IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES G. DUDGEON,

ORDER

Petitioner,

04-C-075-C

v.

MATTHEW J. FRANK, DICK VERHAGEN,
JANE DIER-ZIMMEL, ROY BOUTAN,
TODD JOHNSON and WAYNE MIXDORF,

Respondents.

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This is a proposed civil action for monetary, declaratory and injunctive relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Prairie du Chien Correctional Institution in Prairie du Chien, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if

the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has had three or more lawsuits or appeals dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages.

In his complaint and its attachments, I understand petitioner to allege the following.

ALLEGATIONS OF FACT

Petitioner James Dudgeon is an inmate at the Oakhill Correctional Institution in Oregon, Wisconsin. He was transferred there from the Independent Living Unit at the Thompson Correctional Center in Deerfield, Wisconsin on August 13, 2003. Respondent Matthew Frank is the secretary of the Wisconsin Department of Corrections. At the Oakhill Correctional Institution, respondent Dick Verhagen is the warden, respondent Jane Dier-Zimmel is the superintendent, respondents Roy Boutan and Todd Johnson are both correctional captains. Respondent Wayne Mixdorf is the deputy warden of the Wisconsin Community Corrections System in Oregon, Wisconsin.

On August 19, 2003, respondent Johnson gave petitioner a major conduct report. Respondent Johnson attached a copy of Wisconsin Department of Corrections document

#71, which is entitled "Notice of Major Disciplinary Hearing Rights and Waiver of Major Hearing and Waiver of Time." This document indicates that petitioner or his advocate would have the right to question any adverse witnesses and to present oral, written, documentary and physical evidence and evidence from voluntary eye witnesses. This notice indicates that "[i]f there are eye witnesses (institutional offenders and/or staff) to the alleged violation(s), [the inmate] may request, in writing, within two days of this notice, using form DOC-73 which will be provided to you."

Petitioner made numerous requests to the staff at the Oakhill facility for document DOC-73 within the first two days after having received notice of the disciplinary hearing. Because he had not received a copy of this document, he continued to make requests after the two days had expired. Despite these requests, petitioner never was provided with a copy of this form. On or about September 30, 2003, Kelly Nabiley, a librarian at the Oakhill facility, told petitioner in response to one of his requests that document DOC-73 does not exist.

Because petitioner was not provided with a copy of the document DOC-73, he was unable to call supporting witnesses in his defense or question adverse witnesses. Respondent Boutan, who was in charge of petitioner's hearing, would not allow petitioner or his advocate to question the adverse witness and failed to postpone the hearing in order to insure that petitioner's due process rights would not be violated. Petitioner's inability to question either

the adverse witness or his own supporting witnesses had a direct effect on the outcome of the hearing. Petitioner filed an inmate grievance complaining of his unfulfilled requests for document DOC-73, which respondent Johnson rejected as untimely. Petitioner appealed this determination and respondent Dier-Zimmel dismissed the appeal on the ground that respondent Johnson was correct in dismissing the complaint as untimely. Petitioner appealed again to respondent Mixdorf, who has an obligation to respond to appeals within sixty days of receipt. This time period lapsed before petitioner filed his complaint in this court. Respondent Mixdorf had not responded to the appeal as of the date petitioner filed his complaint.

DISCUSSION

The Prison Litigation Reform Act requires prisoners to exhaust their administrative remedies before filing an action in federal court. 42 U.S.C. § 1997e(a). To exhaust administrative remedies, a prisoner must observe the procedural requirements of the system. Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002). "[A] prisoner who does not properly take each step within the administrative process has failed to exhaust state remedies, and thus is foreclosed by § 1997e(a) from litigating. Failure to do what the state requires bars, and does not just postpone, suit under § 1983." Id. at 1024.

Ordinarily, this court would not dismiss petitioner's case on its own motion for lack

of administrative exhaustion but instead would wait for respondents to raise failure to exhaust as an affirmative defense. See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999) (administrative exhaustion not jurisdictional threshold); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999). However, the Court of Appeals for the Seventh Circuit has held that courts have discretion to raise affirmative defenses on their own. Gleash v. Yuswak, 308 F.3d 758, 760-61 (7th Cir. 2002). In Walker v. Thompson, 288 F.3d 1005, 1009-10 (7th Cir. 2002), the court held that a court may dismiss a claim if it is plain from the face of the complaint that the plaintiff failed to exhaust his administrative remedies.

Petitioner has attached copies of his administrative remedies forms indicating that petitioner's inmate complaint was dismissed and his appeals rejected because he failed to file his complaint within fourteen days of the disciplinary hearing. Documents attached to a complaint are considered part of the complaint for all purposes. Tierney v. Vahle, 304 F.3d 734, 738 (7th Cir. 2002) (citing Fed. R. Civ. P. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is part thereof for all purposes.")). Because plaintiff's grievance was dismissed as untimely, he has not properly taken each step within the administrative process and has not exhausted his administrative remedies.

Although it appears clear on the face of the complaint that petitioner has failed to exhaust administrative remedies, he may have until May 5, 2004, in which to inform the

court whether it has misconstrued his complaint or its attachments. If plaintiff does not respond by that date with a showing that his claim in this lawsuit was considered administratively on its merits through the entire administrative procedure, this case will be dismissed.

ORDER

IT IS ORDERED that petitioner James Dudgeon may have until May 5, 2004, in which to inform the court that it has misconstrued his complaint and its attachments that his inmate complaint was dismissed as untimely. If plaintiff does not respond by that date, the clerk of court is directed to enter judgment dismissing this case for plaintiff's failure to exhaust his administrative remedies.

Entered this 15th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge