UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

YAHYA (JOHN) LINDH, on his own behalf and on behalf of those similarly situated,	)	
Plaintiff,	)	
v.	)	No. 2:14-cv-142-JMS-WGH
WARDEN, FEDERAL CORRECTIONAL INSTITUTION, TERRE HAUTE, INDIANA, in his official capacity,	)	
Defendant.	)	

Plaintiff's Reply Memorandum in Support of Motion to File Second Amended Complaint

I. Introduction

On July 27, 2015, plaintiff Lindh sought to file a second amended complaint to raise a new legal claim that, as applied to him, the defendant's policy of subjecting all prisoners in the Communications Management Unit at the Federal Correction Institution in Terre Haute to strip-searches prior to non-contact visits violates the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 20)0bb-1. (Dkt. 36). This Court has discretion to deny leave to amend "where the amendment would be futile." *Arreola v. Godinez*, 546 F.3d 788, 796 (7th Cir. 2008) (citing *Foman v. Davis,* 371 U.S. 178.,182 (1962); *Thompson v. Ill. Dep't of Prof'l Regulation*, 300 F.3d 750, 759 (7th Cir. 2002)). The Warden argues that inasmuch as plaintiff has failed to exhaust administrative remedies as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), amendment would be futile and the motion to amend must be denied. However, plaintiff has

fully exhausted his grievance remedies as required and the Warden's objection to the motion to amend is not meritorious.[1]

II. Facts

As this Court has noted, the Federal Bureau of Prisons ("BOP") has:

> promulgated an administrative remedy system which is codified in 28 C.F.R. §§ 542.10, *et seq.,* and BOP Program Statement 1330.18,*Administrative Remedy Procedures for Inmates.* The Administrative Remedy process is a method by which an inmate may seek formal review of a complaint related to any aspect of his imprisonment. To exhaust his remedies, an inmate must first file an informal remedy request through an appropriate institution staff member via a BP–8, prior to filing a formal administrative remedy request with the Warden, Regional Director, and General Counsel. If the inmate is not satisfied with the informal remedy response, he is required to first address his complaint with the Warden via a BP–9. If the inmate is dissatisfied with the Warden's response, he may appeal to the Regional Director via a BP–10. If dissatisfied with the Regional Director's response, the inmate may appeal to the General Counsel via a BP–11. Once an inmate receives a response to his appeal from the General Counsel, after filing administrative remedies at all required levels, his administrative remedies are deemed exhausted as to the specific issues properly raised therein.

David v. Tussy, No. 2:14-CV-00077-JMS, 2015 WL 1526694, at *1 (S.D. Ind. Apr. 2, 2015) (footnote omitted).

It is uncontested that Mr. Lindh did fully exhaust this process, beginning with an informal remedy noting that:

> Beginning on October 31, 2012, strip searches began to be conducted in the Terre Haute CMU before and after non-contact visits in which the prisoner is separate from his visitors by a metal and glass partition These searches do not serve any security or correction objective; they are only conducted to harass and humiliate the predominantly Muslim population of the CMU. Unlike contact visits, non-contact visits do not provide prisoners any opportunity to transfer contraband or other items.

[1] Although the Warden also argued that prejudice would be suffered by allowing the amendment, (Dkt. 39 at 3), the Warden explicitly notes that this prejudice would arise because plaintiff has not exhausted mandatory administrative remedies. (*Id.*). There is therefore no need to separately respond to the Warden's argument against prejudice as it is subsumed into the exhaustion argument.

> No strip searches were ever deemed necessary before or after non-contact social visits in the CMU from its inception in December, 2006 until October 31, 2013. There is no reason they should take place now.

(Dkt. 7-1 at 7-8; Dkt. 39-1 at 11-12). Mr. Lindh, in articulating attempts that he made to resolve the issue noted in his informal resolution that "I have tried to resolve the issue in a peaceful manner, but the pattern of persecution and harassment of Muslim prisoners in the CMU continues. The issue is only one out of many." (Dkt. 7-1 at 7; Dkt. 39-1 at 11). And he noted that the desired resolution was "I expect this heinous, perverted, criminal behavior on the part of B.O.P. staff towards Muslim prisoners to come to an immediate end." (Dkt. 7-1 at 7; Dkt. 39-1 at 11). He then appealed through each level of the BOP system, reiterating his belief that the searches were intended to harass and humiliate the predominantly Muslim prisoners in the Communications Management Unit. (Dkt. 7-1 at 2-6; Dkt. 39-1 at 3-7). At the final level the appeal was denied with the Administrator for National Inmate Appeals concluding, "You have not presented any credible evidence the search procedures were implemented in retaliation or discrimination against Muslim inmates." (Dkt. 7-1 at 1; Dkt. 39-1 at 18).

III. Mr. Lindh properly exhausted his administrative remedies

The Warden does not contend that Mr. Lindh has failed to exhaust all levels of the BOP's grievance system. Instead, he argues that Mr. Lindh's grievances did not properly assert a RFRA claim. *See* Dkt. 39 at 6 ("The administrative remedy submitted to the Bureau underlying this litigation raises no such claim."). It is true that nowhere in his grievance history does Mr. Lindh state that the Warden has violated his rights under RFRA. Of course, he also did not state that his Fourth Amendment rights were being violated. What is clear is that a grievance need not be this specific or identify any, let alone all, potential legal claims, and the Warden's arguments to the contrary are not correct.

The Prison Litigation Reform Act's exhaustion requirements states in pertinent part that no action may be brought by a prisoner "until such administrative remedies as available are exhausted." 42 U.S.C. § 1997e(a). The Supreme Court has stressed that:

> Compliance with prison grievance procedures, therefore, is all that is required by the PLRA to "properly exhaust." The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirement, and not the PLRA, that define the boundaries of proper exhaustion.

Jones v. Bock, 549 U.S. 199, 218 (2007). The Warden, for good reason, has not claimed that the BOP's grievance policy requires any degree of specificity in the articulation of the prisoner's grievance. The applicable federal regulation concerning the first step of informal resolution states only that "an inmate shall first present an issue of concern informally to the staff." 28 C.F.R. § 542.13(a). The Federal Bureau of Prisons Program Statement 1330.18 contains no more specific requirements. PS 1330.18 ¶ 7 (available at Federal Bureau of Prisons, General Administration and Management Policy, Number 1330.18 – Administrative Remedy Program, http://www.bop.gov/policy/progstat/1330_018.pdf (last visited Aug. 11, 2015)). And, the only relevant regulatory guidance concerning the initial filing of the grievance is that "[t]he inmate shall place a single complaint or a reasonable number of closely related issues on the form." 28 C.F.R. § 542.14(c)(2). The Program Statement adds nothing other than stating that "[p]lacing a single issue or closely related issues on a single form facilitates indexing, and promotes efficient, timely and comprehensive attention to the issues raised." PS 1330.18 ¶ 8(c)(2). For the grievance appeal the regulations provide only, in pertinent part, that "[a]ppeals shall state specifically the reason for the appeal," "[a]n inmate may not raise in an Appeal issues not raised in the lower level filing," and, "[a]n inmate shall complete the appropriate forms with all requested identifying information and shall state the reasons for the Appeal in the space provided

on the form." 28 C.F.R. § 542.15(b)(1), (2), (3). The Program Statement is no more specific. *See* PS 1330.18 ¶9(b).

Thus, the BOP regulations and Program Statement are silent as to the detail required for a grievance. In such a situation the Seventh Circuit has clearly spoken as to what is required.

> When the administrative rulebook is silent, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought. As in a notice-pleading system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming.

Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002). "In the absence of more specific requirements in the grievance procedure, the exhaustion requirement is modest: prisoners must only put responsible persons on notice about the conditions about which they are complaining." *Wilder v. Sutton*, 310 F. App'x 10, 15 (7th Cir. 2009).

In *Kelly v. Person*, 1:14-cv-01364-SEB-DML, 2015 WL 1548971 (S.D. Ind. 2015), the Court rejected the argument that a prisoner's grievance was not specific enough inasmuch as "the Superintendent has not pointed to any provision of the grievance procedures outlined in the inmate handbook which requires anything more than what Mr. Kelly did." *Id.* at *2. Similarly, the Warden here has not pointed to any portion of the BOP's grievance procedures that required Mr. Lindh to do anything more specific than he did. He clearly "object[ed] intelligibly" to the fact that strip searches are required, even though visits are non-contact. He even noted repeatedly that this particularly burdened Muslim prisoners. The Seventh Circuit is clear that he was not required to articulate his legal theories. The BOP appears to acknowledge as much by not contending that he was required to explicitly raise his Fourth Amendment claim in the grievance process. Mr. Lindh was required to put the Bureau of Prisons on notice as to his concerns, and that is exactly what he did. *Strong, supra.* He properly exhausted his administrative remedies.

IV. Conclusion

Given that Mr. Lindh properly exhausted his administrative remedies his request to file a second amended complaint is not futile. The request to amend should be granted.

Kenneth J. Falk
Kenneth J. Falk
No. 6777-49

Gavin M. Rose
Gavin M. Rose
No. 26565-53
ACLU of Indiana
1031 E. Washington St.
Indianapolis, IN 46202
317-635-4059
Fax: 317-635-4105
kfalk@aclu-in.org
grose@aclu-in.org

Attorneys for Plaintiff

Certificate of Service

I hereby certify that on this 12th day of August, 2015, a copy of the foregoing was filed electronically with the Clerk of this Court. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system and the parties may access this filing through the Court's system.

Thomas Kieper
Assistant United States Attorney
tom.kieper@usdoj.gov

Jonathan Bont
Assistant United States Attorney
jonathan.bont@usdoj.gov

s/ Kenneth J. Falk
Kenneth J. Falk
Attorney at Law