United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 10, 2020
Lyle W. Cayce
Clerk

No. 18-20832

NOEL TURNER,

Plaintiff—Appellant,

versus

TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:17-CV-297

Before GRAVES, COSTA, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:*

Texas Department of Criminal Justice inmate Noel Turner sued TDCJ claiming that its policies, which at the time prevented him from always wearing a religious beard and yarmulke, violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), the Equal Protection Clause, the Due Process Clause, and the First Amendment. *See* 42 U.S.C. § 1983; 42

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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U.S.C. § 2000cc-1(a). Turner seeks declaratory and injunctive relief, asking that he always be allowed to grow and keep a four-inch beard and always be allowed to wear a yarmulke.

TDCJ changed its policies during the pendency of his lawsuit. Inmates can now wear religious beards and approved religious headgear at all times. Because Turner has received what he wanted, we affirm the district court's denial of his discovery requests, affirm its grant of summary judgment in TDCJ's favor, and deny his motions for a preliminary injunction and his request for costs.[1]

I.

The affidavit of TDCJ Region I Director Tony O'Hare states that prisoners can now wear four-inch religious beards and never have to shave them for ID photographs. Although voluntary cessation of a challenged activity does not ordinarily deprive a federal court of its power to determine its legality, courts are justified in treating a voluntary governmental cessation of potentially wrongful conduct with solicitude. *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009). Such self-correction provides a secure foundation for a dismissal based on mootness so long as it appears genuine. *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988). Government actors in the exercise of their official duties are accorded a presumption of good faith because they are public servants, and without evidence to the contrary, courts assume that formally announced changes to official policy are not mere litigation posturing. *Sossamon*, 560 F.3d at 325.

[1] We review the summary judgment decision *de novo* and the denial of the discovery requests for abuse of discretion. *JP Morgan Chase Bank, N.A. v. DataTreasury Corp.*, 936 F.3d 251, 255–56 (5th Cir. 2019); *Milton v. Tex. Dep't of Crim. Just.*, 707 F.3d 570, 572 (5th Cir. 2013).

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Turner cannot controvert O'Hare's affidavit and has put forth no evidence to overcome the presumption of good faith to which government actors are entitled. Since nothing suggests Turner will be subjected to the same allegedly defective grooming policies again or that TDCJ will reverse the new policies, Turner's religious beard claim is moot.

II.

After Turner filed suit, TDCJ twice changed its religious headgear policy to accommodate a Jewish inmate's need to always wear a yarmulke. Initially, inmates were always allowed to wear yarmulkes purchased (or obtained via donation) from the commissary. But according to exhibits attached to Turner's motions for a preliminary injunction, TDCJ altered the policy again in January 2020 to expressly allow inmates to wear yarmulkes obtained from sources other than the commissary so long as they are white with holes. Those with religious headgear that does not comply with the two policy changes can still wear it in their cells and at religious programs, but it must be carried, and not worn, to and from religious programs.

Turner cannot deny that the current policy allows him to always wear a yarmulke. The question now becomes whether the policy's mandate that the yarmulke either be one that is white with holes or be one obtained from the commissary, which an inmate can purchase for $1.25 or receive via donation, imposes a substantial burden upon Turner's ability to exercise his religious beliefs.

RLUIPA provides that the government shall not impose a substantial burden on the religious exercise of a person residing in or confined to an institution unless the burden furthers a compelling governmental interest and does so by the least restrictive means. 42 U.S.C. § 2000cc-1(a)(1)-(2)(2000). A governmental action creates a substantial burden on a religious exercise if it truly pressures the offender to significantly modify his religious behavior and significantly violates his religious beliefs. *Adkins v. Kaspar*, 393 F.3d 559,

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570 (5th Cir. 2004). The effect of a government action is significant when it either influences the adherent to act in a way that violates his religious beliefs or forces the adherent to choose between enjoying a generally available, non-trivial benefit, and following his religious beliefs. *Id.* The fact-specific substantial burden inquiry demands a case-by-case analysis. *Id.* at 571.

RLUIPA does not give prisoners an unfettered right to religious accommodations. *See Cutter v. Wilkinson*, 544 U.S. 709, 723–26 (2005). And Turner does not suffer a substantial burden just because the prison fails to provide all the religious accommodations that he desires. *See Sefeldeen v. Alameida*, 238 F. App'x 204, 206 (9th Cir. 2007). For example, prisoners do not have a right to the religious advisor of their choice. *Blair-Bey v. Nix*, 963 F.2d 162, 163–64 (8th Cir. 1992).

Similarly, Turner does not have a right to wear a particular yarmulke of his choosing at all times. A satisfactory accommodation is the touchstone. *Davis v. Powell*, 901 F. Supp. 2d 1196, 1232 (S.D. Cal. 2012). And requirements that devotional accessories such as religious headgear be obtained through the commissary or meet prescribed standards do not impose a substantial burden upon an inmate's exercise of religious belief because such policies do not prohibit a religious practice but only limit an inmate's preferences. *See Jihad v. Fabian*, No. 09-CV-1604, 2011 WL 1641767, at *1, *8 (D. Minn. May 2, 2011) (finding no substantial burden where inmates could only wear state-approved religious headgear purchased from the commissary); *Thomas v. Little*, No. 07-1117-BRE/EGB, 2009 WL 1938973, at *5 (W.D. Tenn. July 6, 2009) (finding no substantial burden on religious exercise where inmate was required to purchase prayer oils from one supplier).

Turner claims that he cannot afford to purchase a yarmulke from the commissary. But prisons are not required to provide inmates with devotional

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of material fact. *McFaul v. Valenzuela*, 684 F.3d 564, 580 (5th Cir. 2012). He may not rest his argument on vague assertions. *Id.*

The record suggests that Turner either possessed the documents he wanted or had been alerted to their content when he filed his discovery requests. The documents add nothing new as they either detail the updated grooming policy or address a policy that was superseded by it. Most importantly, nothing shows that Turner, or any other inmate, has been required to shave or been barred from wearing a complying yarmulke since TDCJ implemented its new policies. Because Turner failed to show that these records would defeat TDCJ's motion for summary judgment, the district court did not abuse its discretion in denying them.

V.

We deny Turner's request for costs. TDCJ's policy changes alone do not render him a prevailing party, and he has not prevailed on any of his claims. 42 U.S.C. § 1988(b); *Dearmore v. City of Garland*, 519 F.3d 517, 521 (5th Cir. 2008).

AFFIRMED and motions for a preliminary injunction DENIED.

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NOEL TURNER, TDCJ No. 1861086, Plaintiff, v. TEXAS DEPARTMENT OF CRIMINAL JUSTICE, Defendant.	§ § § § § § § § § § §	CIVIL ACTION H-17-297

MEMORANDUM AND ORDER

Plaintiff Noel Turner is currently a state inmate in the custody of the Texas Department of Criminal Justice - Correctional Institutions Division ("TDCJ"). Turner brings this civil action pursuant to 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc ("RLUIPA"), alleging that the TDCJ policies regarding religious headwear and grooming substantially burden his religious exercise. Pending are TDCJ's motion for summary judgment based on mootness and motion to seal (Docket Entry Nos. 75 & 80) and several motions filed by Turner (Docket Entry Nos. 72, 73, 81, 82, 85, 86, 87, 95). Turner has also filed a response in opposition to TDCJ's motion for summary judgment (Docket Entry No. 83). The Court has considered the motions, responses, replies, arguments of the parties, evidence in the record, objections, and applicable law and concludes that this case must be dismissed as moot for the reasons that follow.

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I. Background

The relevant background facts are recounted in the Court's December 1, 2017 Memorandum and Order and need not be repeated in detail here. *See* Docket Entry No. 59. In that Order, the Court dismissed Turner's First Amendment claims against TDCJ without prejudice for want of jurisdiction as barred by the Eleventh Amendment and conditionally dismissed Turner's request to wear a four-inch beard in perpetuity, allowing Turner to submit a supplemental complaint to plead sufficient facts to support Turner's claim that he is entitled to a religious exemption from TDCJ's annual shaving/dual photo requirement. Id. at 15-16. The Court stayed determination of Turner's religious headwear claim until TDCJ's forthcoming policy regarding religious headwear is implemented. Id. at 16. On December 29, 2017, Turner filed a Supplemental Complaint alleging that the annual shaving/dual photo policy implemented on February 1, 2017 violates his religious rights. Docket Entry No. 66. He also claims that the December 2017 policy would require him to trim his beard on demand but does not allege that he has been required to do so. Id.

Turner, an observant Orthodox Jew, alleges that TDCJ is violating his federal constitutional and statutory religious rights in prison in connection with tenets of his Jewish faith. In particular, Turner claims that his faith dictates that he should

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wear a religious beard and a yarmulke at all times and that TDCJ policies place a substantial burden on these practices.

At the time Turner filed this lawsuit, TDCJ required all inmates with religious beards to keep their beards at a maximum length of one-half an inch and to submit to a yearly shaving and identification photograph procedure.[1] In addition, TDCJ allowed inmates to wear their religious headwear in their cells and at religious services only.[2] Turner seeks declaratory and injunctive relief, requesting that TDCJ: (1) "allow plaintiff to grow and keep a four (4) inch beard in all TDCJ facilities and keep in perpetuity;" and (2) "allow plaintiff to wear his Yarmulke in all TDCJ facilities, in perpetuity."[3]

On February 1, 2017, and again on December 1, 2017, TDCJ changed its religious grooming policies.[4] The February 1, 2017 policy still required inmates to submit to the yearly shaving and photography procedure, but the December 1, 2017 policy ended that procedure and allows inmates to maintain a four-inch beard.[5] Also

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[1] Docket Entry No. 1 ("Complaint") at 3-5. Unless otherwise specified, citations to the record reference the pagination stamped by the Clerk in the CM/ECF court filing system.

[2] Id. at 5-8.

[3] Id. at 9 ¶¶B (1)(2).

[4] *See* Docket Entry No. 9 (explaining the February 1, 2017 change in policy); Docket Entry No. 75-1 (Ex. A, Affidavit of Tony O'Hare), 75-2 (Ex. B, December 1, 2017 Notice to Offenders regarding religious grooming).

[5] *See* Docket Entry Nos. 75-1, O'Hare Aff. at 3 [Exhibit A-002] ("This practice [of requiring offenders with religious beards to shave

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on December 1, 2017, TDCJ changed its religious headwear policy to allow inmates to wear white, commissary purchased religious headwear at any time throughout the prison.[6] TDCJ issued two Notices to Offenders on December 1, 2017 explaining the policy changes regarding religious grooming and headwear.[7] TDCJ moves for summary judgment on all claims based on mootness based on the December 1, 2017 changes in its policies, contending that the changes in the policies allow Turner to maintain a four-inch beard and to wear commissary purchased religious headwear throughout the unit, subject to reasonable searches.

II. Legal Standard

To be entitled to summary judgment, the pleadings and summary judgment evidence must show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56. The moving party bears the burden of initially pointing out to the court the basis of the motion and identifying the portions of the record demonstrating the absence of a genuine issue for trial. Duckett v. City of Cedar Park, Tex., 950 F.2d 272, 276 (5th Cir. 1992). Thereafter, "the

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annually] is no longer being implemented at TDCJ units"); *see also* Docket Entry No. 75-2 (omitting any requirement that offenders shave annually for a photograph).

[6] *See* Docket Entry Nos. 75-1 (Affidavit of Tony O'Hare); 75-3 ("Ex. D," December 1, 2017 Notice to Offenders regarding religious headwear).

[7] Docket Entry Nos. 75-2, 75-3.

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burden shifts to the nonmoving party to show with 'significant probative evidence' that there exists a genuine issue of material fact." Hamilton v. Segue Software, Inc., 232 F.3d 473, 477 (5th Cir. 2000) (quoting Conkling v. Turner, 18 F.3d 1285, 1295 (5th Cir. 1994)).

Factual controversies are resolved in favor of the non-movant "only 'when both parties have submitted evidence of contradictory facts.'" Alexander v. Eeds, 392 F.3d 138, 142 (5th Cir. 2004) (quoting Olabisiomotosho v. City of Houston, 185 F.3d 521, 525 (5th Cir. 1999)). "Mere conclusory allegations are not competent summary judgment evidence, and such allegations are insufficient, therefore, to defeat a motion for summary judgment." Eason v. Thaler, 73 F.3d 1322, 1325 (5th Cir. 1996) (citing Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992)). The Court may grant summary judgment on any ground supported by the record, even if the ground is not raised by the movant. United States v. Houston Pipeline Co., 37 F.3d 224, 227 (5th Cir. 1994).

III. Discussion

TDCJ contends that Turner's remaining RLUIPA claims are moot because it changed its state-wide religious grooming and headwear policies, which now: (1) allow prisoners who wear religious beards to keep a four-inch beard at all times; (2) no longer implement the annual shave requirement; and (3) allow prisoners to wear approved, commissary-purchased religious headwear at all times.

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A. Mootness

A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Already, LLC v. Nike, Inc., 133 S. Ct. 721, 726 (2013); Spencer v. Kemna, 118 S. Ct. 978, 983 (1998). When the controversy between litigants "has resolved to the point that they no longer qualify as 'adverse parties with sufficient legal interests to maintain the litigation,' [courts] are without power to entertain the case." Sossamon v. Lone Star State of Texas, 560 F.3d 316, 324 (5th Cir. 2009) (citation omitted). The Supreme Court has noted that the "capable-of-repetition" exception to mootness applies only in exceptional situations and only where two criteria are simultaneously present: (1) the challenged action is too short in duration to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again. Spencer, 118 S. Ct. at 988 (citations and internal quotation marks omitted). The plaintiff bears the burden of proving both prongs of the exception. *See* Libertarian Party v. Dardenne, 595 F.3d 215, 216-17 (5th Cir. 2010) (citing cases).

Additionally, although voluntary cessation of a challenged activity does not ordinarily deprive a federal court of its power to determine its legality, "courts are justified in treating a

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voluntary governmental cessation of possibly wrongful conduct with some solicitude." Sossamon, 560 F.3d at 325. The Fifth Circuit noted:

> Although [Friends of the Earth v. Laidlaw Environmental Servs., Inc., 120 S. Ct. 693, 708 (2000)] establishes that a defendant has a heavy burden to prove that the challenged conduct will not recur once the suit is dismissed as moot, government actors in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested private parties. Without evidence to the contrary, we assume that formally announced changes to official governmental policy are not mere litigation posturing.

Id. The Seventh Circuit in Ragsdale v. Turnock, 841 F.2d 1358, 1365 (7th Cir. 1988), which Sossamon cites with approval, also noted that "cessation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties. According to one commentator, such self-correction provides a secure foundation for a dismissal based on mootness so long as it appears genuine." Ragsdale, 841 F.2d at 1365 (citing 13A Wright, Miller & Cooper, FED. PRAC. & PROC. § 3533.7, at 353 (2d ed. 1984)).

In support of its motion for summary judgment, TDCJ has submitted the Affidavit of TDCJ Region I Director, Tony O'Hare ("Ex. A"); TDCJ Notice to Offenders regarding the change in grooming policy dated December 1, 2017 ("Ex. B"); TDCJ Security Memorandum, SM-06.16 (rev. 2) ("Ex. C") (under seal); and Notice to Offenders regarding the change in religious headwear policy dated

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December 1, 2017 ("Ex. D"). *See* Docket Entry Nos. 75-1, 75-2, 83 (under seal), and 75-3, respectively. Regarding the changes to the religious grooming policies pertaining to Turner, O'Hare testified:

> Offenders with religious beards have in the past been required to shave once annually during the month of their birth so that the TDCJ could obtain an up-to-date clean-shaven photograph. This practice is no longer being implemented at TDCJ units, and TDCJ is in the process of amending its written policies to reflect this change.
>
> . . . .
>
> Offender Noel Turner (1861086) is currently housed at the Jester III Unit and is currently permitted to wear a four-inch religious beard. Absent any unforeseen disciplinary issues or failure to abide by the religious beard specifications outlined in the Offender Orientation Handbook and updated with the Notice to Offenders effective December 1, 2017, it is anticipated that Offender Turner will continue to be permitted to wear a four-inch religious beard for the duration of his time in TDCJ custody.

Docket Entry No. 75-1 at 3. Turner does not present evidence to controvert O'Hare's sworn statement specifically indicating that offenders with religious beards, including Turner, are now allowed to wear their four-inch beards for the duration of their time at TDCJ and are no longer subject to the annual shave requirement, so long as they abide by the prison rules and do use their beards to conceal contraband. Likewise, Turner does not present evidence to controvert TDCJ's evidence that it now allows inmates to wear approved, commissary purchased religious headwear throughout the prison at all times, subject to reasonable searches.

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Turner contends that the policy changes are "not true," pointing to a February 1, 2017 policy submitted by TDCJ in connection with an earlier motion to dismiss in this case. *See* Docket Entry No. 83 at 1-2 (citing Docket Entry No. 9-1). Contrary to Turner's contention, however, the December 1, 2017 policy replaced the February 1, 2017 policy and is the applicable policy for the purposes of TDCJ's motion.[8] Although Turner argues that he did not receive the December 1, 2017 Security Memorandum stating the new policy because it was filed under seal as "Exhibit C," the substance of Exhibit C relevant to Turner's claims is explained in O'Hare's affidavit and in the December 1, 2017 Notice to Offenders regarding offender grooming.[9] Turner submits no evidence to show that he has been required to shave or trim his beard since the policy was changed in December 2017.

Moreover, Turner does not point to competent summary judgment evidence to raise a fact issue that the policy changes are not genuine or that TDCJ will reinstate its old policies after this litigation is over. Turner also does not overcome the presumption

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[8] *See* Docket Entry Nos. 75-1, 75-2, 75-3.

[9] *See* Docket Entry Nos. 75-1, 75-2. The Court observes that both the affidavit of Mr. Tony O'Hare (Ex. A) and "Notice to Offenders" dated December 1, 2017 (Ex. B) are attached to TDCJ's motion and are not under seal. Id. Because both of these documents relay the substance of the new policy, Turner has been apprised of the contents of that policy as it relates to religious grooming. Therefore, his motion for a subpoena of designated documents (Docket Entry No. 81), motion to hold in abeyance (Docket Entry No. 82), motion produce and disclose policies (Docket Entry No. 85), and motion to strike TDCJ's motion for summary judgment (Docket Entry No. 86), which are all predicated on his request to view the security document filed under seal, will be **DENIED.**

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of good faith that attends formally announced changes to official governmental policy such as the new TDCJ religious beard and headwear policies set forth in the summary judgment evidence in this case. *See* Sossamon, 560 F.3d at 325 (holding that government entities are entitled to a presumption of good faith in voluntary ceasing challenged conduct absent evidence to the contrary). In sum, Turner does not present evidence to raise a fact issue regarding mootness or the applicability of an exception to mootness in this case.

"If a claim is moot, it presents no Article III case or controversy, and a court has no constitutional jurisdiction to resolve the issues it presents." National Rifle Ass'n of America v. McCraw, 719 F.3d 338, 344 (5th Cir. 2013) (internal quotation marks and citation omitted). TDCJ submitted competent summary judgment evidence that it changed the grooming policy to allow offenders to maintain a four-inch beard and that it no longer implements the annual shave dual-photograph requirement. Accordingly, Turner's claims regarding wearing a four-inch beard for the duration of his confinement at TDCJ will be dismissed without prejudice as moot. *See* Sossamon, 560 F.3d at 324.

B. Religious Headwear

In the Notice to Offenders dated December 1, 2017 regarding religious headwear, TDCJ notified offenders that they would be "permitted to wear white commissary purchased yarmulkes or

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religious headgear at any time." *See* Docket Entry No. 75-3 at 2. O'Hare testified that the approved headwear available through the commissary is designed to allow easier detection of contraband and to offset the increased risk posed by the new policy that allows wearing the religious headwear throughout TDCJ. *See* Docket Entry No. 75-1 at 4.

Although Turner claims that he is not allowed to wear his own yarmulke to and from his religious services, he does not controvert TDCJ's evidence that he would be allowed to wear, at all times, a prison-approved yarmulke that has been purchased from the commissary. Thus, TDCJ has established that it no longer prohibits inmates from covering their heads at all times throughout the prison, so long as they wear the approved headwear available at the commissary.

Nonetheless, Turner contends that he is so indigent that he cannot afford to pay $1.25 for the commissary yarmulke in order to fulfill his religious obligation to cover his head when he walks throughout the prison. Broadly construed, Turner claims that the $1.25 commissary yarmulke requirement substantially burdens his religious exercise.

RLUIPA provides that the government shall not "impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the burden furthers "a compelling governmental interest" and does so by "the least

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restrictive means." 42 U.S.C. § 2000cc-1(a)(1)-(2)(2000). To support a claim under the RLUIPA, a plaintiff must produce *prima facie* evidence that defendants substantially burdened his exercise of religion; he also bears the burden of persuasion on whether the policies and regulations substantially burden the same. 42 U.S.C. § 2000cc-2(b); Adkins v. Kaspar, 393 F.3d 559, 567 (5th Cir. 2004). A "religious exercise" for purposes of the RLUIPA includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

A governmental action or regulation creates a "substantial burden" on a religious exercise if it truly pressures the offender significantly to modify his religious behavior and significantly violates his religious beliefs. Adkins, 393 F.3d at 569-70 & n. 37. Specifically, the Fifth Circuit has stated the following:

> [T]he effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, nontrivial benefit, and, on the other hand, following his religious beliefs. On the opposite end of the spectrum, however, government action or regulation does not rise to a level of a substantial burden on religious exercise if it merely prevents the adherent from enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed.

Id. at 570. The substantial burden inquiry is a fact-specific, case by case analysis. Id. at 571.

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As noted above, TDCJ's policy no longer prohibits an inmate like Turner from covering his head with a yarmulke everywhere in the prison, so long as he uses a yarmulke that he purchases (or that a charity donates to him) from the commissary for $1.25. Turner submits a February 2018 inmate trust fund statement that reflects that in December 2017 and January 2018, the first two months of the new policy allowing inmates to wear commissary yarmulkes at all times and in all places in TDCJ, Turner had $33.81 and $21.56, respectively, in his account. *See* Docket Entry No. 70. Accordingly, Turner does not raise a fact issue that TDCJ's requirement that he obtain a commissary yarmulke to wear throughout the prison substantially burdened his religious exercise. To the extent that Turner objects to having to pay for a religious item, the Supreme Court has noted that the State need not provide personal religious items to inmates cost-free. *See* Cutter v. Wilkinson, 125 S. Ct. 2113, 2121 n. 8 (2005) ("RLUIPA does not require a State to pay for an inmate's devotional accessories."). Further, to the extent that Turner objects because he prefers to wear his own yarmulke instead of the one allowed for security purposes, he does not show a substantial burden to his religious belief that he must cover his head. *See, e.g.*, Jihad v. Fabian, Civ. A. No. 09-CV-1604, 2011 WL 1641767, at *8 (D. Minn. May 2, 2011) (holding that the requirement that only commissary-purchased headwear could be worn outside of plaintiff's cell instead of his personally preferred headwear did not substantially burden the

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plaintiff's religious exercise because the prison policy did not prohibit him from covering his head at all times in public). Because Turner does not meet his burden to show that the $1.25 commissary yarmulke requirement substantially burdens his religious exercise, TDCJ is entitled to summary judgment on that issue. *See* Houston Pipeline Co., 37 F.3d at 227 (holding that a court may grant summary judgment on any ground supported by the record, even if the ground is not raised by the movant).

IV. ORDER

Based on the foregoing, it is hereby

ORDERED that Defendant TDCJ's motions for summary judgment based on mootness (Docket Entry No. 75) and motion to seal (Docket Entry No. 80) are **GRANTED**, and this case is **DISMISSED without prejudice as MOOT**; it is further

ORDERED that Plaintiff Noel Turner's motions for a trial setting, for a temporary restraining order, for an extension of time, and for discovery (Docket Entry Nos. 72, 73, 87, 95) are **DENIED as MOOT**; it is

ORDERED that Turner's other pending motions and/or objections (Docket Entry Nos. 81, 82, 85, 86) are **DENIED**; and it is

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ORDERED that all other pending motions, if any, are **DENIED as MOOT**.

The Clerk will enter this Order, providing a correct copy to all parties of record.

SIGNED at Houston, Texas, on this 5TH day of December, 2018.

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NOEL TURNER, TDCJ No. 1861086, Plaintiff, v. TEXAS DEPARTMENT OF CRIMINAL JUSTICE, Defendant.	§ § § § § § § § § §	CIVIL ACTION H-17-297

FINAL JUDGMENT

For the reasons set forth in the Court's Memorandum and Order signed on this date, Plaintiff Noel Turner's claims are **DISMISSED** without prejudice as moot.

This is a **FINAL JUDGMENT.**

The Clerk of Court will provide a copy of this Order to all the parties of record.

SIGNED at Houston, Texas, on this 5TH day of Dec., 2018.

Ewing Werlein, Jr.

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

Appendix C

Texas Department of Criminal Justice

STEP 1 OFFENDER GRIEVANCE FORM

OFFICE USE ONLY

Grievance #: 2021042434
Date Received: DEC 07 2020
Date Due: 1-16-21
Grievance Code: 100
Investigator ID #: I1008
Extension Date:
Date Retd to Offender: JAN 11 2021

Offender Name: Noel Turner TDCJ # 1861086
Unit: Powledge (B2) Housing Assignment: 14-46
Unit where incident occurred: Powledge (B2)

You must try to resolve your problem with a staff member before you submit a formal complaint. The only exception is when appealing the results of a disciplinary hearing.

Who did you talk to (name, title)? Major Harbin When? 12-02-2020
What was their response? I must obtain approval from Unit Chaplain first.
What action was taken? None

State your grievance in the space provided. Please state who, what, when, where and the disciplinary case number if appropriate

- TOPIC OF GRIEVANCE: Prohibited from wearing my White Yarmulke / Kippa (that is approved) on the Powledge Unit "at ALL times and in ALL places."
- ADDITIONAL INFORMATION TO ONLY SUPPORT TOPIC OF GRIEVANCE: On 12/02/2020, at the Powledge Unit Classification Committee ("UCC") for my being assigned to the Powledge Unit, I asked Major Harbin if there was a prohibition of wearing Religious Headwear on the Unit. Major Harbin informs me that I must first obtain approval from the Unit Chaplain (who happens to be on the Unit one (1) day a week) before I can wear one. I tried to explain that I had already litigated this matter and was assured via the Court's, The Texas Attorney Generals' Office and Texas Department of Criminal Justice Officials (Huntsville Administrators and Directorate) that I would be allowed to wear my White Yarmulke / Kippa "at ALL times and in ALL places of the Texas Department of Criminal Justice ("TDCJ"). This has been violated. See Noel Turner v. TDCJ, 4:17-cv-297 (S.D. Tx Houston); Noel Turner v. TDCJ, 18-20832 (5th Cir. 2020). Being forced to walk more than 6 cubits with my head uncovered violates my sincerely held religious beliefs, as litigated in Turner v. TDCJ, 4:17-cv-297. [END OF STATEMENT.]

I-127 Front (Revised 11-2010) YOUR SIGNATURE IS REQUIRED ON BACK OF THIS FORM (OVER)

Appendix D ~~Appendix F~~

Action Requested to resolve your Complaint.
To immediately be allowed to wear my yarmulke/Kippa "at All times and in All places of the TDCJ", as already litigated, and to STOP hindering my sincerely held religious beliefs.

Offender Signature: [signature] **Date:** 12/06/2020

Grievance Response:

The Chaplaincy Policy states that the kippa/yarmulke shall be stored in the offender's locker box and used only in the cell, in an area immediately around the offender's bunk in a dormitory, and in designate worship areas. No further action.

Signature Authority: [signature] Asst. Warden Vernon Mitchell **Date:** 12/8/21

If you are dissatisfied with the Step 1 response, you may submit a Step 2 (I-128) to the Unit Grievance Investigator within 15 days from the date of the Step 1 response. State the reason for appeal on the Step 2 Form.

Returned because: ***Resubmit this form when the corrections are made.**

- ☐ 1. Grievable time period has expired.
- ☐ 2. Submission in excess of 1 every 7 days. *
- ☐ 3. Originals not submitted. *
- ☐ 4. Inappropriate/Excessive attachments. *
- ☐ 5. No documented attempt at informal resolution. *
- ☐ 6. No requested relief is stated. *
- ☐ 7. Malicious use of vulgar, indecent, or physically threatening language. *
- ☐ 8. The issue presented is not grievable.
- ☐ 9. Redundant, Refer to grievance #_____
- ☐ 10. Illegible/Incomprehensible. *
- ☐ 11. Inappropriate. *

UGI Printed Name/Signature: _____

Application of the screening criteria for this grievance is not expected to adversely Affect the offender's health.

Medical Signature Authority: _____

OFFICE USE ONLY

Initial Submission UGI Initials: _____
Grievance #: _____
Screening Criteria Used: _____
Date Recd from Offender: _____
Date Returned to Offender: _____

2nd Submission **UGI Initials:** _____
Grievance #: _____
Screening Criteria Used: _____
Date Recd from Offender: _____
Date Returned to Offender: _____

3rd Submission **UGI Initials:** _____
Grievance #: _____
Screening Criteria Used: _____
Date Recd from Offender: _____
Date Returned to Offender: _____

MAR 05 2021

Texas Department of Criminal Justice

STEP 2 OFFENDER GRIEVANCE FORM

OFFICE USE ONLY

Grievance #: 2021040434
UGI Recd Date: 1-19-21
HQ Recd Date: JAN 25 2021
Date Due: 2-28
Grievance Code: 100
Investigator ID#:
Extension Date:

Offender Name: Noel Turner **TDCJ#** 1861086
Unit: Powledge **Housing Assignment:** 14-46
Unit where incident occurred: Powledge

You must attach the completed Step 1 Grievance that has been signed by the Warden for your Step 2 appeal to be accepted. You may not appeal to Step 2 with a Step 1 that has been returned unprocessed.

Give reason for appeal (Be Specific). *I am dissatisfied with the response at Step 1 because...*

On 01/30/2017 Turner filed a 42 U.S.C.§1983 [Turner vs. TDCJ, 4:17-CV-0297 (S.D. Tx Houston) regarding:"...2. Immediately allow Plaintiff [Turner] to wear his yarmulke [kippa] in all TDCJ facililties, in perpurtuity." On 01/02/2018 TDCJ's attorny, Ms. Emily Landon, Assistant Atty. Gen. of Tx, filed to the Court, its new Religious Headwear policy that allows Turner an d other like Offenders to wear their Religious Headwear at all times and in all places of the TDCJ. COpy of "NOTICE" is Exhibit A to the Court. On 06/20/2018 the TDCJ certifies Turner's right to wear his yarmulke [kippa] at all times and in all places of the TDCJ. pp. 4-5, and Exhibit A is a sworn affidavit of Tony O'Hare, Direstor, Region 1, Stateing that policy has been changed to allow Turner to wear religious headwear at all times and places of TDCJ. This was reaqffirmed to the Court by TDCJ on: 06/20/2018, pp. 2-4, Exhibit A: a sworn affidabvit of Tony O'Hare; Exhibit D; a copyh of the new policy "NOTICE TO OFFENDERS REGARDING RELIGIOUS HEADWEAR"; On 12/05/2018 case dismissed as MOOT due to TDCJ policy change to give Turner what he originally filed fo r in his suit. On 01/09/2019 Turner v. TDCJ, No. 18-20832 (5th Cir) was filed in the U.S. Court of Appeals. On 05/06/2019 TDCJ files Brief to 5th Cir. claiming/certify that TDCJ changed its policy to allow Turner to wear yarmulke [kippa] at all times and in all places of TDCJ. pp. 3-6, 8. & 10-12. Reaffirmed on 06/26/2020 to 5th Cir. pp. 4,7-8 & 14. On 11/10/2020 the 5th Cir. Dismissed as MOOT due to TDCJ amending/changing policy to give Turner what he sought in his original suit. On 12/02/2020 at re-assignment to the Bowledge unit, Major Harbin tells Turner that he cannot wear his kippa except in cell & at services. [See STEP 1]. On 12/06/2020 STEP 1 GRIEVANCE filed. On 12/22/2020 Turner was taken to Major Harbins office & met with Warden Bowman, TDCJ Chaplain & Major Harbin. Was told that I was allowed to wear my kippa at all times and in all places of TDCJ [after being denied for 20 days]. On 01/08/2021 just seventeen (17) days later the Assist.

Appendix E ~~Appendix G~~

Warden V. Mitchell, in writing, denies Turner the right to wear his kippa except in cell/ Dorm & worship services. See STEP 1 RESPONSE. Thus, Turner is once again, being denied his RIGHT already previously litigated. STEP 1 is proof that TDCJ did not change its policy and that they committed Purjury to the courts. This issue shall be re-litigated. This STEP 2 Effectivly satisfies ALL Requirements to exhaust State remidies. Turner is owed damages now.

Offender Signature: _____ **Date:** 01/14/2021

Grievance Response:

An investigation has been conducted into your complaint. Per Chaplaincy Policy Procedures "Notice to Offenders: Change in General Rules," Effective January 1, 2020 states, "The following rules pertain to approved yarmulkes and religious headgear for offenders: 1. Donated, Non-white in color: May only be worn in the offenders' cell or at religious programming; Must be carried, and not work, and from religious programming. 2. Commissary purchased or donated, White with holes: May be worn at any time. 3. Yarmulkes and religious headgear are subject to search by staff at any time. Refusal to submit to searches will result in disciplinary action. 4. Yarmulkes or religious headgear found to be altered in any way will be confiscated and will result in disciplinary action." No further action from this office is warranted.

C.F. HAZLEWOOD
DIRECTOR OF RELIGIOUS SERVICE

Signature Authority: _____ **Date:** 1 Feb 2021

Returned because: ***Resubmit this form when corrections are made.***

- ☐ **1. Grievable time period has expired.**
- ☐ **2. Illegible/Incomprehensible.***
- ☐ **3. Originals not submitted. ***
- ☐ **4. Inappropriate/Excessive attachments.***
- ☐ **5. Malicious use of vulgar, indecent, or physically threatening language.**
- ☐ **6. Inappropriate.***

CGO Staff Signature: _____

OFFICE USE ONLY

Initial Submission **CGO Initials:** _____
Date UGI Recd: _____
Date CGO Recd: _____
(check one) ___Screened ___Improperly Submitted
Comments: _____
Date Returned to Offender: _____

2nd Submission **CGO Initials:** _____
Date UGI Recd: _____
Date CGO Recd: _____
(check one) ___Screened ___Improperly Submitted
Comments: _____
Date Returned to Offender: _____

3rd Submission **CGO Initials:** _____
Date UGI Recd: _____
Date CGO Recd: _____
(check one) ___Screened ___Improperly Submitted
Comments: _____
Date Returned to Offender: _____