

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FILED
DEC 16 2009
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NATIVE AMERICAN COUNCIL OF)
TRIBES; Blaine Brings Plenty,)
Shawn Garrnett, Nephi Antelope)
Brian Dubray, Bryan White Pipe)
Clayton Creek, David Deloria,)
and all other persons who are)
similarly situated,)

PLAINTIFFS,)

vs)

DOUGLAS WEBER, Warden of)
South Dakota State Prison,)
TIMOTHY REISCH, Secretary of)
the Department of Corrections,)
MARTY JACKLEY, Attorney)
General, et al,)

DEFENDANTS.)

CIV. NO. 09- 4182

PLAINTIFF'S COMPLAINT
UNDER 42 U.S.C. §2000cc-
1(a)(1)-(2) FOR
VIOLATION OF THE RIGHT
TO FREE EXERCISE OF
RELIGION

Plaintiffs, the Native American Council of Tribes, ("NACT or organization"), institute this civil rights suit pursuant to the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §2000cc-1(a)(1)-(2), seeking an injunction and judicial review of an adverse administrative decision, wherein Plaintiffs were not given a full, fair and adequate hearing, Fed.R.Civ.P.65(a)(2). The Plaintiffs never agreed for such decision to be made. Fed.R.Civ.P.56(c). With this, the Plaintiffs seek an immediate injunction asserting the following claims for relief: (1) violation of right to free exercise of religion; (2) violation of the American Indian Religious Freedom Act, 42 U.S.C. § 1999; (3) violation of equal protection; (4) violation of Federal trust responsibility; (5) violation of the right of freedom of religion under customary international law and the United Nations Charter; (6) violation of plaintiffs right to protection against

genocide as provided in international law and in the Geneva Convention; (7) violation of plaintiffs rights as a "self governing people" under Article 73 of the United Nations Charter. Manybeads v. United States, No 88 Civ. 0181, Slip.Op. at 51-54 (1988).

In addition to this complaint, the named defendants are prohibited and may not rely on mere denials or allegations of other similar situated complaints related to the present in its answer or pleadings. *Id* at 612-613 (quoting Fed.R.Civ.P.56(c)).

FACTUAL BACKGROUND

Plaintiff (N.A.C.T.) is a federally recognized Indian organization with its headquarters at the South Dakota State Penitentiary (S.D.S.P.) in Sioux Falls, South Dakota. By virtue of its federally registered status, the Native American Council of Tribes organization is entitled to affiliate with the nine (9) Sioux Indian Tribes in South Dakota and North Dakota, Montana, Nebraska and Minnesota, to plan, conduct, and administer spiritual programs or portions thereof under §501(c)(3) of the Indian Reorganization Act of 1934. See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979). N.A.C.T. instituted this suit pursuant to the R.L.U.I.P.A., seeking to reverse the predilection penal administration decision and to restore all spiritual ceremonial programs that are embodied in "tobacco", and offered within a ceremonial framework.

DISCUSSION

Discrimination prohibited: No Native American prisoner shall be penalized or discriminated against solely on the basis of Native American religious beliefs or practices, (BOP) states that "no one may disparage the religious beliefs of an inmate." (Sec. 13) Federal regulations on the protection of incarcerated Native Americans' religious rights can serve, as the United Nations (U.N.) Report (PS 5360.07.Aug.25, 1997).

STANDARD OF REVIEW

Unlike the usual civil case in which the Plaintiffs bear the burden of proof by a preponderance of the evidence, the South Dakota State Penitentiary Administration places the burden on itself in not providing any full, fair or adequate hearing, or an opportunity to plaintiffs to establish, by clearly demonstrating the validity of the grounds for constitutional rights (or portion thereof). (O'Lone v. Shabazz, 482 U.S. 342, at 348 (1987)) (quoting 28 U.S.C. §2403(a)). Freedom of religion is one of the Federal Constitutional rights of prisoners...discrimination is prohibited: No Native American prisoner shall be penalized or discriminated against solely on the basis of Native American religious beliefs or practices. The Fourteenth Amendment to the United States Constitution is the most important guarantee against infringement of civil liberties by the States. Its due process and equal protection clauses protect all "persons" and it is the South Dakota State Penitentiary Administration's violation of such constitutional rights that we address herein, although Indians clearly qualify on both counts, to rights and immunities clause protections. The penological administration has been reluctant to accord Indian Inmates those rights enjoyed under State law by non-Indians. These attitudes still linger. The United States Supreme Court has made it clear that State discrimination against Indians because of their status is without support of law. White Mountain Apache Tribe v. Bracker, 448 U.S. 142 U.S. (1980).

This general principle suggests that judicial review of the Penological Administration decisions should be taken as discriminatory because the South Dakota State Penitentiary administration has not given Plaintiffs any hearings in the matter but arbitrarily took from them the most effective part of their ceremonies which is "tobacco" for prayer, and for prayer to be effective, it must be embodied in "tobacco" and offered within a ceremonial framework. See generally,

Youngbear v. Thalacker, 17 F.Supp.2d 902 (N.D.Iowa 2001)(quoting Swift v. Lewis, 901 F.2d 730 (9th cir. 1990).

The plain language of §2000cc-2(a) mandates the Plaintiffs defense against a party who violates Congressional enactments that protect incarcerated Native Americans' religious rights pursuant to 28 U.S.C. §2403(a), makes a showing sufficient to establish the existence of an element essential to Plaintiffs' case, 349 F.3d 257, 261 (CA6 2003). "In this situation, there is no genuine issue as to any material fact," because the Defendants' complete failure of proof concerning an essential elaborated element. Turner v. Safley, 482 U.S. 78, at 100 (1987)).

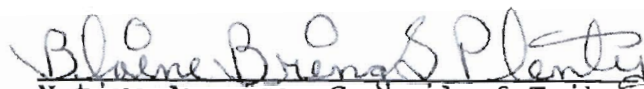
MOREOVER, because there was no hearing held or offered between the parties is a violation of the due process clause in the most basic sort, and Defendants' request for Summary Judgment will not defeat an otherwise properly supported action for penalogical disregard for inmates' Constitutional rights. Turner, supra. Plaintiffs are entitled to judgment as a matter of law. Id. at 261 (quoting Fed.R.Civ.P.56(c)).

PROCEDURAL PROPRIETY OF THE DECLINATION

The Prison Administration statutes, policies and regulations are unconstitutional in this case because any agency action taken without statutory authorization, or which frustrates the Congressional policy which underlies a statute, is invalid. Lemon v. Kurtzman, 403 U.S. 602 (1971).

As to N.A.C.T. action, 403 U.S., at 612-613 for Constitutional rights violations. A preliminary injunction should be granted.

Respectfully submitted,


Native American Council of Tribes
Blaine Brings Plenty, Chairman

Dated this 1st day of December 12th, 2009



**SOUTH DAKOTA
DEPARTMENT OF CORRECTIONS
STATE PENITENTIARY**

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10/19/09

Dear Tribal Liaisons, Spiritual Leaders, Pipe Carriers, and Sundancers,

In 2000, the South Dakota Department of Corrections became tobacco free with the only exception that tobacco may be used for Native American Ceremonies. Over the years, tobacco tie mixtures and pipe mixtures have increasingly been abused and this problem is directly impacting the Native American Ceremonies. Many inmates have been caught separating the tobacco from their tie and pipe mixtures. This tobacco is then sold or bartered to other inmates. Sometimes the prison gangs are pressuring the inmates to sell their tobacco instead of using it for spiritual reasons.

Many times the SDDOC has reached out to the elders of the NACT/LDN/LCT groups to help prevent the abuse of tobacco. The quantities of tobacco have been adjusted to prevent the separation. Inmates caught abusing tobacco are suspended for six months from purchasing tobacco tie and pipe mixtures. However, unfortunately the tobacco continues to be abused.

Medicine Men and Spiritual Leaders, who lead ceremonies at our facilities, have brought to our attention that tobacco is not traditional to the Lakota/Dakota ceremonies and that it is too addictive to be used for ceremonies. They have requested that tobacco be removed from Native American Ceremonies so that the participants of these ceremonies will focus on their spiritual paths and not abusing the tobacco.

Effective 10/19/09, the SDDOC will follow the advice of the respected Medicine Men and Spiritual Leaders and remove tobacco from Native American Ceremonies. All Native American ceremonies will continue with the use of other botanicals (cansasa, sage, bitter root, bearberry, lovage, flat cedar, sweet grass, etc).

Understanding the importance of all spiritual and religious ceremonies at our facilities, our goal is to work together to ensure that no religious or spiritual path is abused.

Sincerely,

Douglas L. Weber
Director of Prison Operations

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Clayton
Creek

Nephi Antelope #49471

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