. Rec.
6 41.) Both parties have submitted their closing arguments in the
7 form of written memoranda. (Ct. Rec. 59 and 64.)

8 **OBJECTIONS TO EXHIBITS**

9 Post-trial, Defendants objected to certain Exhibits admitted
10 at trial, or submitted with Plaintiff's closing argument, including
11 Exhibit 21, WSP Administrative Bulletin, dated September 8, 1995;
12 Exhibits 33(a), (b) and (c) and Exhibit 34 on grounds of lack of
13 proper foundation and/or authentication; and exhibits submitted as
14 attachments to Plaintiff's closing argument.

15 Defendants objected to the admission of Exhibit 21 during
16 trial and the court agreed it would not be helpful to ask questions
17 from the policy statement, but had it marked as an Exhibit. (Tr.
18 at 58.) Because Exhibit 21 is outside the time frame of the
19 lawsuit, it is not relevant and the objection is therefore
20 **SUSTAINED**. However, to the extent the Administrative Bulletin has
21 been incorporated into WSP regulations, the objection is **OVERRULED**.

22 _____
23 addressed at trial, they are foreclosed untimely.

24 ³On February 23, 1996, Defendants filed a Motion for Summary
25 Dismissal. (Ct. Rec. 32.) The court did not consider Defendants'
26 motion because it was filed after December 29, 1995, the
27 dispositive motion cutoff date designated in the Scheduling Order.
28 (Ct. Rec. 23 and 41.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Exhibits 33(a), (b) and (c) are copies of the grievance proceedings instituted with various mail rejections and address the Level I responses to those grievances. Defendants object these reports lack authentication in that the grievance coordinator's signature was not authenticated. No objection was raised at trial, so the objection is **OVERRULED** as untimely. (Tr. at 89.)

Defendants object to Exhibit 34, a letter from Superintendent Bosse of the Special Offender Center. Defendants object the letter was submitted without authentication of the signature or its contents. Defendants objected at trial and that objection was overruled. (Tr. at 89, 90.) The court will not reconsider its Motion at this time. Accordingly, Defendants' objection is **OVERRULED**.

Finally, Defendants object to all exhibits not admitted at trial but attached to Plaintiff's closing argument. Defendants' objection is **SUSTAINED**.

MOTION TO DISMISS DEFENDANT SPALDING

At the start of trial, Defendants moved to dismiss Defendant Spalding because he had retired from the Washington State Department of Corrections two days after the first of the mail rejections. The court reserved its ruling on the Motion. (Tr. at 9.) Exhibit 25 involves a response by Defendant Spalding to a grievance filed by Plaintiff in conjunction with the mail rejection issues being litigated here. Thus, Defendants' Motion is **DENIED**.

42 U.S.C. § 1983

To state a claim under 42 U.S.C. § 1983, a plaintiff must

1 allege (1) the violation of a right secured by the Constitution and
2 laws of the United States, and (2) the deprivation was committed by
3 a person acting under color of state law. Parratt v. Taylor, 451
4 U.S. 527, 535 (1981), overruled in part on other grounds, Daniels
5 v. Williams, 474 U.S. 327, 330-31 (1986); Leer v. Murphy, 844 F.2d
6 628, 632-33 (9th Cir. 1988).

7 DISCUSSION

8 Since January 9, 1991, Plaintiff has been incarcerated at
9 several institutions in the State of Washington. The civil rights
10 claims at issue here concern Defendants' alleged unconstitutional
11 application of WSP Field Instructions 450.100⁴

12
13 ⁴WSP Field Instruction 450.100 provides in part:

14 V. FIELD INSTRUCTION: The Penitentiary encourages
15 correspondence that is directed to socially useful goals.
16 In an effort to promote this communication, the
17 Institution shall provide each inmate free writing paper
18 and envelopes. All housing Units will ensure inmates
19 have access to writing paper and envelopes.

18
19 F. Inmate incoming mail shall be opened for
20 inspection and removal of contraband.

21
22 K. The Associate Superintendent or designees shall
23 inspect the Mail Room monthly to include reviewing logs
24 concerning mail disposal, mail charges, indigent
25 listings, mail security, timely receipt of Legal Mail and
26 mail returned to sender.

24 VI. PROCEDURE:

25 A. Incoming Mail:

26
27 2. . . .Delivery of such mail will be refused
28 when the mail meets any of the following criteria:

1 and/or 440.000⁵ to four types of mail: forwardable second class.

2 _____
3
4 r. Catalog, pamphlet, or magazine not allowed
5 by this instruction, i.e., the mail contains an
6 unauthorized publication (catalog, pamphlet, or magazine)

7 s. Magazine, book, newspaper not mailed
8 directly by the publisher/retailer.

9 t. Items not ordered and approved in advance
10 through facility-designated channels.

11
12 L. Change of Address and Forwarding of Inmate Mail

13 1. Staff shall make available to an inmate
14 upon his request appropriate change of address forms.

15 2. Inmates are responsible for informing their
16 correspondents of a change of address.

17 3. Postage for mailing change of address cards
18 is paid by the inmate.

19 4. Staff shall use all means practicable to
20 forward Legal mail.

21 5. Staff shall forward inmate general 1st
22 class and all Legal mail to the new address for a period
23 of 30 days; after which time all mail received will be
24 returned to the U.S. Postal Service for disposition.

25 ⁵WSP Field Instruction 440.000, since amended October 8, 1995,
26 states:

27 II. PURPOSE: To prescribe limitations on the volume and
28 type of personal property to be maintained in an inmate's
possession and to maintain proper safety, sanitation,
control of security at Washington State Penitentiary.
This order specifies what property is authorized.
Anything not specified in this instruction, other than
items available in the Inmate Store, is not authorized.

29
30 VII. PROCEDURE - PURCHASES

1 mail, catalogs, magazine gift subscriptions, and university and
2 financial aid applications. Both parties agree the issue in this
3 case is whether Defendants' actions deprived Plaintiff of his
4 rights under the First to the Constitution.⁶

5 Initially, the parties agree this lawsuit does not challenge
6 the facial validity of WSP Field Instruction 450.100 or 440.000.
7 Notwithstanding that conclusion, Plaintiff contends the regulations
8 have been unconstitutionally applied. Statutes may be challenged
9 on two grounds: (1) either facially or (2) as applied. ² Compassion
10 in Dying v. State of Washington, 79 F.3d 790, 842 (9th Cir. 1996).

11 As noted by Justice Scalia:

12 Statutes are ordinarily challenged, and their

13
14 B. All purchases must be from an approved vendor or
15 catalog outlet, approved curio sales, or the inmate
16 store. Only authorized items NOT sold in the Inmate
17 Store may be purchased from vendors, catalogs, or curio.

18 C. In compliance with Inmate Fund Accounts Policy
19 (02.160), all orders must be on Institutional Order Forms
20 and witnessed by the CUS or Counselor. All order and
21 disbursement forms will be routed by the Counselor to
22 Intelligence and Investigations, Special
23 Service/Property, and Accounting.

24 D. All purchases must come from the purchasing
25 inmate's account, and the disbursement request(s) must
26 cover the full amount of the purchase. No payment plans,
27 trade-ins, barter or contract arrangements will be
28 allowed.

29 ⁶To the extent Plaintiff claims relief under 18 U.S.C. § 1702,
30 such a claim will not be considered, since that statute is criminal
31 and does not provide for relief in a civil action. Sciolino v.
32 Marine Midland Bank-Western, 463 F. Supp. 128, 131-34 (W.D.N.Y.
33 1979); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 162
34 (D.D.C. 1976).

1 constitutional¹ evaluated, "as applied" -- that is, the
2 plaintiff contends that the application of the statute in
3 the particular context in which he has acted, or in
4 which he proposes to act, would be unconstitutional. The
5 practical effect of holding a statute unconstitutional
6 "as applied" is to prevent its future application in a
7 similar context but not to render it utterly inoperative.
8 TO achieve the latter result, the plaintiff must succeed
9 in challenging the statute "on its face." Out
10 traditional rule has been, however, that a facial
11 challenge must be rejected unless there exists no set of
12 circumstances in which the statute can constitutionally
13 be applied.

14 Id., citing Ada v. Guam Society of Obstetricians and Gynecologists,
15 506 U.S. 1011 (1992) (Scalia dissenting from denial of certiorari).

16 Thus, the court examines each of Plaintiff's claims in light of the
17 regulations and how they have been applied in those specific
18 instances.

19 **1. Failure to Forward Second Class Mail**

20 Plaintiff first claims Defendants, through procedures used in
21 the mailroom, failed to forward second-class mail, an omission he
22 contends is a violation of his First Amendment rights.

23 Rights secured by the First Amendment are fundamental;
24 convicted prisoners retain First Amendment rights not incompatible
25 with their status as prisoners. Burton v. Nault, 902 F.2d 4 (6th
26 Cir. 1990), cert. denied, 498 U.S. 873 (1990). In Procunier v.
27 Martinez, 416 U.S. 396 (1974), overruled on other grounds,
28 Thornburgh v. Abbott, 490 U.S. 401 (1989), the Supreme Court held
29 censorship of prisoner mail is justified only when the regulation
30 furthers "an important or substantial government interest unrelated
31 to the suppression of expression" and that the limitation of First
32 Amendment freedoms "must be no greater than is necessary or
33 essential to the protection of the particular governmental

10

1 interest" involved. Id. at 404. The ruling in Martinez was not.
2 based on an analysis of prisoner rights, but on the protection of
3 the First Amendment rights of a party outside the prison wishing to
4 correspond with an inmate. Martinez, at 408. Here, Plaintiff does
5 not challenge the constitutionality of the regulations at issue;
6 rather, he claims they were unconstitutionally applied to
7 particular pieces of mail.

8 Initially, Plaintiff was incarcerated at the Washington
9 Corrections Center (WCC), in Shelton, Washington. At that time, he
10 received by mail subscriptions to several different magazines.⁷ In
11 April 1991, Plaintiff was transferred to WSP and his subscriptions
12 were forwarded without difficulty. (Ct. Rec. 53, Ex. A; Tr. at
13 84.) In March 1992, Plaintiff returned to WCC. (Tr. at 83.) At
14 that time, Plaintiff alleges Defendants failed to forward his mail
15 to WCC in accordance with the United States postal regulations.⁸

16 _____
17 ⁷Plaintiff's subscriptions included the following: (1) The
18 Christian Science Monitor; (2) Guideposts; (3) Metropolitan Home;
19 (4) Mother Jones; (5) National Geographic; (6) Playboy; (7) Popular
20 Science; (8) Reader's Digest; (9) The Rocket; and (10) Rolling
21 Stone.

22 ⁸United States Postal Service regulations provide forwarding
23 of first-class mail for one year following a change of address and
24 second-class mail for sixty days. Domestic Mail Manual F010.5.1
25 and F010.5.2. Mail addressed to an inmate who has left an
26 institution "must be redirected to the current address, if known,
27 or endorsed appropriately and returned by the institution to the
28 post office." Domestic Mail Manual D042.5.1.

1 After Plaintiff's subscriptions failed to arrive, he was able to
2 contact only one publisher with his new address because he did not
3 have the addresses of the remaining publications. (Tr. at 104.)

4 When Plaintiff returned to WSP in July 1992, Plaintiff
5 testified he was provided with a copy of a WSP field instruction
6 which stated the institution maintained records of undeliverable
7 mail. (Tr. at 84.) Pursuant to that field instruction, Plaintiff
8 requested information regarding his mail which had ~~not~~ been
9 forwarded to him at WCC. ~~AND NOT ATTACHED~~ In response, Plaintiff was provided
10 copies of the covers of magazines to which he had subscribed, with
11 Postal Service Form 3579 attached, noting as Plaintiff's new
12 address: "WASHINGTON STATE CORRECTIONS CENTER, PO BOX 900,
13 SHELTON, WA. 98504." (Ex. 3, and Ex. 26-32.) In December 1992,
14 Plaintiff was transferred from WSP to Clallam Bay Corrections
15 Center (CBCC). Again, Plaintiff's magazines⁹ were not forwarded to
16 his new address. (Tr. at 87.)

17 Plaintiff filed several grievances concerning WSP's forwarding
18 policy, but the WSP Grievance Coordinator refused to adopt
19 Plaintiff's suggested remedies. (Ex. 33(a), (b) and (c).)
20 Plaintiff appealed WSP's refusal to change its mail forwarding
21 policy to Defendant Spalding without success. (Ex. 25.)

22 Prisoners have a right to send and receive mail, Thornburg 490
23 U.S. at 407, and prison authorities have a responsibility to
24 _____

25 ⁹Plaintiff testified he misplaced his list of subscriptions,
26 but recalled he was receiving at that time, gift subscriptions to
27 The Christian Science Monitor, National Geographic, Popular
28 Science, The Rocket, and Rolling Stone. (Tr. at 87.)

1 promptly forward mail to an inmate once it has been received at the
2 institution. ~~Bryan v. Werner~~, 516 F.2d 233, 238 (3d Cir. 1975);
3 ~~United States ex. rel. Wolfish v. Levi~~, 439 F. Supp. 333, 345
4 (S.D.N.Y. 1977), rev'd in part on other grounds, sub. nom., Bell v.
5 Wolfish, 441 U.S. 520, 529 n.10 (1979) (the district court's
6 decision with respect to mail forwarding was not appealed). An
7 isolated incident of delay is not enough to state a cognizable
8 claim for relief under 42 U.S.C. § 1983. ~~See Bach v. Illinois~~, 504
9 F.2d 1100, 1102 (7th Cir.), cert. denied, 418 U.S. 910 (1974).

10 Defendant Van Boening stated when mail is delivered to the
11 institution, it ceases being United States mail because the act of
12 delivery has been completed. (Tr. at 60.) Mr. Potts indicated
13 Form 3579 is placed on second, third and fourth-class mail to
14 enable forwarding to a new address when an inmate has been
15 transferred to another institution. The form is not used for
16 first-class mail; rather, the new address is written directly on
17 the first-class mail envelope and the letter is returned to the
18 U.S. Postal Service for delivery. (Tr. at 39.)

19 The circumstances here differ from others which address the
20 obligation of a penal institution to forward legal mail,
21 inferentially involving access to court issues. See Wolfish. It
22 also differs from other rulings when there were no procedures for
23 inmates to report changes of address; here, WSP provides inmates
24 with change of address cards and has instituted a policy of
25 forwarding all first-class mail, either legal or not, for 30 days.
26 With respect to second-class mail, Postal Service Form 3579 is
27 affixed to the magazine and that form is stamped with the new

28

11

1 address. (Exs. 27-32.)

2 Plaintiff alleges by affixing Form 3579, Defendants are
3 directing the Postal Service to return the mail to sender, not to
4 forward it to the new address. (Ex. 33(b).) Plaintiff contends
5 the procedures used at the WSP mailroom result in the permanent
6 loss of property.

7 With respect to the use of Form 3579, and in response to a
8 grievance filed by Plaintiff on this issue, Sgt. Warneka, WSP mail
9 room supervisor, noted:

10 I find that WSP Mail Room procedures reflect the advice
11 of local postal authorities. Because WSP is an
12 institution, and its employees act as agents of those
13 individuals incarcerated here, PS form 3579 is used to
14 notify the senders of Second Class, Third Class and
Fourth Class mail where to send future mailings. In the
long run, an inmate will receive his future mailings
faster, with fewer delays for forwarding.

15 (Ex. 33(b).)

16 Sgt. Warneka's statement is supported by postal service
17 regulations and practices. Under postal service regulations,
18 undeliverable second-class mail is forwarded by the U.S. Postal
19 Service for 60 days at no expense if a change of address is filed,
20 even if the copies show a request for return by the sender.
21 Domestic Mail Manual (DMM), Issue 40, 09-01-95, 5.2. || However,
22 since the second-class mail in this instance has been addressed to
23 an institution, the mail is considered delivered under postal
24 regulations when it reaches the institution. DMM Issue 49, 09-01-
25 95, D042.2.51. This rule would also apply to mail delivered to
26 group homes, law offices, hospitals or other addresses with
27 multiple addressees.

28

1 DO42.2.51 further provides "[i]f the addressee is no longer at
2 that address, the mail must be redirected to the current address,
3 if known, or endorsed appropriately and returned by the institution
4 to the post office." However, when a change of address is affixed
5 to a particular piece of mail delivered to an institution,
6 additional postage is required for it to reenter the postal stream,
7 because the article is considered to have been delivered. There is
8 no evidence Plaintiff offered to affix additional postage to his
9 second-class mail. The mail room's reliance on Form 3579 and the
10 return of the item to the sender ensures that the publisher is
11 ultimately informed of the change of address and constitutes
12 compliance with the second portion of DO42.2.51. Although the
13 court recognizes a minimum of one issue of the publication will not
14 be delivered to the inmate (the issue with Form 3579 affixed), the
15 remaining issues should reach the inmate at the new address. Any
16 failure to do so would be the fault of the publisher, not the
17 institution. Moreover, the decision by WSP to forward mail for 10,
18 30,¹⁰ 60, or 90 days is within its discretion since postal
19 regulations do not apply to inter- or intra-institutional delivery.
20 The mail forwarding practices and procedures of the WSP mailroom,
21 as applied to Plaintiff's mail, are reasonable and in compliance
22 with postal regulations. Moreover, they are a reasonable response

23 _____
24 ¹⁰In Ex. 33(c), it is noted WSP's policy of forwarding mail for
25 30 days is reasonable because it is expected within that time frame
26 the inmate's change of address card will have gone into effect in
27 the Post Office. Thus, the Post Office would do all subsequent
28 forwarding.

1 to a legitimate penological goal, and are constitutional as
2 applied. See Turner, 482 U.S. at 78. Accordingly, judgment is for
3 Defendants and the claim is **DISMISSED WITH PREJUDICE**.

4 **2. Catalogs**

5 On November 4, 1993, Plaintiff wrote a letter to Amnesty
6 International inquiring about literature on the effects of
7 long-term sensory deprivation. (Ex. 37.) In response, a company
8 representative mailed Plaintiff a catalog and an unsigned note
9 explaining lack of familiarity with other publications on that
10 subject. (Ex. 37.) Defendant Potts rejected the catalog; later,
11 Plaintiff requested the catalog be forwarded to Mia Means. (Ex.
12 4.) Ms. Means photocopied the catalog and mailed the photocopy,
13 along with a note, to Plaintiff. Defendant Potts rejected the
14 photocopy. (Ex. 5.)

15 WSP Field Instruction 450.100(IV)(B)(a) specifically defines
16 an authorized catalog as "[o]ne offering hobby craft or curio items
17 for receipt by an inmate with a current and authorized curio
18 permit." The Amnesty catalog does not meet this exception to the
19 rule. Although it is slender and comprised of a svelte fourteen
20 pages, it falls within WSP's definition of a catalog or pamphlet.
21 See WSP FI 450.100(IV)(M). (Ex. 1.) Whether an item is a catalog
22 or a pamphlet, it is not authorized mail. WSP Field Instruction
23 450.100(V)(r).

24 The court finds Defendants' policy regarding catalogs and/or
25 pamphlets, as applied in this instance, was a reasonable response
26 to WSP's legitimate penological concerns of preventing fraudulent
27 behavior, concealing contraband, and keeping cells sanitary and
28

1 free of fire hazards. (Tr. at 24.) Additionally, catalog materials
2 are available through the curio program if they are an authorized
3 curio, the chapel (for religious material) or the prison library.
4 (Tr. at 24, 61.) Accordingly, as to Plaintiff's claim regarding
5 Defendants' rejection of the Amnesty International catalog,
6 judgment is for Defendants and the claim is **DISMISSED WITH**
7 **PREJUDICE.**

8 3. Magazine Gift Subscriptions

9 Defendants Rolfs and Potts¹¹ rejected numerous issues of
10 Guidepost magazine, citing WSP Field Instruction 450.100 and/or
11 440.000. (Ex. 7, 8, 9, 10, 22 and Tr. at 45.) Defendants Van
12 Boening and Spalding affirmed the rejections. Initially, the court
13 notes the rejection is "source" based, rather than "content" based,
14 because the magazine was a gift to Plaintiff and there is no
15 contention it was rejected because of its content.

16 WSP regulations require that all inmate purchases be made
17 through facility-designated channels. WSP Field Instruction
18 450.100(VI)(A)(2)(t). According to Defendants' interpretation of
19 this policy, inmates may receive magazine subscriptions only if
20 purchased by the inmate, pre-approved by the inmate's counselor and
21 paid with funds from the inmate's account. (Tr. at 30.) Defendant
22 Wood stated she did not know which field instruction addressed the
23 issue of magazine subscription purchases, but admitted it was
24 "readily known." (Tr. at 30.) The policy is necessary, as
25

26 ¹¹Ex. 35 and 36 indicate gift subscription notices were
27 rejected by mail room employee N. Frost, not a party to this
28 action.

1 explained by Defendant Wood, to facilitate WSP's ability to control.
2 payment for the subscription and the content of the magazine. (Tr.
3 at 32.) She also stated the policy prevents strong arming and
4 payoffs among inmates and their families outside the institution.
5 (Tr. at 32, 33.)

6 Despite this policy, Plaintiff testified and Defendant did not
7 dispute he received numerous gift subscriptions to several
8 magazines through the years while at WSP. (Tr. at 107.) The
9 evidence infers and the court finds a rejection of a gift magazine
10 subscription occurs only when a gift subscription notification is
11 mailed to the inmate. (Tr. at 43.) Inferentially, if no such
12 notification is sent, there would be no rejection. Thus, the
13 application of the policy depends, in large part if not
14 exclusively, upon the publisher's practice with respect to
15 acknowledging gift subscriptions.

16 The court first questions whether a "policy" exists. WSP
17 Field Instruction 450.100(E)(1), which addresses the receipt of
18 magazines, does not address the facility-designated channel
19 requirement:

20 1. Conditions for Receipt: Inmates may receive a
21 reasonable number of books, newspapers, magazines, and
22 other publications directly from the publisher provided
23 they do not constitute a threat to the order and security
policy.

24 Rather, the regulation confines restrictions to content
25 requirements. There is no allegation by Defendants the gift
26 subscriptions met the definition of security threat or obscene or
27 sexually explicit materials. There is also no language in this
28

18

1 field instruction which addresses an inmate's right to receive a
2 gift subscription. Rather, the inmate must read this section in
3 conjunction with the section allowing purchases only through
4 facility designated channels.

5 WSP Field Instruction 440.000(VII)(A), since superseded by
6 Administrative Bulletin dated September 8, 1995, effective October
7 8, 1995, addresses only "purchases." Furthermore, the record
8 discloses Defendants' inability to locate a gift subscription
9 restriction in WSP Field Instruction 450.100. (Tr. at 31, 45, and
10 69.) In response to Plaintiff's grievance, Defendant Rolfs stated
11 WSP Field Instruction 450.100 "very clearly states that all
12 magazines will be prepaid and will be preauthorized by the
13 authorities at Washington State Penitentiary." (Ex. 22.) However,
14 at trial, Defendant Rolfs testified WSP Field Instruction 450.100
15 "alludes" to the prohibition of gift subscriptions. Similarly,
16 Defendant Wood was unable to quote the particular section of the
17 field instruction which applied, stating only that it was "readily
18 known." (Tr. at 30, 69-70.)

19 A gift is not a purchase by an inmate. Rather, it involves the
20 rights of those outside the institution to provide a source of
21 enrichment for inmates. Conceivably, quarterly gift packages may
22 lawfully contain magazines not purchased by the inmate. WSP Field
23 Instruction 450.100(F). The content of those magazines is examined
24 at the time the quarterly package is inspected. The content of any
25 gift subscription also would be examined when it is received at the
26 institution. The only remaining rationale for rejecting a gift
27 subscription is to prevent strongarming among inmates and family

28

NOT ON POINT

1 members.

2 Avoidance of strong arming is a legitimate penological
3 interest, see, e.g., Mann v. Adams, 846 F.2d 589, 591 (9th Cir.),
4 cert. denied, 488 U.S. 898 (1988). However, Defendants'
5 application of this "policy" is inconsistent. Defendant Potts
6 admitted he knew Plaintiff's subscriptions were gifts because he
7 saw the publisher's notification on behalf of the donor. (Tr. at
8 43.) Defendants describe no other steps taken by mail room
9 officials to prevent inmates from receiving publications paid for
10 by others. For example, if WSP cross-checked their inmate accounts
11 to determine whether an inmate had paid for an incoming
12 publication, Defendants' argument would be more persuasive.
13 However, inmates easily can have family members or friends direct
14 a publisher not to send the notice of gift subscription, depriving
15 WSP officials of their basis on which to reject the publication.

16 The court's review of WSP Field Instruction 450.100 reveals no
17 requirement magazines be ordered by an inmate. As to the
18 strongarming rationale, no evidence was presented other than
19 Defendant Woods' conclusory statement, that inmates will attempt to
20 coerce third parties outside the institution to provide gift
21 magazine subscriptions in exchange for favors among inmates. This
22 argument is not persuasive as the institution permits gift packages
23 on a quarterly basis and, surely, the same strongarming tactics
24 could be imposed. The court concludes the application of this
25 policy is inconsistent; furthermore, there is no legitimate
26 penological interest at stake here. Accordingly, Plaintiff has met
27 his burden on this claim against Defendants Rolfs, Potts, Van

28

20

1 Boening and Spalding.

2 **QUALIFIED IMMUNITY**

3 Defendants argue they are entitled to qualified immunity from
4 any damages which may be awarded. They contend Plaintiff has not
5 met his burden with respect to demonstrating a clearly established
6 law that their actions were unconstitutional in this instance, or
7 in the absence of such law, that their actions were unreasonable.

8 A prison official is not absolutely immune from suit, but
9 rather, only "insofar as his or her conduct does not violate
10 clearly established statutory or constitutional rights of which a
11 reasonable person would have known." Harlow v. Fitzgerald, 457
12 U.S. 800, 818 (1982). Qualified immunity protects "all but the
13 plainly incompetent or those who knowingly violate the law."
14 Malley v. Briggs, 475 U.S. 335, 341 (1986). The test for
15 determining whether a law enforcement officer is entitled to
16 qualified immunity consists of two parts: "(1) Was the law
17 governing the official's conduct clearly established? (2) Under
18 the law, could a reasonable officer have believed the conduct was
19 lawful?" Act Up!/Portland v. Bagley, 988 F.2d 868, 871 (9th Cir.
20 1993.) The second part of this test is an objective inquiry; the
21 subjective belief of the official as to the lawfulness of his or
22 her conduct is not relevant. Anderson v. Creighton, 483 U.S. 635,
23 641 (1987).

4 The determination of qualified immunity should be made by the
5 factfinder if it involves facts which are genuinely in dispute.
6 Barlow v. Ground, 943 F.2d 1132, 1139 (9th Cir.), cert. denied, 505
7 U.S. 1206 (1992). That line of cases was questioned in Sloman v.
8

(21)

(22)

1 only, a regulation which has not been challenged by Plaintiff as
2 being unconstitutional on its face. Defendants' rejection of the
3 gift subscriptions was not unreasonable. Consequently, the court
4 finds Defendants are entitled to qualified immunity with respect to
5 Plaintiff's prayer for damages. However, proof of this defense
6 does not prevent the court from imposing permanent injunctive
7 relief, preventing further interference by WSP personnel with
8 Plaintiff's right to receive gift subscription magazines, which
9 meet the requirements of content and storage, under institutional
10 regulations which are currently in effect.

11 **4. College and Financial Aid Applications**

12 In April 1993, while incarcerated at SOC, Plaintiff enrolled
13 in a correspondence program administered by Ohio University, taking
14 15 credits of classes. The tuition charges (\$715) were advanced by
15 his mother on the condition she would be repaid after Plaintiff
16 received a Pell grant. (Tr. at 94.) To qualify for that grant,
17 Plaintiff, with the approval of SOC, completed an application.
18 (Ex. 18.) After submitting his application, Plaintiff was
19 transferred to WSP in June 1993. Some time after his transfer, the
20 agency sent Plaintiff a copy of his completed application to ensure
21 the information he had provided was accurate. (Ex. 17.) Defendant
22 Potts rejected the application as unauthorized mail under WSP Field
23 Instruction 450.100. (Ex. 11.) Plaintiff also received an
24 application to enroll in a correspondence course offered through
25 Ohio University. Defendant Potts rejected this application, under
26 WSP Field Instruction 450.100. (Ex. 13.)

27 Plaintiff appealed the mail rejection on December 15, 1993,
28

1 requesting his mail from the federal student aid agency. (Ex. 14.)
2 Defendant Van Boening responded and suggested Plaintiff contact his
3 counselor. (Ex. 15.)

4 Prisoners do not have a liberty interest in education under
5 the due process clause, Rizzo v. Dawson, 778 F.2d 527, 530 (9th
6 Cir. 1985); or under Washington law. See Hernandez v. Johnston,
7 833 F.2d 1316, 1318 (9th Cir. 1987). Moreover, limitations on
8 educational opportunities do not constitute punishment within the
9 meaning of the Eighth Amendment. Rhodes v. Chapman, 452 U.S. 337,
10 348 (1981); Hoptowit v. Ray, 682 F.2d 1237, 1254-55 (1982).

11 Defendants assert the restrictions imposed by WSP Field
12 Instruction 450.100 provide inmates access to educational programs,
13 while protecting the legitimate concern of the institution to
14 prevent fraud. (Tr. at 22.) Defendants claim any application
15 process provides inmates with an opportunity to commit fraud. It
16 is for these reasons Defendants contend WSP Field Instruction
17 450.100 is necessary and constitutional.

18 The court agrees Defendants' policy, although different from
19 other penal institutions within the state, balances both the
20 institution's concerns to protect the public from fraud and the
21 inmates' access to higher education. Defendant Wood testified an
22 inmate's education is fully funded; under unusual circumstances
23 when a grant is required, the inmate may work through the counselor
24 and education director to secure that grant. Plaintiff admitted he
25 had not inquired of his counselor or the education director
26 regarding the availability of a student grant. (Tr. at 34, 112.)
27 Thus, judgment is for Defendants on this claim. Accordingly,

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS ORDERED:

1. Judgment for injunctive relief shall be entered against Defendants Rolfs, Potts, Van Boening, and Spalding on Plaintiff's claim involving the rejection of his gift magazine subscriptions. However, as to Plaintiff's request for a damages remedy, Defendants are entitled to qualified immunity from damages. DEFENDANTS ARE PERMANENTLY ENJOINED, UNDER THE REGULATIONS WHICH ARE CURRENTLY IN EFFECT, FROM REJECTING THE DELIVERY OF PLAINTIFF'S GIFT SUBSCRIPTIONS TO MAGAZINES UPON THEIR DELIVERY BY THE POSTAL SERVICE TO THE WSP MAILROOM, SO LONG AS THE CONTENT OF THOSE MAGAZINES MEETS INSTITUTIONAL REGULATIONS AND THE BULK OF THOSE MAGAZINES MEETS STORAGE REQUIREMENTS.

2. Judgment shall be entered for Defendants on all other claims at issue, and Plaintiff's complaint and those claims are DISMISSED WITH PREJUDICE.

3. The Clerk is directed to enter this Order and provide a copy to Plaintiff and counsel for Defendants. Each party shall bear its own costs.

DATED this 23rd day of May, 1996.



CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE