

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION**

Lumumba Kenyatta Incumaa, #155651,)
)
 Plaintiff,)
)
 v.)
)
 Bryan P. Stirling, Director of the South)
 Carolina Department of Corrections,)
)
 Defendant.)
 _____)

Civil Action No. 9:12-3493-DCN

**SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

By Order filed January 28, 2014, this Court has requested supplemental briefing on the Defendant's pending motion for summary judgment. Specifically, with respect to the Plaintiff's Religious Land Use and Institutionalized Persons Act (RLUIPA) claim, the Court seeks supplemental briefing and, if needed, evidentiary support on the "least restrictive means" prong of the RLUIPA analysis. *See*, 42 U.S.C. § 2000cc-1(a). Under strict scrutiny, in addition to showing that a compelling governmental interest is furthered by the STG Policy, the Defendant is required to show that the policy is the least restrictive means of accomplishing those compelling governmental objectives. In the 2012 case of *Couch v. Jabe*, 679 F.3d 197 (4th Cir. 2012), the Fourth Circuit explained that the government is required to "acknowledge and give some consideration to less restrictive alternatives." 679 F.3d at 203.

For that purpose, the Defendant presents the affidavit of Robert E. Ward, who is the Deputy Director for Operations for SCDC. In that affidavit, Ward addresses several issues pertinent to the "least restrictive alternatives" prong.

In his affidavit, Ward addresses the continued designation of the Five Percenters as a Security Threat Group (STG). While acknowledging that data reflects that the number of assaults committed by validated Five Percenters has declined since 2003, Ward testified that "the potential or even likelihood of assaultive behaviors by Five Percenters remains a reality and an issue that must be addressed by security operations." *See*, Ward Affidavit, para. 6. Ward indicates that there has been no basis for any SCDC Director to have removed the Five Percenters from the list of designated STGs. Ward attests that "[t]here have continued to be assaults, disturbances, and other criminal activities committed by Five Percenters since that time, and in my professional judgment, there has been no valid basis for removing the Five Percenters from the list of designated STGs at any time in the past or currently. *See*, Ward Affidavit, para. 5. Further, he rejects any suggestion that the downward trend in assaults means that the Five Percenters are no longer a threat. *See*, Ward Affidavit, para. 5. Ward further rejects any suggestion that the Five Percenters who are currently classified as Validated-STG-SD and in security detention could be released into the general population without dire consequences. In fact, he predicts, based on his professional judgment, that if that occurred, "the number of serious disciplinarys including assaults, riots, and similar behaviors would dramatically increase." *See*, Ward Affidavit, para. 6.

Consequently, to remove the designation of the Five Percenters as an STG, as requested by the Plaintiff, is not feasible. That would fail to address the fact that the Five Percenters remain a serious threat. Ward explains that the current policy is working, which accounts for the declining trend in the number of assaults. *See*, Ward Affidavit, para. 6. As he further explains, "[t]he designation of the Five Percenters as an STG, the continued intelligence techniques used to identify and validate Five Percenters, the monitoring of Five Percenters in the general population, and the re-classification to Security Detention for Five Percenters who commit

serious disciplinary offenses are all facets of the program that have been working and remain effective." *See*, Ward Affidavit, para. 6.

Nonetheless, as Ward points out, SCDC has in the past made changes to the STG Policy and the classification process for STG members. Ward testified as follows:

Initially, after the Five Percenters were designated as an STG, validated members were all re-classified to Security Detention, regardless of their individual circumstances and disciplinary history. Since that time, SCDC developed two separate classifications, Validated-STG-GP and Validated-STG-SD, which taken into account the inmates' individual circumstances and are assessed on an individual basis. Therefore, an inmate who is validated as a member of an STG who has not committed serious disciplinary infractions may be classified as Validated-STG-GP and is allowed to remain in the general population.

See, Ward Affidavit, para. 9. Thus, SCDC has considered and actually implemented procedures to make the application of the STG Policy less restrictive, particularly for those inmates whose prior conduct and individual circumstances did not necessarily warrant security detention. *See*, Ward Affidavit, para. 9. Admittedly, as Ward states, this was not done to accommodate religious beliefs because SCDC does not recognize the Five Percenters (or any other gang for that matter) as a religious faith group. *See*, Ward Affidavit, para. 9. Yet, it was implemented to make the policy less restrictive for those STG members, including Five Percenters, who are classified as Validated-STG-GP and may remain in the general population. As Ward explained, "security detention is used for those validated STG members whose past conduct, including participation in riots, hostage takings, aggravated assaults of staff and other inmates, and other gang-related activities, makes their classification to SD necessary to maintain and control the inmate and to provide safety and security for the staff and other inmates." *See*, Ward Affidavit, para. 9.

The Plaintiff argues that SCDC should "only segregate its members after they have committed violent, disruptive and/or criminal acts with the SCDC." *See*, Plaintiff's Objections to Report and Recommendation, p. 7 of 14. (Dkt. #39). Yet, that is what is occurring in the STG

classification process. Some STG members – while validated as such and subject to closer monitoring – are allowed to remain in the general population because they do not have the prior history of serious disciplinaries. In his Report and Recommendation, Magistrate Judge Marchant recognized as follows:

Plaintiff's lone suggestion of a less restrictive means of implementing the policy at issue is a process that both he and Pearson in his affidavit state is already being used, i.e., identifying the validated Five Percenters who have engaged in assaultive and other criminal conduct within the general population, reclassifying them as Validated-SDs, and committing those inmates to security detention where they are subject to greater control and observation. This process is exactly the process that been applied to the Plaintiff.

See, Report and Recommendation, p. 24 of 26. (Dkt. #37).

As for other alternatives that have been considered and rejected, Robert Ward discussed the placement of gang members in a close custody unit rather than the use of Special Management Unit cells (which is the current policy). Ward noted that such an approach was deemed "unworkable and dangerous," and he described the problems that would result:

Specifically, the use of a close custody unit would likely encourage gang participation. It would allow the gangs to be identified and would serve as identifiers much like "colors" do. Inmates could associate a particular gang with a particular housing unit. That would likely create the risk of targeting and increase the likelihood of inter-gang violence. The use of a close custody unit would also allow gang members easier access to one another and allow more opportunity for communication and planning. Finally, and most importantly, the use of a close custody unit would create a heightened level of danger for the correctional officers and other staff who would work in that unit.

See, Ward Affidavit, para. 8. In sum, Ward expressed concern "that such an approach would result in more riots such as what occurred at BRCI with the Five Percenters and the Plaintiff in 1995." *See*, Ward Affidavit, para. 8.

As the affidavit of Robert Ward demonstrates, the Defendant has satisfied his burden of

proof on the "least restrictive alternative" prong. Where SCDC determined that the STG Policy could be made less restrictive – at least for validated STG members without serious disciplinary histories – it took that action. Moreover, SCDC has considered other ways to address the problems posed by gangs or threat groups, including the Five Percenters. But such an approach as the use of close custody units for STG members was deemed "unworkable and dangerous." Ward is involved with the National Institute of Corrections (NIC), which is an agency within the U.S. Department of Justice, Federal Bureau of Prisons. *See*, Ward Affidavit, para. 3. Based on discussions at NIC conferences and his discussions with other operations professionals in other states, Ward explained that "the general consensus in the field is that the best way to manage prison threat groups is to identify the persons most responsible for the criminal behaviors and place those inmates in security detention." *See*, Ward Affidavit, para. 7. This conclusively shows that SCDC's STG Policy and its approach to managing threat groups such as the Five Percenters have no less restrictive alternatives. Although not decided under the RLUIPA standard, it is significant that the Fourth Circuit has previously found with respect to the STG Policy that "there are no ready alternatives to the SCDC's course of action." *In re Long Term Administrative Segregation of Inmates Designated as Five Percenters*, 174 F.3d 464, 470 (4th Cir. 1999).

Based on the foregoing analysis and discussion, in supplementation of the memoranda and affidavits previously submitted, the Defendant Bryan Stirling respectfully renews his request that this Court grant his motion for summary judgment and dismiss the Plaintiff's complaint with prejudice on the merits.

Respectfully submitted,

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