IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROBERT L. COLLINS-BEY,
Inmate No. 084404,

Plaintiff,

v.

ANTHONY BROADBENT, Food Service Manager, SMCI; and J. WEHRLE, Food Service Manager, SMCI,

Defendants.

ORDER

01-C-0080-C

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This is a civil action for injunctive and monetary relief in which plaintiff Robert L. Collins-Bey contends that defendants Anthony Broadbent and Jacqueline Wehrle violated his constitutional rights by failing to provide him with an adequate vegetarian diet. Plaintiff is presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin. In an order entered February 28, 2001, I granted plaintiff leave to proceed in forma pauperis on his freedom of religion claim against defendants Anthony Broadbent and Jacqueline Wehrle, brought pursuant to 42 U.S.C. § 1983. In that same order, I denied him leave to proceed in forma pauperis against all other proposed defendants on his equal protection and

denial of medical care claims because he failed to state a claim upon which relief could be granted and on his due process claim because the claim was legally frivolous.

Presently before the court is defendants' motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6). Defendants contend that plaintiff failed to exhaust his administrative remedies before filing suit as required by 42 U.S.C. § 1997e(a). In support of their motion, defendants have submitted documents relating to plaintiff's exhaustion efforts within the inmate complaint review system. Plaintiff has submitted additional documents in opposition to the motion. Consideration of this documentation is necessary to reach a decision on the motion. Documentation of a prisoner's use of the inmate complaint review system is a matter of public record. For this reason, a court may take judicial notice of the documents without converting the motion to dismiss into a motion for summary judgment. See Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 455 (7th Cir. 1998) (citing General Electric Capital Corporation v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997)). After reviewing the documents, I conclude that plaintiff has failed to exhaust his available administrative remedies and will grant defendants' motion to dismiss.

A motion to dismiss will be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. Cook v. Winfrey, 141 F. 3d 322, 327 (7th Cir. 1998) (citing Hishon v. King & Spalding,

467 U.S. 69, 73 (1984)). For the purpose of deciding this motion to dismiss, I accept as true the allegations in the complaint. Those allegations of fact are set forth in the February 28, 2001 Order, dkt. #2. In addition, I am considering the exhibits that plaintiff and defendants submitted in support of their positions. I summarize below only the steps toward administrative exhaustion taken by plaintiff.

ADMINISTRATIVE EXHAUSTION

On December 27, 2000, plaintiff filed an inmate complaint (#SMCI-2000-37003), alleging that he was being denied proper nutrition because Supermax does not provide meal substitutes for vegetarians. On January 23, 2001, the inmate complaint examiner dismissed the complaint, stating that the complaint was being returned without any action because plaintiff's "use of the word 'Bey' as a part of his legal name is inappropriate since that is not the name on his record of conviction." Plaintiff appealed the decision. On February 16, 2001, the corrections complaint examiner issued a decision, recommending that the complaint be dismissed for the same reason cited by the inmate complaint examiner. On February 28, 2001, plaintiff filed this action. As of that date, the Secretary of the Department of Corrections had not issued a decision reviewing plaintiff's complaint and had not extended the deadline for doing so.

OPINION

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), mandates that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." The term "prison conditions" is defined in 18 U.S.C. § 3626(g)(2), which provides that "the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." The Court of Appeals for the Seventh Circuit has held that "a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits." Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999); see also Massey v. Helman, 196 F.3d 727 (7th Cir. 1999).

The Seventh Circuit has stated that "if a prison has an internal grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim. The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures." Massey, 196 F.3d at 733. Further

emphasizing the importance of exhausting administrative remedies before filing suit, the court of appeals has made clear that "[t] here is no futility exception to § 1997e(a)," Perez, 182 F.3d at 537; see also Massey, 196 F.3d at 733, and that a prisoner's request for monetary damages that are unavailable under the administrative complaint system does not allow a prisoner to avoid 42 U.S.C. § 1997e's exhaustion requirement. See Perez, 182 F.3d at 537-38; see also Nyhuis v. Reno, 204 F.3d 65, 70 (3d Cir. 2000) (discussing circuit split on whether prisoner needs to exhaust administrative remedies when seeking money damages not available through prison grievance procedure).

Wis. Admin. Code § DOC 310.04 requires that "[b]efore an inmate may commence a civil action . . . the inmate shall file a complaint under §§ DOC 310.09 or 310.10, receive a decision on the complaint under § DOC 310. 12, have an adverse decision reviewed under § DOC 310.13, and be advised of the secretary's decision under § DOC 310.14."

Plaintiff contends that he exhausted his administrative remedies for three reasons. First, he argues that the corrections complaint examiner's recommendation was a final decision because ten days had passed between its issuance and the date he filed this action. Second, he argues that he was acting under the "emergency health clause of Fed. R. Civ. P." Pltf.'s Br. in Opp., at 2, dkt. #10. Finally, he asserts that his appeals were futile because they were rejected automatically when he signed them with his "legal name" (Collins-Bey) rather than the name used on his record of conviction (Collins).

A. Final Decision

Under Wis. Admin. Code § DOC 310.04, an inmate must "be advised of the secretary's decision" before bringing a civil action. Once a corrections complaint examiner issues a recommendation, the Secretary of the Department of Corrections "shall make a decision within 10 working days following receipt of the recommendation" unless the time is extended for cause and with notice to all interested parties. Wis. Admin. Code § DOC 310.14(1). "Working days" means "all days except Saturdays, Sundays, and state legal holidays." Wis. Admin. Code § DOC 310.03(19). If the secretary does not issue a written decision within ten working days, the recommendation of the corrections complaint examiner is deemed the secretary's decision. See Wis. Admin. Code § DOC 310.14(3).

Plaintiff makes two arguments in support of his contention that he had received a final decision by the time he filed this action. First, plaintiff argues that the corrections complaint examiner issued a final decision on February 16, 2001, and that he did not file this action until February 28, 2001. To support this argument, plaintiff points to the bottom of the report where it is printed: "decision date: Friday, February 16, 2001." Despite the language on the form, the corrections complaint examiner's report is not a final decision within the meaning of § DOC 310.04 until the secretary has had the opportunity to review it. Until that time, the report is merely a recommendation.

Second, plaintiff contends that more than ten days had lapsed between the time the

corrections complaint examiner's recommendation was issued and the time he filed suit. Plaintiff overlooks the fact that ten *working* days must pass after the secretary receives the recommendation before it becomes the secretary's decision. See § DOC 310.14(1). Despite plaintiff's assertion otherwise, it is irrelevant when plaintiff received the corrections complaint examiner's recommendation. In this case, the corrections complaint examiner issued his recommendation on February 16, 2001. For the purpose of deciding this motion, I assume that the secretary received the recommendation on the same day even though the evidence does not demonstrate whether plaintiff filed an appeal to the secretary. Ten working days from February 16 is March 2, 2001. Because the secretary did not issue a written decision within ten working days, the corrections complaint examiner's recommendation became the final decision on March 2 at the earliest, two days after plaintiff filed suit. The holding in Perez, 187 F.3d 532, requires that I dismiss plaintiff's suit because he did not exhaust his administrative remedies before filing this suit.

B. "Emergency Health Clause"

Plaintiff relies on the "emergency health clause" for the proposition that the requirement to exhaust his administrative remedies does not apply to this action. Plaintiff submitted documentation showing that he did not have access to the Federal Rules of Civil Procedure in order to explain why he cannot provide a cite for this exception. Even if he had

had access to the rules, his argument would still fail. The federal rules do not provide an "emergency health clause" exception to the exhaustion requirement. It is possible that plaintiff is thinking of the exception to the "three strikes" provision of 28 U.S.C. § 1915(g), which allows an inmate who has three strikes to proceed in forma pauperis when the inmate is in imminent danger of serious physical harm. The exhaustion requirement of 42 U.S.C. § 1997e(a) does not contain a similar exception.

C. Futility

Plaintiff suggests that it was pointless to appeal the adverse inmate complaint decisions because his complaints were dismissed for his not using the name under which he was convicted. In essence, plaintiff argues that the court should apply a futility exception to the requirement of exhausting administrative remedies. I need not decide whether plaintiff should have or could have used his supposed "legal name" on documents submitted under the inmate complaint review system because "[t] here is no futility exception to § 1997e(a)," Perez, 182 F.3d at 537; see also Massey, 196 F.3d at 733. Even if plaintiff suspected that his complaint and appeals would not lead to a judgment in his favor, he is required to complete the process of administrative review. As discussed above, plaintiff was not advised of the secretary's decision and ten working days had not passed as of the date he filed suit. His futility argument does not alter this fact. Accordingly, I conclude that

plaintiff has failed to exhaust his administrative remedies on his claim that defendants violated his freedom of religion by failing to provide him with an adequate vegetarian diet. Defendants' motion to dismiss will be granted.

ORDER

IT IS ORDERED that the motion to dismiss of defendants Anthony Broadbent and Jacqueline Wehrle is GRANTED and the case is DISMISSED without prejudice for failure to exhaust administrative remedies. The clerk of court is directed to enter judgment for defendants and close the case.

Entered this 23rd day of May, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge