No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY BARTUNEK,

Petitioner,

v.

HALL COUNTY NEBRASKA AND TODD BAHENSKY,

Respondents.

On Petition for a Writ of Certiorari to the

United States Coiurt of Appeals for the Eighth Circuit

APPENDIX

Gregory P. Bartunek

29948-047

Federal Correctional Institution

P.O. Box 9000

Seagoville, TX 75159

United States Court of Appeals
For the Eighth Circuit

No. 20-1880

Gregory Bartunek

Plaintiff - Appellant

v.

Hall County, Nebraska; Todd Bahensky

Defendants - Appellees

United States of America; Unknown Person

Defendants

Appeal from United States District Court
for the District of Nebraska - Omaha

Submitted: October 30, 2020
Filed: November 4, 2020
[Unpublished]

Before LOKEN, GRUENDER, and GRASZ, Circuit Judges.

PER CURIAM.

Gregory Bartunek appeals the district court's[1] denial of appointed counsel and adverse grant of summary judgment in his pro se 42 U.S.C. § 1983 action. Initially, after careful review, we conclude that the district court did not abuse its discretion in denying Bartunek's request for appointed counsel after considering the relevant factors. See Ward v. Smith, 721 F.3d 940, 942 (8th Cir. 2013).

Further, having reviewed the record de novo, we conclude that the district court properly granted summary judgment to defendants. See Stearns v. Inmate Servs. Corp., 957 F.3d 902, 906 (8th Cir. 2020) (standard of review). Specifically, as to the conditions-of-confinement claims while Bartunek was a pretrial detainee, we agree with the district court that the undisputed evidence demonstrated the prison temperature and sleeping arrangements were not punitive. See id. at 906-08 (discussing the relevant standards); Ferguson v. Cape Girardeau Cty., 88 F.3d 647, 650 (8th Cir. 1996); Green v. Baron, 879 F.2d 305, 309-10 (8th Cir. 1989). We also agree that the lockdown served a legitimate governmental purpose of maintaining the ongoing safety and order in the facility. See Bell v. Wolfish, 441 U.S. 520, 544-48 (1979). As to the medical deliberate-indifference claims, we agree that Bartunek failed to demonstrate defendant Todd Bahensky was deliberately indifferent to his serious medical needs, for the reasons the district court explained. See Johnson v. Leonard, 929 F.3d 569, 575 (8th Cir. 2019). Furthermore, we conclude Bartunek's First Amendment free-exercise claim failed because he failed to demonstrate that his religious practice was substantially burdened, or that he took advantage of alternative means of exercising his religion. See Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 813-15 (8th Cir. 2008). Because Bartunek failed to demonstrate any constitutional violation, the district court properly dismissed the official-capacity claims against Bahensky and the claims against the county. See Whitney v. City of St. Louis, 887 F.3d 857, 860-61 (8th Cir. 2018).

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[1]The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska.

Accordingly, the judgment of the district court is affirmed. See 8th Cir. R. 47B.

AMENDMENT I

Congress shall make no law respecting an establishment of relition, or prohibiting the free exercise thereof, or abridging the freedoem of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Appendix [2]

AMENDMENT V

No person shall be held to answer for capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without the due process of law; nor shall private property be taken fro public use, without just compensation.

Appendix [3]

AMENDMENT XIV
(Section 1.)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privleges or immunities of the citizents of the United States; nor ahall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

Appendix [4]

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title [18 USCS § 1151], knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce, or has been shipped or transported in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

§ 2252A. Certain activities relating to material constituting or containing child pornography

(a) Any person who—

(1) knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes—

(A) any child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(3) knowingly—

(A) reproduces any child pornography for distribution through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer; or

(B) advertises, promotes, presents, distributes, or solicits through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151 [18 USCS § 1151]), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or

foreign commerce by any means, including by computer;

(5) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151 [18 USCS § 1151]), knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(6) knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct—

(A) that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer;

(B) that was produced using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(C) which distribution, offer, sending, or provision is accomplished using the mails or any means or facility of interstate or foreign commerce,

for purposes of inducing or persuading a minor to participate in any activity that is illegal; or

(7) knowingly produces with intent to distribute, or distributes, by any means, including a computer, in or affecting interstate or foreign commerce, child pornography that is an adapted or modified depiction of an identifiable minor.

shall be punished as provided in subsection (b); or

(b) (1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, section 1591 [18 USCS § 1591], chapter 71, chapter 109A, or chapter 117 [18 USCS §§ 2251 et seq., §§ 1460 et seq., 2241 et seq., or 2421 et seq.], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution,

shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if any image of child pornography involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117 [18 USCS §§ 2251 et seq., §§ 1460 et seq., 2241 et seq., or 2421 et seq.], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(3) Whoever violates, or attempts or conspires to violate, subsection (a)(7) shall be fined under this title or imprisoned not more than 15 years, or both.

(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that—

(1) (A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

(B) each such person was an adult at the time the material was produced; or

(2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C) [18 USCS § 2256(8)(C)]. A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 14 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

(d) Affirmative defense. It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant—

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

(e) Admissibility of evidence. On motion of the government, in any prosecution under this chapter [18 USCS §§ 2251 et seq.] or section 1466A [18 USCS § 1466A], except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography shall not be admissible and may be redacted from any otherwise admissible evidence, and the jury shall be instructed, upon request of the United States, that it can draw no inference from the absence of such evidence in deciding whether the child pornography depicts an actual minor.

(f) Civil remedies.

(1) In general. Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) or section 1466A [18 USCS § 1466A] may commence a civil action for the relief set forth in paragraph (2).

(2) Relief. In any action commenced in accordance with paragraph (1), the court may award appropriate relief, including—

(A) temporary, preliminary, or permanent injunctive relief;

(B) compensatory and punitive damages; and

(C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.

(g) Child exploitation enterprises.

(1) Whoever engages in a child exploitation enterprise shall be fined under this title and imprisoned for any term of years not less than 20 or for life.

(2) A person engages in a child exploitation enterprise for the purposes of this section if the person violates section 1591 [18 USCS § 1591], section 1201 [18 USCS § 1201] if the victim is a minor, or chapter 109A [18 USCS §§ 2241 et seq.] (involving a minor victim), 110 [18 USCS §§ 2251 et seq.] (except for sections 2257 and 2257A [18 USCS §§ 2257 and 2257A]), or 117 [18 USCS §§ 2421 et seq.] (involving a minor victim), as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons.

§ 3142. Release or detention of a defendant pending trial

(a) In general. Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—

(1) Released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;

(2) released on a condition or combination of conditions under subsection (c) of this section;

(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or

(4) detained under subsection (e) of this section.

(b) Release on personal recognizance or unsecured appearance bond. The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a), unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(c) Release on conditions.

(1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person—

(A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a); and

(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—

(i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) maintain employment, or, if unemployed, actively seek employment;

(iii) maintain or commence an educational program;

(iv) abide by specified restrictions on personal associations, place of abode, or travel;

(v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii) comply with a specified curfew;

(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(xi) execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require;

(xii) execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;

(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

In any case that involves a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title [18 USCS § 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), (2), (3), 2252A(a)(1), (2), (3), (4), 2260, 2421, 2422, 2423, or 2425], or a failure to register offense under section 2250 of this title [18 USCS § 2250], any release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified at subparagraphs (iv), (v), (vi), (vii), and (viii).

(2) The judicial officer may not impose a financial condition that results in the pretrial detention of the person.

(3) The judicial officer may at any time amend the order to impose additional or different conditions of release.

(d) Temporary detention to permit revocation of conditional release, deportation, or exclusion. If the judicial officer determines that—

(1) such person—

(A) is, and was at the time the offense was committed, on—

(i) release pending trial for a felony under Federal, State, or local law;

(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

(iii) probation or parole for any offense under Federal, State, or local law; or

(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and

(2) the person may flee or pose a danger to any other person or the community;

such judicial officer shall order the detention of the person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take the person into custody during that period, the person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B) of this subsection, the person has the burden of proving to the court such person's United States citizenship or lawful admission for permanent residence.

(e) Detention.

(1) If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.

(2) In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such judicial officer finds that—

(A) the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;

(B) the offense described in subparagraph (A) was committed while the person was on release pending trial for a Federal, State, or local offense; and

(C) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in subparagraph (A), whichever is later.

(3) Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed—

(A) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USCS § 70501 et seq.];

(B) an offense under section 924(c), 956(a), or 2332b of this title [18 USCS § 924(c), 956(a), or 2332b];

(C) an offense listed in section 2332b(g)(5)(B) of title 18, United States Code [18 USCS § 2332b(g)(5)(B)], for which a maximum term of imprisonment of 10 years or more is prescribed;

(D) an offense under chapter 77 of this title [18 USCS §§ 1581 et seq.] for which a maximum term of imprisonment of 20 years or more is prescribed; or

(E) an offense involving a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title [18 USCS § 1201, 1591, 2241, 2242, 2244, (a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425].

(f) Detention hearing. The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of the person as required and the safety of any other person and the community—

(1) upon motion of the attorney for the Government, in a case that involves—

(A) a crime of violence, a violation of section 1591 [18 USCS § 1591], or an offense listed in section 2332b(g)(5)(B) [18 USCS § 2332b(g)(5)(B)] for which a maximum term of imprisonment of 10 years or more is prescribed;

(B) an offense for which the maximum sentence is life imprisonment or death;

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USCS §§ 70501 et seq.];

(D) any felony if the person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921 [18 USCS § 921]), or any other dangerous weapon, or involves a failure to register under section 2250 of title 18, United States Code [18 USCS § 2250]; or

(2) upon motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves—

(A) a serious risk that such person will flee; or

(B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, the person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

(g) Factors to be considered. The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591 [18 USCS § 1591], a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including—

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

(h) Contents of release order. In a release order issued under subsection (b) or (c) of this section, the judicial officer shall—

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

(2) advise the person of—

(A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(C) sections 1503 of this title [18 USCS § 1503] (relating to intimidation of witnesses, jurors, and officers of the court), 1510 [18 USCS § 1510] (relating to obstruction of criminal investigations), 1512 [18 USCS § 1512] (tampering with a witness, victim, or an informant), and 1513 [18 USCS § 1513] (retaliating against a witness, victim, or an informant).

(i) Contents of detention order. In a detention order issued under subsection (e) of this section, the judicial officer shall—

(1) include written findings of fact and a written statement of the reasons for the detention;

(2) direct that the person be committed to the custody of the Attorney General for confinement in

a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

(3) direct that the person be afforded reasonable opportunity for private consultation with counsel; and

(4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

(j) Presumption of innocence. Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

§ 2000cc. Protection of land use as religious exercise

(a) Substantial burdens.

(1) General rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application. This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion.

(1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits. No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GREGORY P. BARTUNEK, Plaintiff, vs. HALL COUNTY, NEBRASKA, and TODD BAHENSKY, in his individual and official capacities, Defendants.	)	Case No. 8:18CV489

SUPPLEMENTAL AFFIDAVIT OF TODD BAHENSKY, DIRECTOR OF HALL COUNTY DEPARTMENT OF CORRECTIONS

STATE OF NEBRASKA)
) ss
COUNTY OF HALL)

I, Todd Bahensky, being first duly sworn upon oath, depose and state as follows:

1. This affidavit is intended to explain the basis for the classification and housing status of Plaintiff Gregory Bartunek during his time at the HCDC.

2. At the time he was booked at the HCDC, Plaintiff Bartunek was 63 years of age and taller than average, with a height of six feet and two inches.

3. Plaintiff was also a registered sex offender at the time of his booking, a status which is commonly abbreviated on jail paperwork as "RSO."

4. Advanced age and height are uniformly used factors in our facility that are considered to medically indicate a need for a lower bunk assignment, because it

is generally physically easier for persons having those characteristics to not have to climb to an upper bunk.

5. For as long as I am aware, it has been standard management procedure at the HCDC to uniformly and always house registered sex offenders in the maximum security unit (D Unit), for reason of their own safety, security, and protection. Even if the inmate wishes to be moved to a different unit, this cannot be permitted because the desire of the inmate cannot outweigh the substantial risks to the safety of the inmate population as a whole, and we aim for consistency in classification standards. In my experience, inmates who are RSOs face much more significant threats to their safety if they are housed in any less secure unit available at our facility.

6. At the time that Plaintiff Bartunek was booked into the HCDC, there were no lower bunks available in D unit.

7. As a result of the above, Plaintiff Bartunek's classification status was initially overridden "for medical reasons" and he was housed in the infirmary in a lower bunk until such time as a lower bunk could be provided in D unit. Once a lower bunk became available in that unit, Plaintiff Bartunek's classification status was overridden for reason of his "RSO" status.

8. Plaintiff Bartunek's classification status is accurately reflected in the pertinent forms contained in his inmate file previously submitted as Exhibit C to my original affidavit filed in this case.

FURTHER AFFIANT SAITH NOT.

Todd Bahensky

Subscribed and sworn to before me this 28th day of January, 2020.

Notary Public

GENERAL NOTARY - State of Nebraska
AARON GRAY
My Comm. Exp. October 26, 2023

---------- Forwarded message ---------
From: **Barb Brunkow** <bbrunkow@leg.ne.gov>
Date: Thu, Jul 5, 2018 at 10:50 AM
Subject: Re: Gregory Bartunek
To: Craig Gottschalk <craigg@hallcountyne.gov>

Thanks--I appreciate the input.

On Thu, Jul 5, 2018 at 5:12 AM, Craig Gottschalk <craigg@hallcountyne.gov> wrote:

> Barb,
>
> Here are the responses to your questions I can give you right now. I will address the others when I gather some information
>
> 1. Mr. Bartunek was brought to Hall County per the US Marshal's decision to house him here. We have no impact on that decision to house him here.
>
> 2. I am not aware of any request for an eye exam submitted by Mr. Bartunek. That would be a request he'd need to submit to the US Marshals and they would determine

the need or schedule to do so.

3. Our facility does not do teeth cleanings or checkups. Our dental services are provided for emergency need situations and not routine maintenance.

4. Our facility lighting levels meet all Nebraska State Standards and the schedule for such (11pm Lights out – 5am Lights on) is our own policy ensuring ample lights out opportunity for sleep.

5. Mr. Bartunek's time out of cell is correct and a facility management need due to keep separate, classification and other operational needs. This is a county by county policy choice and inmate management parameter.

6. Mr. Bartunek filed a grievance claiming zero church services since his arrival in January. It was noted to him that on 11 occasions Church was offered for his pod and he did not choose to attend. In one instance he chose to shower instead of attend. On the other scheduled dates the volunteers leading the services did not arrive to hold the services. Church services rely completely upon the time and availability of volunteers to hold such services and are scheduled weekly.

I will gather a response to the rest of his allegations and get back to you.

Thanks,

Craig Gottschalk

Assistant Director

Hall County Corrections

110 Public Safety Drive

Grand Island, NE 68801

(308) 385-5211

"Semper Vigilo"

or follow up in any way. I am suffering from degenerative damage and arthritis in both shoulder cups. However, a few years ago I had surgery on my right shoulder cup which fixed it. I also informed medical of this. The tylonal failed to relieve the pain but medical refused to do anything else.

I also developed back and siatic nerve pain from not getting enough exercise, being locked down for 23 hours a day. Medical told me they could do nothing to solve this problem.

I am a Christian and my beliefs require that I attend a religious service conducted by an ordained Minister weekly, and communion once a month. I informed the DOC of this but they failed to accomodate my religious freedom. They do not have a pastor, and provided no organized religious activities with an ordained minister at all.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GREGORY P. BARTUNEK, Plaintiff, vs. HALL COUNTY, NEBRASKA, and TODD BAHENSKY, in his individual and official capacities, Defendants.	)	Case No. 8:18CV489

AFFIDAVIT OF CRAIG GOTTSCHALK
ASSISTANT DIRECTOR OF HALL COUNTY DEPARTMENT OF CORRECTIONS

STATE OF NEBRASKA)
) ss
COUNTY OF HALL)

I, Craig Gottschalk, being first duly sworn upon oath, depose and state as follows:

1. That I am of lawful age and have personal knowledge of the facts stated herein.
2. That at all pertinent times, I have served as the Assistant Director of the Hall County Department of Corrections (HCDC).
3. That in my capacity as Assistant Jail Director for Hall County, it is within the scope of my job duties to assist in responding to detainee/inmate grievances and appeals of grievances.
4. That I have reviewed Exhibits C, D, and G to Director Bahensky's affidavit in the

above-captioned matter. These exhibits include certain responses written by me to Plaintiff Bartunek's grievances and grievance appeals, and replies I wrote to inquiries made by the Ombudsman's Office related to Plaintiff Bartunek. Each such response or reply included in this exhibit was written after good faith investigation of the complaints Plaintiff Bartunek raised in his letters.

5. That in my review of the portions of Exhibits D and G that were authored by me, I did discover some inaccuracies for the first time, that I wish to explain. In approximately June/July of 2018, Plaintiff Bartunek complained, separately in a grievance and in correspondence to the Ombudsman's Office, that a weekly Christian religious service was not available to his unit. I investigated this complaint in good faith through inquiry with HCDC staff who worked on the floor, however, in doing so, I accidentally and inadvertently mistook Plaintiff Bartunek for a different inmate who was housed very near to him in the same maximum security unit. My investigation revealed that this other inmate, who had been at the facility since January of 2018, had received eleven (11) opportunities during his stay at the facility to attend religious programming, but he chose not to attend. I mistakenly relayed this investigative information to the Ombudsman's Office, in response to its inquiry regarding Bartunek's complaint to that agency, and in my response to Plaintiff Bartunek's grievance on the same topic, when it actually reflected the situation of a different inmate.

6. That it is accurate that my investigation revealed there were at least eleven (11) Christian religious programs held at the facility and available to the maximum security unit from January to June, 2018.

7. That in the pertinent time period, the HCDC staff had difficulty locating any groups or persons who were willing to offer religious programs consistently to the maximum security unit, which is designed to house those accused or convicted of violent crimes, serious felonies, and those accused of sexual crimes against children. Even when such programs can be scheduled, the leaders will unexpectedly cancel or no-show. Because of the amount of time that has now

passed, I am unable to determine with certainty how many religious programs were offered to the maximum security unit during the six month time period of April to October, 2018 when Bartunek was housed at the facility. But I know such programs were offered whenever a willing provider could be located to appear. Detainees and inmates also always have the ability to request that a particular pastor or religious provider be contacted to visit or call them, but to the best of my knowledge, Plaintiff Bartunek never made such a request.

8. That I never took any action to prevent Plaintiff Bartunek from freely exercising his religion, and am not aware of any other HCDC staff who tried to prevent Plaintiff Bartunek from freely exercising his religion.

FURTHER AFFIANT SAITH NOT.

GENERAL NOTARY - State of Nebraska
JASON CONLEY
My Comm. Exp. October 25, 2023

Craig Gottschalk

Subscribed and sworn to before me this 30th day of December, 2019.

Notary Public

Grievance

For 227639: Gregory Bartunek HCDCGP D D108 on 7/2/2018 9:14:54 AM
Dates and Times are presented in Central Time (US & Canada)

Issue ID: 11444589

Last Status: Closed by 227639: Gregory Bartunek on 7/3/2018 10:13:24 AM

Last Assigned to: None on 7/3/2018 6:54:41 AM

i sign up for church very week but it is never held. At Douglas we always had it. what can you do to help?

Submitted by 227639: Gregory Bartunek HCDCGP D D108 on 7/2/2018 9:14:54 AM

Mr. Bartunek,

As I explained in my previous response to your grievance - the religious services have been held multiple times since your arrival and you chose not to attend when offered. You even once decided to shower instead of attend. Our volunteers who lead the services are not always able to attend. This last Sunday, July 1, 2018 - I was told they did not arrive to do so.

thank you,

Craig Gottschalk, Asst Dir

Accepted by Craig Gottschalk on 7/3/2018 6:54:41 AM

HALL COUNTY DEPARTMENT OF CORRECTIONS

INMATE GRIEVANCE FORM

FORMA DE AGRAVIO DE PRESIDIARIO

Date: 7/3/18 **Name:** Gregory Bartlett **Inmate #:** 227639
(Feche) **(Nombre)** **(Presidiario#)**

Housing Unit: D **Bunk/Cell:** 103 L
(Alojamiento de Unidad) **(Litera o Célula)**

Please describe what RIGHT or PRIVILEGE has been violated:
(Por favor describa que DERECHO O EL PRIVILEGIO han sido violados)
PLEASE PRINT LEGIBLY
(POR FAVOR IMPRIMA LEGIBLEMENTE)

I sent a grievance about not having church services on 7/2/18. Your answer doesn't make sense, as I never grieved it before or missed any call for church or took shower. Never had Church since here.

Please describe a possible SOLUTION to your grievance:
(Por favor describa una SOLUCIÓN posible con su agravio:)
PLEASE PRINT LEGIBLY
(POR FAVOR IMPRIMA LEGIBLEMENTE)

Consider this Level 2 grievance (Appeal) Solution is to have church services or take me to a church for services. Thanks.

Inmate's Signature: Gregory P. Bartlett
(La Firma del Presidiario:)

**********Below to be completed by Hall County Department of Corrections Staff**********

Forwarded to the Department Grievance Officer by Officer: _____

Response/Conclusion: You need to use the Kiosk

Grievance Officer Signature: _____

Date Response Issued: 7/3/18

***Copy to be returned to inmate**
***Original to be placed into inmate file**
FORM SI-02.01

Dear Mr. Bahensky, July 31, 2018

This is to inform you that the Hall County Department of Corrections (HCDOC) is in violation of several of my constitutional rights, including but not limited to, my right for due process, against cruel and unusual punishment, and equal protection, under the fifth, eighth, and fourteenth amendments of the U.S. Constitution, and Articles § I-3 and 9 of the Nebraska Constitution, as well as violations of 18 U.S.C. § 3142 and the right to proper medical treatment and clothing as stated on page 6 of the HCDOC Inmate/Detainee Handbook.

According to 18 U.S.C. § 3142(i)(2), I should be detained separate from persons convicted of a crime. However, I have had all mates that are convicted felons and convicted illegal immigrants waiting for appeal or deportation. The intent of pretrial detention is not to punish, but to give as much freedom as possible. Yet, HCDOC only allows me 5-6 hours out of my cell per day, only 5-6 hours of sleep a night, and subjects me to cold

conditions, not allowing me the proper clothing to keep warm. I should not be subjected to any punishment let alone punishment that qualifies as abuse of the elderly. The World Health Organization has confirmed that individuals of all ages require a minimum of 8 hours of uninterrupted sleep per night in dark conditions. Not getting this results in shorter lifetimes and possibly increased alzheimers disease.

I also need the following medical attention:

1. Eye exam and new glasses
2. Hearing exam and repaired hearing aids
3. Dental exam, teeth cleaning, and cancer check.
4. Dr. Exam of left shoulder cup and MRI and surgery to repair it.

I am also in need of a weekly visit by a Christen Pastor. I sign up for Church Service weekly, have never refused going, was available, but never have seen a pastor since I arrived on April 25, 2018.

(2)

Mr. Bartunek,

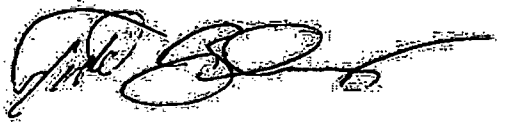
Per your letter of written complaint dated July 31, 2018, I've tried to address each of your concerns. Every request that you have submitted has been addressed but I will attempt to summarize those responses here.

1. It is the US Marshal's decision to hold you in our facility as a component of your US Federal Case (Hall County has not brought you here and holds you as a service to the US Marshals).
2. In Jail settings, per Nebraska Jail Standards, if the physical plant design permits, jails are to consider the separation of pre-trial and convicted inmates. The Hall County facility does not allow complete separation of pre-trial and convicted inmates at all time, but its classification program and inmate housing efforts meets the need to separate those inmates charged or convicted of crimes involving serious physical harm to persons or attempt to do serious physical harm to persons are separated.
3. The inmate classification level identified for you – looking at past criminal history, current charges, inmate behavior records and security decisions – places you in the Pod identified for inmates of your classification level – and management decisions for time out of your cell provide the maximum opportunity for this facility to ensure your health, safety and security from the inmates of the same classification level in this pod. Yes that is providing 5-6 hours out of cell each day (not counting time out for meals, recreation and other program opportunities.
4. The Hall County Lights out period (11pm to 5am) provides and meets the Nebraska Jail Standards for reduced lighting levels to meet inmate sleeping requirements and meeting the lighting levels appropriate for sleeping opportunities and required facility security and safety standards.
5. The Hall County heating and ventilation system provides and surpasses the Nebraska Jail Standards for inmate comfort and temperature control. Per your grievances submitted to Hall County indicating that temperature conditions were not meeting your needs, facility maintenance staff responded and measured the temperature conditions at those times. The Jails HVAC system maintains facility temperatures well within the Nebraska Jail Standards of 65-80 degrees. On the date of your first grievance the cell air temperature set for your cell was at 70.1 degrees. In your cell, the temperature was tested and recorded at 72 degrees. On 6-6-18, you again submitted a grievance and the Pod dayroom temperature was measured at 75.3 degrees. This rise in temperature was due to an equipment malfunction which resulted in numerous other inmate grievances of the temperatures being too hot. On 6-8-18 your cell temperature was 70.1 – again, well above the minimal standards for cell temperatures.
6. You claim you need an eye exam. Our facility does not provide eye exams for inmates, but will provide reading glasses if needed or any inmate is allowed to contact family or friends for delivery of any needed prescription glasses/contacts for inmate use. As you are not a Hall County Inmate, if needing an eye exam – you must contact the US Marshals for approval and scheduling to do so, as they are responsible for this care.
7. You claim to need a hearing exam. Again, Our facility does not provide hearing exams for inmates, but inmates are allowed to contact family or friends to access personal hearing aids not

with the inmate in facility – or to route personal property on the inmate to family or friends for repair or replacement. Again, as a US Marshal inmate – you do need to communicate with that agency for the approval and coordination of those efforts to address the exam needs.

8. You claim to need a Dental exam and teeth cleaning. Our facility addresses all needed inmate emergency Dental needs but does not provide routine exams or annual cleanings. You must address your Dental care needs with the US Marshals for approval and coordination of said actions.
9. You claim to need a Cancer check. You need to address this need via a kite to Medical identifying the symptoms you are exhibiting and the reasonings why you need a Cancer check. This too can then be addressed, by you, with a communication to the US Marshals for confirmation of need, approval and coordination of said diagnostic exams with our Medical Department. It is their decision to proceed or not to proceed.
10. You claim a need for a Dr. exam of a left shoulder cup, ask for an MRI and surgery to repair alleged damage. Hall County Corrections meets and addresses all emergency medical needs of inmates as those emergency needs arise. Again, communicate with Medical, via the electronic kiosks, describing the chronic symptoms and conditions needing addressed and communicate with the US Marshals to again acknowledge, approve and coordinate said medical treatment needs of your shoulder .
11. You claim a need for a weekly visit by a Christian Pastor. This facility schedules and provides Church/Bible Study services for inmates on a weekly basis that are provided by outside volunteers. These programs must be signed up for by each inmate wishing to participate on the dates of the scheduled services/programs. You have the same right and responsibility to sign-up for and attend when they occur. You also have every right to request and coordinate a Pastoral visit with the clergy you believe meets your needs. I am not aware that this has ever been requested by you or Clergy identified to do so.

Respectfully,



Todd Bahensky, Director
Hall County Department of Corrections

U.S. Department of Justice
United States Marshals Service
Prisoner Operations Division

Detention Services
Intergovernmental Agreement

1. Agreement Number	2. Effective Date	3. Facility Code(s)	4. DUNS Number
47-08-0028	12/1/2016	7DM	021262600

5. Issuing Federal Agency

United States Marshals Service
Prisoner Operations Division
CG-3, Suite 3000
Washington, DC 20530-0001

6. Local Government
Hall County Department of Corrections
110 Public Safety Drive
Grand Island, NE 68801

Tax ID#: [redacted]

7. Appropriation Data

15-1020/X

8. Local Contact Person

Todd Bahensky, Director

9. Telephone: 308-385-5206
Fax:
Email: toddb@hallcountyne.gov

IGA Services	Estimated Number of Federal Beds	Per Diem Rate
10. This agreement is for the housing, safekeeping, and subsistence of Federal detainees, in accordance with content set forth herein.	11. Male: 20 Female: 10 Total:	12. $75.00

13a. Optional Guard/Transportation Services to:

☒ Medical Facility ☐ Other _____

☒ U.S. Courthouse

☐ JPATS

13b. ☐ Department of Labor Wage Determination

14. Guard/Transportation Hourly Rate: $28.78

15. Local Government Certification

To the best of my knowledge and belief, information submitted in support of this agreement is true and correct. This document has been duly authorized by the governing authorities of their applying Department or Agency State or County Government and therefore agree to comply with all provisions set forth herein this document.

16. Signature of Person Authorized to Sign (Local)

Signature

Todd Bahensky
Print Name

Director — 11-3-16
Title — Date

17. Federal Detainee Type Authorized	18. Other Authorized Agency User
☒ Adult Male	☒ BOP
☒ Adult Female	☐ ICE
☐ Juvenile Male	
☐ Juvenile Female	

19. Signature of Person Authorized to Sign (Federal)

Signature

Tiffani Eason
Print Name

Chief Intergovernmental Agreements — 11/29/16
Title — Date

Exhibit A to Affidavit of T. Bahensky

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GREGORY P. BARTUNEK,

Plaintiff,

vs.

HALL COUNTY, NEBRASKA, and TODD BAHENSKY in his individual and official capacities,

Defendants.

8:18CV489

MEMORANDUM AND ORDER

Plaintiff Gregory Bartunek, who is proceeding pro se, brings this 42 U.S.C. § 1983 action challenging the conditions of his six-month confinement at the Hall County Department of Corrections, where he was being temporarily held as a federal pretrial detainee pursuant to an agreement with the United States Department of Justice.[1] Requesting compensatory and punitive damages,[2] Plaintiff sues Defendants Hall County and Todd Bahensky, Director of the Hall County Department of Corrections, in his official capacity for injury caused by their alleged unconstitutional policy or custom of depriving inmates of basic services.[3] Plaintiff also sues Bahensky in his individual capacity.

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[1] Plaintiff now resides at a federal correctional institution in Seagoville, Texas.

[2] Plaintiff's request for injunctive relief was previously denied as moot because he no longer resides at the institution that is the subject of his claims. (Filing 12 at CM/ECF p. 11.) *See Randolph v. Rodgers*, 253 F.3d 342, 345 (8th Cir. 2001) (when actions required by injunction would be impossible for correctional-center defendants to execute because plaintiff was moved to another institution, plaintiff's claims for injunctive relief against defendants were moot).

[3] Plaintiff's claim against Defendants Hall County and Bahensky in his official capacity are actually a single claim against the County and shall be construed

Plaintiff complains that Defendants limited his out-of-cell time to two hours per day; subjected him to uncomfortably cold conditions; enforced a lights-out policy that only allowed him to get five to six hours of sleep per night; and failed to repair his broken glasses or give him an eye exam, fix his hearing aids, administer routine dental care, give proper medical care for a variety of ailments, and provide any religious services despite his request. (Filing 14 at CM/ECF p. 2 (summary of Plaintiff's claims after initial review); Filing 12 at CM/ECF p. 1.)

Defendants move for summary judgment (Filing 32) on the merits as to Hall County and Bahensky in his official capacity and argue that Bahensky is entitled to qualified immunity as to Plaintiff's claims against him individually. For the reasons discussed below, I shall grant the Defendants' Motion for Summary Judgment.

I. UNDISPUTED MATERIAL FACTS[4]

1. At all pertinent times, Hall County has maintained a written agreement with the United States Department of Justice, under which it may temporarily house

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as such. *Elder-Keep v. Aksamit*, 460 F.3d 979, 986 (8th Cir. 2006) ("A suit against a public official in his official capacity is actually a suit against the entity for which the official is an agent.").

[4] Plaintiff objects to Defendants' Statement of Undisputed Material Facts "in it[]s entirety." (Filing 34 at CM/ECF p. 2.) However, I shall only consider proper objections that include "pinpoint references to affidavits, pleadings, discovery responses, deposition testimony (by page and line), or other materials upon which the opposing party relies," as required by NECivR 56.1(b)(1), and that do not constitute legal conclusions or unsupported allegations. *See Bedford v. Doe*, 880 F.3d 993, 997 (8th Cir. 2018) (in responding to motion for summary judgment, "The nonmoving party must do more than raise some metaphysical doubt about the material facts, and cannot rest on mere denials or allegations. The nonmoving party must instead present enough evidence that a jury could reasonably find in his favor." (internal citations omitted)); *Conolly v. Clark*, 457 F.3d 872, 876 (8th Cir. 2006) (unsupported self-serving affidavit attempting to establish contractual terms not sufficient to defeat motion for summary judgment; "a properly supported motion for summary judgment is not defeated by self-serving affidavits"); *Davidson & Assocs.*

federal pretrial detainees and inmates at the request of the federal government. (Filing 33-1, Aff. Bahensky ¶ 5 & Ex. A.)

2. Plaintiff Gregory Bartunek was arrested by the United States Marshals Service in February 2017 and was charged by the United States Department of Justice with federal criminal charges related to possession, receipt, or distribution of child pornography. (Filing 33-1, Aff. Bahensky ¶ 9 & Ex. C.)

3. On or about April 25, 2018, federal law enforcement authorities elected to transfer Plaintiff Bartunek, then a pretrial detainee, to the Hall County Department of Corrections ("HCDC"), where he was at all times classified to be housed in the maximum-security unit due to the nature of his charges. (Filing 33-4 at CM/ECF pp. 1-3, 7, 11, 18, 23, 29-32, 39-41, 51; Filing 33-5 at CM/ECF p. 100 (Hall County's response to Plaintiff's complaint about his classification: "Your classification has not changed since your arrival. You are housed where you are for your own protection due to the nature of your current charges."); Filing 33-8 at CM/ECF p. 1 ("D Pod consists of inmates classified as MAXIMUM security and includes populations of accused child molesters, inmates with violent tendencies or charges, those requiring separation from other inmate populations including gang ties, behavioral separation and others.").)[5]

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v. Jung, 422 F.3d 630, 638 (8th Cir. 2005) (to defeat a motion for summary judgment, "[a] plaintiff may not merely point to unsupported self-serving allegations, but must substantiate allegations with sufficient probative evidence that would permit a finding in the plaintiff's favor"). Defendants' Undisputed Material Facts that are not properly controverted shall be considered admitted. NECivR 56.1(b)(1). I shall comment on the merits of Plaintiff's noteworthy objections in future footnotes.

[5] Plaintiff asserts, without argument or rationale, that he should have been classified at two levels below his "Med 3" classification. He offers no evidence in support of his claim. (Filing 34 at CM/ECF p. 2.)

4. Hall County contracts with a private company, Advanced Correctional Health Care ("ACH"), to provide medical professionals who are responsible for addressing the medical needs of those incarcerated in the HCDC population. (Filing 33-1, Aff. Bahensky ¶ 4.)[6]

5. Plaintiff was housed at the HCDC from April 25, 2018, to October 23, 2018. (Filing 33-1 at CM/ECF p. 3.) On December 6, 2018—shortly after Plaintiff left the HCDC—the HCDC was determined to be in full compliance with the Nebraska Minimum Jail Standards by a Jail Standards Field Representative for the Nebraska Commission on Law Enforcement and Criminal Justice after an annual inspection required by Neb. Rev. Stat. § 83-4,131 (Westlaw 2020). (Filing 33-7.) The State of Nebraska Minimum Jail Standards for Adult Jail Facilities are set forth in Title 81, Chapters 1-15 of the Nebraska Administrative Code, and may be found at https://ncc.nebraska.gov/documents-0. (Filing 33-1, Aff. Bahensky ¶¶ 12, 14.)[7]

6. State minimum jail standards for adult jail facilities include the following pertinent provisions:

- Title 81, Chapter 15, section 006.04, governing "Heating and Cooling Systems," provides that the living environment at "newly constructed and renovated jail facilities" shall have "temperatures maintained between sixty-five (65) and eighty (80) degrees Fahrenheit."

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[6] Plaintiff's objection to the quality of ACH's care does not controvert this particular Undisputed Material Fact. (Filing 34 at CM/ECF p. 2.)

[7] Plaintiff's argument (Filing 34 at CM/ECF p. 3) that the complaints and grievances he filed during his stay at the HCDC prove that the facility did not comply with applicable jail standards does not properly controvert the Defendants' proof that the HCDC was deemed to be compliant with relevant jail standards after an annual inspection on December 6, 2018.

- Title 81, Chapter 7, section 003.01, provides that inmates "shall have opportunities for active physical exercise at least one (1) hour per day, five days per week outside their cells."

- Title 81, Chapter 12, section 003, provides that the facility administrator "shall, to the best of his ability, insure the right of inmates to practice and express their religious beliefs." However, this section does not require any particular type or frequency of access to religious events.

- Title 81, Chapter 10, sections 001 and 002, provide that: "It is the policy of the State of Nebraska that all jail facilities shall provide all inmates with a healthful environment and access to adequate medical care"; that only a medical authority can diagnose any illness or injury, give treatment, or prescribe medication, except in emergencies; and that the facility administrator "shall make provisions for the daily collection and review of inmate medical complaints and to insure that each inmate is observed on a regular basis" and "to the best of his ability, insure that the proper medical attention is provided as soon as possible" when there are "indications of illness or injury."

- Title 81, Chapter 10, section 002.07, provides that: "Any inmate known to be seriously ill or injured shall be examined by a medical authority, delivered to an emergency center, or the proper judicial authority shall be forthwith requested to release the inmate."

7. Inmates and detainees of the HCDC have access to an electronic kiosk system where they are able to submit requests and grievances (except when special circumstances may require the use of paper forms), which Plaintiff accessed and utilized on many occasions throughout his stay at the HCDC.[8] (Filing 33-1, Aff.

[8]Plaintiff's frequent complaints, requests, and commentary submitted through the kiosk system included, "why do you allow illegal immigrants [to] control tv?"

Bahensky ¶ 6; Filing 33-3 at CM/ECF pp. 13, 34-35; Filing 33-5 at CM/ECF pp. 1-117.)

8. During the six months he was housed there, Plaintiff submitted the following requests to HCDC staff or ACH medical personnel pertaining to the temperature in the jail. (Filing 33-1, Aff. Bahensky ¶¶ 9-11; Filings 33-4, 33-5, 33-6.)

- On April 26, 2018—one day after Plaintiff was moved to the HCDC and was fully examined by a medical practitioner—Plaintiff complained to medical staff that he was "cold all the time" and was "cold even with a blanket." (Filing 33-6 at CM/ECF pp. 3-4.)

- On April 28, 2018, Plaintiff submitted a complaint to staff, stating, "I am cold all the time. I have a subnormal body temp and can't keep warm day or night. I asked med but they said they could not help. I have thermals Douglas County sold me in my property. Can you help me to stay warm?," and staff responded two days later, "Denied." (Filing 33-4 at CM/ECF p. 60 (spacing corrected).)

- On May 11, 2018, Plaintiff submitted a request to "Medical," stating, "I can't get warm. Hands and feet freezing. Didn't start till I was transferred here. Ined [sic] doctor. Now I have cold. Cold at night too. No one else seems to be affcted [sic]. Let me know when I can receive treatment. Thanks."

(Filing 33-5 at CM/ECF p. 12); "i have hiccups almost all the time" (Filing 33-5 at CM/ECF p. 18); "test of system" (Filing 33-5 at CM/ECF pp. 70, 71); "razors very poor" (Filing 33-5 at CM/ECF p. 104); "kiosk bad" (Filing 33-5 at CM/ECF p. 106); "why do some COs get mad when I ask a question?" (Filing 33-5 at CM/ECF p. 15); and "we need more time to get ready for library and rec. co's announce it and run out door. i suggest waiting till 15 after or check list or both" (Filing 33-5 at CM/ECF p. 102).

(Filing 33-4 at CM/ECF p. 59.) Plaintiff's jail medical chart indicates that he was examined on May 12, 2018, by a nurse who noted "visible purple veins mid lower leg to feet" and "tips of fingers cold pedal pulses present." No new orders were given, but the nurse educated Plaintiff to wear socks, increase his water intake, and exercise. (Filing 33-6 at CM/ECF p. 5.)

• On June 4, 2018, Plaintiff submitted a grievance stating, "According to the handbook I have right to proper clothing and medical treatment. This right is bein [sic] violated because I am cold all the time. I did not have this problem until I came here. Please do what it takes to fix this." The next day HCDC staff replied, "You have the same clothing as everyone else. What kind of medical treatment are you not getting? The temperature is 72 degrees in the dayroom and sleeping area." (Filing 33-4 at CM/ECF p. 57.)

• On June 6, 2018, Plaintiff submitted a grievance appeal stating, "Telling me what you believe the temperature is does not address the problem. I am still cold and in needless pain and suffering. Proper clothing is a simple and reasonable solution. I suggest my thermals I got in property from Douglas. This is in RE to No. 161984. Thanks." The next day HCDC staff replied, "We have a computer that tells us what the temperature is in the dayroom and in the cells. In fact right now the temperature in the cells are 75.3 which is down from 78.2. As far as extra clothing we do not allow it." (Filing 33-4 at CM/ECF p. 58.)

• Plaintiff submitted a handwritten letter to Director Bahensky dated July 31, 2018, accusing the HCDC of violating his constitutional rights by "not allowing me the proper clothing to keep warm," which constituted "punishment that qualifies as abuse of the elderly." (Filing 33-4 at CM/ECF p. 27.) Director Bahensky replied in writing to Plaintiff and explained that the temperature of the facility, as measured after each of Plaintiff's complaints, had been verified to be within the requirements of Nebraska Jail Standards,

and that other inmates had complained in the same time period that it was too hot, rather than too cold. (Filing 33-4 at CM/ECF p. 29.)

- On October 10, 2018, at 8:38 p.m., Plaintiff submitted a complaint to staff stating, "I'm cold," and an HCDC staff member replied, "Maintenance will turn the heat up." (Filing 33-5 at CM/ECF p. 3.) Approximately two minutes later on same day, October 10, 2018, at 8:40 p.m., Plaintiff submitted a request directed to "medical" stating, "I'm still very cold." (Filing 33-6 at CM/ECF p. 25.) Plaintiff's jail medical chart shows that he was examined by a nurse on October 11, 2018. While no new medical orders were given, Plaintiff's request for an extra blanket was approved, and he was educated to "drink plenty of water." (Filing 33-5 at CM/ECF p. 2.) Applicable jail standards require all bedding, presumably including blankets, to "remain on the bunk." (Filing 33-3 at CM/ECF p. 14.)

- On October 15, 2018, Plaintiff submitted a "complaint" stating, "me and the boys are cold in the day room. can you crank up the heat to 76? thank you kindly." Two days later an HCDC staff member replied, "I will let maintenance know." (Filing 33-5 at CM/ECF p. 1.)

9. On August 24, 2018, a fight broke out amongst the "most violent and highest classified inmate population," who were held in Plaintiff's housing area, necessitating a lockdown that limited the amount of time inmates were allowed out of their cells. The lockdown was deemed necessary to ensure inmate safety, especially in light of "the multitude of verbal and written threats." (Filing 33-4 at CM/ECF p. 23.) During the six months Plaintiff was detained at the HCDC, he submitted the following requests to HCDC staff or ACH medical personnel pertaining to the amount of time he received outside of his cell.

- On August 30, 2018, Plaintiff submitted a complaint that stated, "when will the tornado warning be over, so we can get more time out? i

believe the tornado has left a long time ago. thanks," to which HCDC staff replied the next day, "Taken care of." (Filing 33-5 at CM/ECF p. 65.)

- On August 31, 2018, Plaintiff submitted a complaint that stated, "do you know when the 22 hour lockdown will be over? can i be moved to another block with more time out?," to which HCDC staff replied on September 4, 2018, "At this time I don't know. As far as I know no one is moving." (Filing 33-5 at CM/ECF p. 66.)

- On September 1, 2018, Plaintiff submitted a grievance stating, "page 24 of inmate manual says we get out every other hour, unless facility needs change. what is the need to change to once every 4 hours? page 5 says we have right to know. thanks. and what need to keep it that way for over a week?" Plaintiff's grievance was "closed" two days later without receiving a response from the HCDC.[9] (Filing 33-5 at CM/ECF p. 69.)

- On September 8, 2018, Plaintiff submitted a handwritten grievance appeal complaining that "keeping inmates of cell Block D locked down for 22 hours/day for over 2 weeks is a violation of R4 of the Inmate Manual," asserting that the lockdown was a "fear-based overreaction" to a "disturbance" on August 24, 2018, and suggesting that the HCDC "talk to" Douglas County "to see how it is done." (Filing 33-4 at CM/ECF p. 22.) The Assistant Director of the HCDC replied in writing to Plaintiff's grievance appeal, explaining that the lockdown "in the most violent and highest classified inmate population" was necessary to ensure inmate safety and security after a fight broke out in Plaintiff's unit on August 24, 2018. The Assistant Director stated that the lockdown was necessary to "address the multitude of verbal and written threats" and reminded Plaintiff that there

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[9] Plaintiff claims in his brief, without supporting evidence, that his grievance was closed due to "a malfunction of the Kiosk system." (Filing 34, Pl.'s Br. at CM/ECF p. 6.)

continued to be access to all programming, and good behavior would be considered in upcoming classification reviews. (Filing 33-4 at CM/ECF p. 23.)

• On September 26, 2018, Plaintiff submitted a grievance stating, "This 22 hour lockdown is causing me severe mental and physical anguish and pain and suffering," to which the HCDC Assistant Director on September 28, 2018, advised Plaintiff to contact Mental Health, "as they are available for just this type of challenge and can provide you insights on addressing these feelings and experiences." (Filing 33-5 at CM/ECF p. 96.) The same day, Plaintiff submitted a request to "Mental Health" stating, "lockdown is very determental [sic]," to which an ACH nurse replied the next morning, "I cannot imagine. Is there something you are requesting from mental health? We can offer counseling services but we cannot lift the lockdown, unfortunately. Please let me know if you wish to be seen." (Filing 33-5 at CM/ECF p. 97.) Plaintiff's ACH medical chart shows that Plaintiff was examined by a nurse at sick call on September 27, 2018, but the only complaint he advanced at that time was a sore back, left shoulder pain, and his prediction that the rotator cuff in his left shoulder was torn. Plaintiff did not mention any mental-health complaints. (Filing 33-6 at CM/ECF p. 23.)

• Plaintiff submitted a handwritten letter to Director Bahensky dated October 3, 2018, which he characterized as a "petition" signed by other inmates in support of his request to be allowed out of his cell into the dayroom at the same time as certain other groups housed in his unit. (Filing 33-4 at CM/ECF pp. 52-53.) On October 12, 2018, Director Bahensky explained in writing why Plaintiff's request to be allowed out of his cell with certain other inmates could not be honored, including the facts that Plaintiff's "unit has had a number of behavioral problems including fighting and numerous inmates that need to [be] kept separate from one another," and granting Plaintiff's request would cause others to make the same request which, if granted, would create an "unmanageable situation and increase the risk that inmates would

inadvertently be allowed out with inmates with whom they have conflicts." Bahensky stated that Plaintiff's classification status, which was reviewed routinely per jail standards, "does not allow for us to house you in a less restrictive unit." (Filing 33-4 at CM/ECF p. 51.)

• Plaintiff claims he never received copies of his classification reviews, so he was denied the right to appeal therefrom. (Filing 34, Pl.'s Br. at CM/ECF p. 5.) However, the HCDC Inmate/Detainee Handbook in effect at the time of Plaintiff's detention only allowed appeals to be taken from "Classification reviews which result in a change in classification status." (Filing 33-3 at CM/ECF p. 8.) Plaintiff's classification status did not change during his time at the HCDC due to his criminal history and the nature of the charges against him (child pornography). (Filing 33-4 at CM/ECF pp. 1-3, 7, 11, 18, 23, 29-32, 39-41, 51; Filing 33-5 at CM/ECF p. 100 ("Your classification has not changed since your arrival. You are housed where you are for your own protection due to the nature of your current charges."); Filing 33-8 at CM/ECF p. 1 ("D Pod consists of inmates classified as MAXIMUM security and includes populations of accused child molesters, inmates with violent tendencies or charges, those requiring separation from other inmate populations including gang ties, behavioral separation and others.").)

10. During the six months he was housed there, Plaintiff submitted the following requests to HCDC staff pertaining to his right to exercise his religion. (Filing 33-1, Aff. Bahensky ¶¶ 9-10.)

• On July 2, 2018, Plaintiff submitted a grievance stating, "i sign up for church [e]very week but it is never held. At Douglas we always had it. what can you do to help?" The Assistant Director replied that he had verified that religious services had been held several times since Plaintiff's arrival, but Plaintiff had chosen not to attend, although acknowledging that at times the volunteer leaders cancelled services, as had been the case on the day prior to his grievance. (Filing 33-5 at CM/ECF p. 11.) On July 3, 2018, Plaintiff

submitted a handwritten appeal of his grievance disagreeing with the Assistant Director's response, to which HCDC staff responded by noting that he needed to use the electronic kiosk to process his grievance. (Filing 33-4 at CM/ECF p. 34.)

- Assistant Director Gottschalk recognized for the first time when reviewing the above grievance and grievance appeal in connection with this litigation that he had mistakenly confused Plaintiff for another inmate in the maximum-security unit when he investigated and responded to Plaintiff's original grievance; however, his investigation revealed that religious programs were offered to the maximum-security unit whenever a religious provider could be located and would appear for maximum-security inmates. (Filing 33-11, Aff. Gottschalk ¶¶ 4-7.)

- In his letter to Director Bahensky dated July 31, 2018, Plaintiff mentioned that he was "in need of a weekly visit by a Christen [sic] Pastor. I sign up for Church service weekly, have never refused going, was available, but never have seen a pastor since I arrived on April 25, 2018." (Filing 33-4 at CM/ECF p. 27.) Director Bahensky explained by letter to Plaintiff that the HCDC schedules and provides church/bible study services for inmates dependent upon participation of outside volunteers, and that Plaintiff was free to request and coordinate a pastoral visit with the clergy he believed would meet his needs, but that he was not aware of any such special requests having been made by Plaintiff. (Filing 33-4 at CM/ECF p. 30.)

11. Director Bahensky instructs personnel at the HCDC to make efforts to schedule weekly religious programs for the inmates, but it is difficult to locate and find religious program leaders to consistently present to the particular classification unit where Plaintiff was housed (maximum security, including sex offenders and those accused of crimes of violence or against children). (Filing 33-11, Aff. Gottschalk ¶ 7; Filing 33-1, Aff. Bahensky ¶ 13.)

12. When Plaintiff arrived at the HCDC on April 25, 2018, the U.S. Department of Justice provided a summary of his medical history and status and a transfer of his medications. Plaintiff's booking assessment did not denote any back or shoulder injuries. (Filing 33-1, Aff. Bahensky ¶ 11; Filing 33-6 at CM/ECF pp. 1-2.)[10]

13. During the six months he was housed there, Plaintiff submitted many other requests to the HCDC pertaining to alleged medical ailments or issues other than those already outlined above, including the following.

- On May 1, 2018, Plaintiff submitted a request to "Medical" stating, "Need to contact VA to get my hearing aid fixed." (Filing 33-6 at CM/ECF p. 7.) Plaintiff's jail medical chart indicates he was seen by a medical professional on May 2, 2018, and a narrative note was generated indicating that the nurse accepted Plaintiff's report that his right hearing aid no longer worked, and the nurse took both hearing aids to check on supply. (Filing 33-6 at CM/ECF p. 6.)

- On June 7 and 14, 2018, Plaintiff submitted requests to "Medical" inquiring about his hearing aids, to which an ACH nurse replied, "we have them," and "have family contact VA." (Filing 33-6 at CM/ECF pp. 9, 12-13.)

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[10] After representing during discovery that he did not have any medical records supporting his claimed medical conditions (Filing 33-10 at CM/ECF pp. 2-4), Plaintiff has now filed what he claims are medical records from the Douglas County Department of Corrections showing that he had previously sought medical treatment for back and shoulder issues. Although not explicitly stated, Plaintiff seems to imply that the Defendants should have procured his past medical records. (Filing 34 at CM/ECF p. 7; Filing 35 at CM/ECF pp. 7-28.) Plaintiff has not submitted evidence that he authorized the release of such medical information to the HCDC. *See, e.g.*, *Scher v. Ortwerth*, No. 4:03-CV-787, 2004 WL 3622037, at *15 (E.D. Mo. July 12, 2004) (noting prisoner's revocation of prior authorization for release of medical information to jail).

• On July 11, 2018, Plaintiff submitted a written grievance form asking for his hearing aids and glasses to be fixed or replaced, teeth cleaning, a cancer test, "Fix left rotator cup," "take me to VA for hearing aid and surgery," and "Give me 8 hours of uninterrupted sleep with very low light levels." (Filing 33-4 at CM/ECF p. 33.) The Assistant Director responded in writing indicating that routine, non-emergency preventative dental exams are not provided; Plaintiff could release his glasses and hearing aids to friends or family to be repaired; Plaintiff could be seen by the contracted medical providers upon request to address his alleged shoulder issue; and "our facility light levels already comply with State Jail Standards." (Filing 33-4 at CM/ECF p. 33.)

• On July 14, 2018, Plaintiff submitted a grievance appeal stating that he expected the facility to get him "hearing, vision, dental, and surgery treatments, and 8 hours of uninterrupted sleep a night." The Assistant Director responded that the guidelines had been explained and his medical needs were being addressed. (Filing 33-5 at CM/ECF p. 21.)

• In a letter to Director Bahensky dated July 31, 2018, Plaintiff stated that his inability to get "8 hours of uninterrupted sleep per night in dark conditions" "results in shorter lifetimes and possibly increased alzheimers disease," and indicated his need for an "Eye exam and new glasses," "Hearing exam and repaired hearing aids," dental exam, teeth cleaning, cancer check, and "Dr. Exam of left shoulder cap and MRI and surgery to repair it." (Filing 33-4 at CM/ECF p. 27.) Director Bahensky responded by letter to each of Plaintiff's medical requests, explaining that the "lights out" rules complied with Nebraska Jail Standards and permitted sufficient hours for sleep; the facility could provide reading glasses but not routine eye, hearing, or dental exams unless afforded by the U.S. Marshal[11]; Plaintiff was welcome to contact

[11] Plaintiff's "objections" to this Material Fact and others—in the form of explaining the physical state of his glasses and hearing aids, how his hearing aids

friends or family about repairing or replacing his hearing aids and needed to contact the U.S. Marshal for examination needs; and Plaintiff should contact Medical using the kiosk to be seen by a medical professional about any symptoms he might be experiencing that would warrant a cancer check or treatment for a shoulder injury. (Filing 33-4 at CM/ECF pp. 29-30.)

- On August 4, 2018, Plaintiff submitted a request to "Medical" seeking "hearing batteries #312 and bandaid," which was responded to by an ACH nurse stating, "Given by noc shift." (Filing 33-5 at CM/ECF p. 37.)

- On August 10, 2018, Plaintiff submitted two separate requests to "Medical," stating, "I need my hearing aids fixed. They don't work right because right one is broken. contact VA or marshal for help," and "i can't sleep and need medical help." (Filing 33-5 at CM/ECF pp. 44-45.) Plaintiff's jail medical chart indicates he was seen by a medical professional on August 11, 2018, and it was noted that Plaintiff did not bring his hearing aids to the visit, but he was able to hear the nurse when she used a normal voice tone, and no new medical orders were given. (Filing 33-6 at CM/ECF p. 14.)

- On September 19, 2018, Plaintiff submitted a request to "Medical" stating, "my back hurts bad. can't walk to medical." (Filing 33-6 at CM/ECF p. 22.) Plaintiff's jail medical chart shows that he was examined by an ACH medical professional on September 20, 2018, and was educated to do stretches for his back pain, but no new medical orders were given. (Filing 33-6 at CM/ECF p. 21.)

- On September 26, 2018, Plaintiff submitted a request to "Medical" stating, "shoulder, hiccup, back pains aggr[a]vated." (Filing 33-5 at CM/ECF

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were damaged, and how other correctional institutions handled his eye, ear, and other medical needs (Filing 34 at CM/ECF pp. 8-11)—do not controvert the contents of Plaintiff's complaints about these issues and the HCDC's responses thereto.

p. 98.) Plaintiff's jail medical chart shows that he was examined by a medical professional on September 27, 2018, about his shoulder and back complaints. The chart notes that Plaintiff had a steady gait, was able to complete stretches and bend to his toes, and was given no new medical orders, but was educated to do stretching exercises and increase his water-intake and activity levels. (Filing 33-6 at CM/ECF p. 23.)

14. On or about October 23, 2018, the U.S. Department of Justice transferred Plaintiff out of the HCDC to a different holding facility. (Filing 33-4 at CM/ECF pp. 35-37.)

15. Law enforcement agencies will generally not accept custody of an inmate who appears or claims to be in medical distress without first seeking medical clearance, but the federal authorities who took Plaintiff into their custody for transfer on October 23, 2018, did so without raising any concerns about his medical status. (Filing 33-1, Aff. Bahensky ¶ 16.)

II. STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The movant bears the initial responsibility of informing the district court of the basis for the motion, and must identify those portions of [the record] . . . which it believes demonstrate the absence of a genuine issue of material fact." *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc) (internal quotation marks and citation omitted). "If the movant does so, the nonmovant must respond by submitting evidentiary materials that set out specific facts showing that there is a genuine issue for trial." *Id.* (internal quotation marks and citation omitted).

"On a motion for summary judgment, facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts.

Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* (internal quotation marks and citations omitted). But "[t]he nonmovant must do more than simply show that there is some metaphysical doubt as to the material facts, and must come forward with specific facts showing that there is a genuine issue for trial." *Id.* (internal quotation marks and citations omitted).

"The mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]." *Barber v. C1 Truck Driver Training, LLC*, 656 F.3d 782, 791-92 (8th Cir. 2011) (internal quotation marks and citation omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Torgerson*, 643 F.3d at 1042 (internal quotation marks and citation omitted).

III. DISCUSSION

A. Claims Against Defendant Bahensky Individually

Bahensky asserts that he is entitled to summary judgment because he is immune from suit in his individual capacity under the doctrine of qualified immunity. "Qualified immunity shields government officials from liability for civil damages and the burdens of litigation 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *McKenney v. Harrison*, 635 F.3d 354, 358 (8th Cir. 2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "Stated another way, qualified immunity shields a defendant from suit if he or she could have reasonably believed his or her conduct to be lawful in light of clearly established law and the information that the defendant possessed." *Smithson v. Aldrich*, 235 F.3d 1058, 1061 (8th Cir. 2000) (internal quotation and citation omitted). "The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Id.*

Qualified immunity requires a two-part inquiry: (1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant's alleged misconduct. *Nance v. Sammis*, 586 F.3d 604, 609 (8th Cir. 2009). If no reasonable fact-finder could answer yes to both of these questions, the official is entitled to qualified immunity. *Id.* "Courts may exercise their discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first." *Akins v. Epperly*, 588 F.3d 1178, 1183 (8th Cir. 2009).

1. Violation of a Constitutional Right

For qualified immunity purposes, the first question is whether Plaintiff has established a violation of his constitutional rights. I shall examine each aspect of Plaintiff's Fourteenth Amendment claim separately.

a. Conditions of Confinement

Because Plaintiff was a federal pretrial detainee at the HCDC at the time the Defendants allegedly violated his constitutional rights, the court analyzes Plaintiff's conditions-of-confinement claims under the Fourteenth Amendment instead of the Eighth Amendment, which applies to convicted prisoners. *Morris v. Zefferi*, 601 F.3d 805, 809 (8th Cir. 2010) (analyzing whether manner of transporting pretrial detainee to courthouse constituted punishment). "Under the Fourteenth Amendment, a pretrial detainee's constitutional rights are violated if the detainee's conditions of confinement amount to punishment," *id.*, which includes "penalties that transgress today's broad and idealistic concepts of dignity, civilized standards, humanity, and decency" and "that deprive[] inmates of the minimal civilized measures of life's necessities." *Id.* (internal quotation marks and citations omitted).

In evaluating "whether the conditions of pretrial detention are unconstitutionally punitive, [the court must] review the totality of the circumstances

of a pretrial detainee's confinement," including "whether an official's conduct was reasonably related to a legitimate governmental interest." *Id.* at 810. Specifically,

> [a] court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]. Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment. Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

Id. (quoting *Bell v. Wolfish,* 441 U.S. 520, 538-39 (1979) (internal quotations and citations omitted)).

Further, in analyzing a pretrial detainee's conditions-of-confinement claims, the court is to apply "the same deliberate indifference standard as is applied to Eighth Amendment claims made by convicted inmates." *Id.* at 809 (internal quotation marks and citation omitted). The Eighth Amendment's prohibition against "cruel and unusual punishments" requires that prison officials provide humane conditions of confinement. "The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones . . . ." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (internal quotation marks and citation omitted). "The Eighth Amendment prohibits punishments that deprive inmates of the minimal civilized measure of life's necessities," *Smith v. Copeland*, 87 F.3d 265, 268 (8th Cir. 1996), such as "adequate food, clothing, shelter, and medical care, and . . . reasonable measures to guarantee

the safety of the inmates." *Farmer*, 511 U.S. at 832 (internal quotations and citations omitted).

To prevail on a conditions-of-confinement claim, an inmate must show (1) that the alleged deprivation of rights was sufficiently serious; and (2) that prison officials acted with "deliberate indifference" toward conditions at the prison that created a substantial risk of serious harm to the inmate. *Farmer*, 511 U.S. at 834; *Irving v. Dormire*, 519 F.3d 441, 446 (8th Cir. 2008). "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause [of the Eighth Amendment], whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock." *Whitley v. Albers*, 475 U.S. 312, 319 (1986); *see also Butler v. Fletcher*, 465 F.3d 340, 345 (8th Cir. 2006) ("we hold that deliberate indifference is the appropriate standard of culpability for all claims that prison officials failed to provide pretrial detainees with adequate food, clothing, shelter, medical care, and reasonable safety").

i. Time Out of Cell Limited to Two Hours

Plaintiff argues that restricting him, a pretrial detainee, to his cell for 22 hours a day after the inmate fight that occurred in his housing unit was unconstitutional "punishment."[12] As stated above, whether such a cell restriction on a pretrial detainee amounts to unconstitutional "punishment" requires the court to decide whether the restriction is imposed for the purpose of punishment or, instead, is rationally related to a legitimate nonpunitive governmental purpose and is not excessive in relation to that purpose. *Bell*, 441 U.S. at 538, 561. *See also Martinez v. Turner*, 977 F.2d 421, 423 (8th Cir. 1992) (pretrial detainees may not be punished,

[12] "[T]he Due Process Clause prohibits any punishment of a pretrial detainee, be that punishment cruel-and-unusual or not." *Edwards v. Byrd*, 750 F.3d 728, 732 (8th Cir. 2014).

and whether particular restriction or condition accompanying pretrial detention is punishment turns on whether restriction or condition is reasonably related to legitimate governmental objective).

> Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. That deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, just as it does to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline.

Whitley, 475 U.S. at 321-22 (internal quotation marks and citation omitted). How best to preserve order and discipline is "peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Bell*, 441 U.S. at 548 (internal quotation marks and citation omitted); *see also Holden v. Hirner*, 663 F.3d 336, 341-42 (8th Cir. 2011) ("Courts must give substantial deference to prison officials to determine the best methods for dealing with dangerous inmates in the volatile environment that is prison life." (internal quotation marks and citation omitted)).

Here, the evidence shows that Plaintiff was housed in a highly restrictive area of the jail for his own protection due to the nature of his criminal charges. Plaintiff acknowledges in his Complaint, and the evidence establishes, that a large disturbance in his housing unit in late August 2018 led to a lockdown that restricted prisoners' time out of their cells to two hours per day on a rotating schedule, with programming still available, for the two remaining months Plaintiff was housed at the facility before being transferred to another institution. There is further evidence that the HCDC Assistant Director found the lockdown necessary to "address the multitude of verbal and written threats." (Filing 33-4 at CM/ECF p. 23.)

Subjecting Plaintiff and his fellow inmates to such a lockdown in their restrictive housing unit was rationally related and proportionate to the legitimate nonpunitive governmental purposes of protecting the inmates in Plaintiff's housing unit from each other and maintaining order until the threat of continued unrest subsided. In the absence of any evidence that the cell restriction was imposed for the very purpose of punishment—and there is none here—the court must give the HCDC administrators "wide-ranging deference" in the manner in which they chose to "preserve internal order and discipline and to maintain institutional security," especially when the restriction was "taken in response to an actual confrontation with riotous inmates" and also served as a "preventive measure[] intended to reduce the incidence of these or any other breaches of prison discipline." *Whitley*, 475 U.S. at 321-22 (internal quotation marks and citation omitted).

Therefore, the HCDC's restriction on Plaintiff's time out of his cell did not constitute "punishment" within the meaning of the Due Process Clause. *Bell*, 441 U.S. at 538-40 (maintaining safety and internal order within institution are permissible nonpunitive objectives); *Holden*, 663 F.3d 336, 340-41 (8th Cir. 2011) ("Prison officials have a duty to protect prisoners from violence at the hands of other prisoners."); *Schoelch v. Mitchell*, 625 F.3d 1041, 1046 (8th Cir. 2010) (pretrial detainee's custodians have duty to protect detainee under Due Process Clause of Fourteenth Amendment); *Whitfield v. Dicker*, 41 F. App'x 6, 7 (8th Cir. 2002) (unpublished) (pretrial detainee's Fourteenth Amendment claims failed because detainee did not create genuine issue of material fact that defendants confined him to administrative segregation for punitive reasons rather than for institutional security); *Rust v. Grammer*, 858 F.2d 411, 413 (8th Cir. 1988) (cancellation of yard time for 13 days as part of lockdown undertaken to control prison disturbance was not Eighth Amendment violation when court was "satisfied that prison officials . . . acted in good faith to restore order in the adjustment center and that each of the restrictions imposed had a penological justification"); *Rupert v. Mills*, No. 3:14-CV-161, 2015 WL 2419154, at *5 (E.D. Ark. May 20, 2015) (keeping all inmates, including pretrial detainees, in cells 23 hours per day was reasonably related to legitimate government objective of safety because of guard/inmate ratio; "Plaintiffs'

vague allegations that they were denied outdoor recreation are insufficient to create a genuine issue of material fact on this issue."); *Dale v. Brott*, No. 12-383, 2013 WL 12074952, at *12 (D. Minn. July 23, 2013), *report and recommendation adopted*, No. 12-CV-0383, 2013 WL 12074953 (D. Minn. Sept. 5, 2013), *aff'd*, 562 F. App'x 551 (8th Cir. 2014) (pretrial detainee's 42 days of confinement with limited hours out of cell was not punishment that required due process when he still had access to commissary, library cart, television, visitation, clergy visits, and when jail had legitimate nonpunitive reasons for placing detainee in that housing unit and court was required to give that determination "due deference"); *Miller v. Powers*, No. 6:08-4177, 2009 WL 255983, at *1, *5 (D.S.C. Feb. 2, 2009) (granting prison official's motion for summary judgment on pretrial detainee's conditions-of-confinement claim where detainee was subject to 11-day lockdown after riot involving several inmates because evidence demonstrated that lockdown was based upon security needs and desire to maintain order; "The actions taken by the SCDF were not a form of punishment but essential to maintain good order and discipline following a riot.").

ii. Cold Conditions in Cell

Plaintiff claims that Defendant Bahensky deprived him of the single, identifiable human need of warmth by keeping his cell and the dayroom at too low of a temperature. *See Tokar v. Armontrout*, 97 F.3d 1078, 1082 (8th Cir. 1996) (conditions of confinement may violate Eighth Amendment when conditions have effect of depriving inmate of single, identifiable human need such as warmth, giving example of low cell temperature at night combined with failure to issue blankets (citing *Wilson v. Seiter*, 501 U.S. 294, 304 (1991)).

First, there is no evidence that the conditions caused by the alleged cold temperature in Plaintiff's cell and dayroom were objectively, sufficiently serious. Plaintiff has presented no evidence that the temperature in those areas was ever below the 65- to 80-degree range required by the Nebraska Minimum Jail Standards; in fact, computerized temperature readings taken in response to Plaintiff's

complaints were 72, 75.3, and 78.2 degrees, and at the same time Plaintiff complained it was too cold, other inmates complained that the temperature was too hot.

Second, even if the conditions were sufficiently serious, and even if Defendant Bahensky was aware of such conditions, there is no evidence that he was deliberately indifferent to an excessive risk to Plaintiff's health or safety. There is no evidence that Plaintiff developed an illness related to the alleged cold. Rather, the undisputed evidence shows that Plaintiff was seen and examined promptly by the HCDC medical unit each time he logged a complaint related to his health and the ambient temperature; was educated to wear socks, increase his water intake, and exercise; and was issued an extra blanket.

Simply put, there is neither evidence of an excessive risk to Plaintiff's health or safety caused by the allegedly cold temperatures nor deliberate indifference thereto. Accordingly, Plaintiff has failed to establish that the temperature in his cell and the dayroom was punishment in violation of the Fourteenth Amendment. *See Biesanz v. Ferguson*, No. 10-5017, 2012 WL 601585, at *7 (W.D. Ark. Jan. 19, 2012), *report and recommendation adopted*, No. CIV. 10-5017, 2012 WL 601590 (W.D. Ark. Feb. 23, 2012) (jail's policy of keeping temperatures between 65 and 80 degrees was not unconstitutional punishment when jail used computerized system to monitor and control temperature, system was operated by maintenance staff, and there was no evidence that such policy was not adhered to whenever possible); *Keating v. Helder*, No. CIV. 08-5243, 2011 WL 3703415, at *14 (W.D. Ark. Apr. 11, 2011), *report and recommendation adopted*, No. CIV. 08-5243, 2011 WL 3703264 (W.D. Ark. Aug. 23, 2011) (pretrial detainee's allegations of cold conditions in segregation cell did not establish deprivation of single identifiable human need when evidence established that jail temperature was kept between 65 and 85 degrees and blankets were passed out each evening and collected in the morning).

iii. Lights-Out Policy Allowing 5-6 Hours Sleep

Plaintiff next complains that he suffered from sleep deprivation at the HCDC due to the night-time lighting conditions in his cell. According to the evidence, the HCDC turned lights out at 11:00 p.m. and back on at 5:00 a.m. each day. (Filing 33-8 at CM/ECF p. 12.) Plaintiff claims that this schedule resulted in him getting only five to six hours of uninterrupted sleep per night which, he says, "will lead [to] [A]lzheimer's as well as other serious physical and mental diseases as well as a shortened life-time." (Filing 1 at CM/ECF p. 15; Filing 13 at CM/ECF p. 12.)

Other than Plaintiff's predictions of dire future consequences from his lack of sleep, there is no evidence that Plaintiff suffered any illness or impairment from his lack of sleep, much less a substantial risk of serious harm. In the absence of conditions that posed a risk of serious harm to Plaintiff, there was nothing toward which Defendant Bahensky could act with deliberate indifference. Further, having a six-hour lights-out policy in the jail cells that balanced the needs of early risers and night owls can hardly be characterized as a transgression of societal standards of dignity, humanity, and decency, nor is there any evidence that the policy was for the purpose of punishment. Accordingly, Plaintiff has failed to prove that the HCDC's lighting practices amounted to unconstitutional punishment. *See Nicholas Cortez Addison Adc #162451 v. Martin*, No. 3:15CV00134, 2016 WL 6634881, at *4 (E.D. Ark. Nov. 8, 2016) (summary judgment granted in favor of defendant detention center administrator when detainee alleged, among other things, that lighting in detention center kept him awake because evidence indicated that facility lighting was in compliance with Department of Health and Criminal Detention Facilities Review Committee annual reports and detainee did not provide any responsive proof); *Biesanz*, 2012 WL 601585, at *7 (jail's policy of dimming cell lights at night to simulate "night lights" for safety reasons was not unconstitutional punishment when pretrial detainee alleged only that he lost sleep, but did not seek medical help for his alleged sleeplessness and did not claim to have "any other physical impairment from the constant lighting"); *Philmlee v. Byrd*, No. 4:10CV00221, 2010 WL 6549829, at *3 (E.D. Ark. Oct. 21, 2010), *report and recommendation adopted*,

No. 4:10CV00221, 2011 WL 1542655 (E.D. Ark. Apr. 25, 2011) (leaving dimmed lights on at night in cells and in guard's area did not deny detainee minimal civilized measure of life's necessities or constitute substantial risk of serious harm). *See, e.g.*, *Wills v. Terhune*, 404 F. Supp. 2d 1226, 1231 (E.D. Cal. 2005) (recommending denial of plaintiff inmate's motion for preliminary injunction where plaintiff claimed constant lighting of his cell resulted in problems sleeping, headaches, visual impairment, and other physical and emotional problems; evidence showed night lighting was only bright enough for security concerns and there was no supporting evidence of alleged physical impairment); *King v. Frank*, 371 F. Supp. 2d 977, 985 (W.D. Wis. 2005) (constant low-level illumination of prisoner's cell during sleep hours did not rise to level of Eighth Amendment claim where health workers found no serious medical consequences from the lighting and plaintiff demonstrated neither "substantial risk of serious harm" nor deliberate indifference to that harm).

iv. Religious Services

Plaintiff claims that he is "a Christian and my beliefs require that I attend a religious service conducted by an ordained minister weekly, and communion once a month" and that the Defendants failed to accommodate those requirements. (Filing 13 at CM/ECF p. 16.)

The undisputed evidence establishes that HCDC Director Bahensky routinely instructs personnel at the HCDC to schedule weekly religious programs for the inmates, but it is difficult to locate and find religious program leaders to consistently present to the particular classification unit where Plaintiff was housed (maximum security, including sex offenders and those accused of crimes of violence or against children). (Filing 33-11, Aff. Gottschalk ¶ 7; Filing 33-1, Aff. Bahensky ¶ 13.) While Plaintiff was housed at the HCDC, religious programs were offered to his unit whenever a religious provider could be located and would appear for them. According to the Assistant Director of the HCDC, there were at least 11 Christian religious programs held at the facility and available to Plaintiff's unit from January to June 2018. (Filing 33-11, Aff. Gottschalk ¶¶ 4-7.) While it is uncertain exactly

how many religious programs were offered to Plaintiff's unit from April to October 2018 when Plaintiff was housed at the facility, "such programs were offered whenever a willing provider could be located to appear." (Filing 33-11 at CM/ECF p. 3.)

Director Bahensky explained by letter to Plaintiff that the HCDC schedules and provides church/bible study services for inmates depending upon the participation of outside volunteers, and that Plaintiff was free to request and coordinate a pastoral visit with the clergy he believed would meet his needs, but Plaintiff made no such requests. (Filing 33-4 at CM/ECF p. 30; Filing 33-11, Aff. Gottschalk ¶ 7 (confirming that Plaintiff never made a request to see or talk by telephone to a particular pastor or religious provider).)

The Eighth Circuit has held that mere deprivation of access to religious services does not violate the Eighth Amendment because it does not "inflict unnecessary or wanton inflictions of pain, nor [does it] involve 'life's necessities,' such as water, food, or shelter." *Phillips v. Norris*, 320 F.3d 844, 848 (8th Cir. 2003) (37-day isolation without contact visitation or religious services did not violate Eighth Amendment). Further, there is no evidence that HCDC personnel attempted to punish Plaintiff with a lack of religious programming; rather, they actively sought to schedule church services and bible study, but such programming was completely dependent upon the unpredictable appearance of clergy who were willing to serve Plaintiff's housing unit.

Under these circumstances, Plaintiff has failed to prove that the sporadic religious activities available to his housing unit at the HCDC constituted punishment within the meaning of the Fourteenth Amendment. *Landers v. Frakes*, No. 8:17CV371, 2019 WL 1517122, at *13 (D. Neb. Apr. 8, 2019) (no Eighth Amendment violation to deprive inmate of ability to attend religious services while in segregation because such deprivation did not inflict unnecessary or wanton pain and did not involve "life's necessities," such as water, food, or shelter, citing *Phillips*); *Hodgson v. Fabian*, No. CIV. 08-5120, 2009 WL 2972862, at *16 (D.

Minn. Sept. 10, 2009), *aff'd*, 378 F. App'x 592 (8th Cir. 2010) (no violation of Eighth Amendment to limit inmate access to certain tools or methods of practicing his religion, such as incense and herbs, because he still had access to religious services, was not subjected to any physical pain or injury, and was not denied any of "life's necessities"); *Harris v. Moore*, No. 2:04CV00073, 2007 WL 4380277, at *8 (E.D. Mo. Dec. 13, 2007) (no violation of Eighth Amendment to restrict inmate's attendance at religious services to once a week, citing *Phillips*).

b. Inadequate Medical Care

Plaintiff complains that the HCDC failed to repair his broken glasses and hearing aids; refused to give him shoulder surgery, proper treatment for back pain, routine dental examinations, and a cancer check; and failed to investigate a medical cause for his constant coldness.

> To prevail on an Eighth Amendment claim for deprivation of medical care, an inmate must show that the prison official was deliberately indifferent to the inmate's serious medical needs. This requires a two-part showing that (1) the inmate suffered from an objectively serious medical need, and (2) the prison official knew of the need yet deliberately disregarded it.

Schaub v. VonWald, 638 F.3d 905, 914 (8th Cir. 2011) (internal quotations and citations omitted). "A serious medical need is one that has been diagnosed by a physician as requiring treatment, or one that is so obvious that even a layperson would easily recognize the necessity for a doctor's attention." *Id.* (internal quotation and citation omitted).

> Deliberate indifference is equivalent to criminal-law recklessness, which is more blameworthy than negligence, yet less blameworthy than purposefully causing or knowingly bringing about a substantial risk of serious harm to the inmate. An obvious risk of harm

> justifies an inference that a prison official subjectively disregarded a substantial risk of serious harm to the inmate. Deliberate indifference must be measured by the official's knowledge at the time in question, not by hindsight's perfect vision.

Id. at 914-15 (internal quotation marks and citations omitted).

Assuming for purposes of Defendants' Motion for Summary Judgment that Plaintiff had an objectively serious medical need that was so obvious that a layperson would easily recognize that a doctor's attention was necessary, Plaintiff has failed to show that Bahensky was deliberately indifferent to that need. On the contrary, the Plaintiff's jail medical chart shows that each of his medical requests and complaints were promptly attended to by the jail's medical professionals supplied through the county's contractor, ACH. The ACH medical personnel who evaluated Plaintiff did not believe, in their professional medical judgment, that his subjective complaints of hearing and vision difficulty, back and shoulder pain, and other issues warranted surgery, a "cancer check," or any other special medical intervention or treatment. Rather, Plaintiff was directed to perform conservative treatment options like stretching, exercising, and increasing his water intake and to contact his supervising entity, the U.S. Marshals Service, for approval of routine eye, hearing, or dental exams. Plaintiff's desire for a particular form of treatment and routine preventative examinations is not the proper basis for a constitutional claim. *Barr v. Pearson*, 909 F.3d 919, 921-22 (8th Cir. 2018) ("[W]hile inmates have a right to adequate medical care, they have no right to receive a particular or requested course of treatment. Indeed, doctors remain free to exercise their independent medical judgment. Thus, [a] prisoner's mere difference of opinion over matters of expert medical judgment or a course of medical treatment fail[s] to rise to the level of a constitutional violation." (internal quotation marks and citations omitted)).

The evidence shows that Director Bahensky fulfilled his responsibility to afford Plaintiff with access to professional medical care, and he investigated and responded to all medical issues of which Plaintiff made him personally aware.

Plaintiff fails to explain how Director Bahensky, who was himself not a medical professional, should have recognized Plaintiff's medical needs as serious or requiring different treatment, when any such conclusion would have been at odds with the assessment of the ACH medical professionals who evaluated Plaintiff. *See Holden v. Hirner*, 663 F.3d 336, 343 (8th Cir. 2011) ("Prison officials lacking medical expertise are entitled to rely on the opinions of medical staff regarding inmate diagnosis and the decision of whether to refer the inmate to outside doctors or dentists."); *Drake ex rel. Cotton v. Koss*, 445 F.3d 1038, 1042 (8th Cir. 2006) ("[I]t is not deliberate indifference when an official relies on the recommendations of a trained professional."); *Meloy v. Bachmeier*, 302 F.3d 845, 849 (8th Cir. 2002) ("A prison's medical treatment director who lacks medical expertise cannot be liable for the medical staff's diagnostic decisions. Prison officials cannot substitute their judgment for a medical professional's prescription." (citations omitted)).

There is simply no showing that Director Bahensky exhibited deliberate indifference to Plaintiff's presumed objectively serious medical needs. *Johnson v. Leonard*, 929 F.3d 569, 576 (8th Cir. 2019) (deliberate-indifference claim involves a "fact-intensive inquiry that requires [the plaintiff] to clear a substantial evidentiary threshold to succeed on his claim" (internal quotation marks and citation omitted)).

c. Conclusion on Claims Against Bahensky Individually

Plaintiff's Fourteenth Amendment claim against Defendant Bahensky individually fails because he has not presented evidence that he was denied access to life's necessities, that any of the disputed conditions of Plaintiff's confinement were imposed for the purpose of punishment, or that Defendant Bahensky knew of and disregarded a substantial risk of serious harm to him.

2. Clearly Established Constitutional Right

Because the Plaintiff has failed to demonstrate that Defendant Bahensky violated his Fourteenth Amendment rights, either Plaintiff's claim fails as a matter

of law or, alternatively, Bahensky is entitled to qualified immunity. *Kahle v. Leonard*, 477 F.3d 544, 550 (8th Cir. 2007) (if an official did not deprive plaintiff of a constitutional or statutory right, the plaintiff "does not need qualified immunity, as he is not liable under § 1983"); *Ambrose v. Young*, 474 F.3d 1070, 1077 n.3 (8th Cir. 2007) ("[I]f the court finds no constitutional violation occurred, the analysis ends and the issue of qualified immunity is not addressed. . . . This is not to say, however, the defendant official is entitled to qualified immunity. Rather, if no constitutional violation occurred, plaintiff's claim fails as a matter of law because plaintiff did not prove an essential element of the § 1983 claim." (citations omitted)).

Alternatively, because there was no constitutional violation, Defendant Bahensky is entitled to qualified immunity. *See Pearson v. Callahan*, 555 U.S. 223, 243-44 (2009) ("An officer conducting a search is entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment."); *Kulkay v. Roy*, 847 F.3d 637, 646 (8th Cir. 2017) (finding individual defendants entitled to qualified immunity when plaintiff failed to state Eighth Amendment claim); *Ransom v. Grisafe*, 790 F.3d 804, 812-13 (8th Cir. 2015) (because officers' seizure of plaintiff did not violate Fourth Amendment, officers were entitled to qualified immunity).

B. Claims Against Hall County and Bahensky in Official Capacity

Hall County cannot be held liable under 42 U.S.C. § 1983 without an underlying constitutional violation by one of its individual officers. Because Defendant Bahensky, a county officer, did not violate the Constitution, Hall County likewise may not be held liable. *Whitney v. City of St. Louis, Missouri*, 887 F.3d 857, 861 (8th Cir. 2018) ("absent a constitutional violation by a city employee, there can be no § 1983 or *Monell* liability for the City"); *see also Malone v. Hinman*, 847 F.3d 949, 955 (8th Cir. 2017) ("Because we conclude that Officer Hinman did not violate Malone's constitutional rights, there can be no § 1983 or *Monell* liability on the part of Chief Thomas and the City."); *Sitzes v. City of W. Memphis*, 606 F.3d 461, 470 (8th Cir. 2010) (agreeing with district court that plaintiffs' *Monell* claims "could not

be sustained absent an underlying constitutional violation by the officer"); *Sanders v. City of Minneapolis*, 474 F.3d 523, 527 (8th Cir. 2007) ("Without a constitutional violation by the individual officers, there can be no § 1983 or *Monell* . . . municipal liability.").

IV. CONCLUSION

Because Plaintiff did not establish a constitutional claim against Defendant Bahensky individually, and because Hall County cannot be held liable under 42 U.S.C. § 1983 without an underlying constitutional violation by Bahensky, the Defendants' Motion for Summary Judgment must be granted.

IT IS ORDERED:

1. The Defendants' Motion for Summary Judgment (Filing 32) is granted; and

2. Judgment shall be entered by separate document.

DATED this 24th day of March, 2020.

BY THE COURT:

Richard G. Kopf

Richard G. Kopf
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GREGORY P. BARTUNEK,

Plaintiff,

vs.

HALL COUNTY, NEBRASKA, and TODD BAHENSKY in his individual and official capacities,

Defendants.

8:18CV489

JUDGMENT

Pursuant to the Memorandum and Order entered this date granting Defendants' Motion for Summary Judgment, this case is dismissed with prejudice. **Plaintiff is hereby notified that the filing of a notice of appeal will make him liable for payment of the full $505.00 appellate filing fee regardless of the outcome of the appeal.** This is because the Prison Litigation Reform Act requires an incarcerated civil appellant to pay the full amount of the $505.00 appellate filing fee by making monthly payments to the court, even if he or she is proceeding in forma pauperis. 28 U.S.C. § 1915(b). By filing a notice of appeal, Plaintiff will be consenting to the deduction of the $505.00 filing fee from his prison account by prison officials.

DATED this 24th day of March, 2020.

BY THE COURT:

Richard G. Kopf

Richard G. Kopf
Senior United States District Judge

UNITED STATES DISTRICT COURT
FOR THE District of Nebraska
Office of the Clerk

NOTICE – CIVIL APPEALS IN PRO SE CASES

The timely filing of a notice of appeal is mandatory and jurisdictional. Except as provided elsewhere in Rule 4 of the Federal Rules of Appellate Procedure, a notice of appeal must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency of the United States is a party, the notice of appeal must be filed in the district court within 60 days of such entry. See Fed. R. App. P. 4(a).

Litigants should refer to Rule 4 for information about the circumstances under which a district court may extend the time to file a notice of appeal, when a district court may reopen the time to file an appeal, and the effect of the filing of various motions on the time limits for filing a notice of appeal. Fed. R. App. P. 4(a) and (c).