IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NATHANIEL ALLEN LINDELL,

Plaintiff,

ORDER

v.

05-C-003-C

PETER HUIBREGTSE; GARY BOUGHTON; STEVEN HOUSER; CAPTAINS STEVE SCHUELER, THOMAS CORE, KURT LINJER, GILBERG and GARY BLACKBOURN; C.O. LANGE and SGT. CARPENTER,

Defendants.

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This is a civil action brought pursuant to 42 U.S.C. § 1983. Plaintiff, an inmate at Wisconsin Secure Program Facility in Boscobel, Wisconsin, contends that defendants violated his equal protection rights when they conspired to harm him because of his political, philosophical or religious views. In an order dated November 14, 2003, I granted plaintiff leave to proceed in forma pauperis on this claim.

On June 30, 2005, defendants filed a motion to dismiss, along with documentation of plaintiff's use of the inmate complaint review system and the prison disciplinary process.

Because I needed to consult disciplinary records in order to rule on defendants' motion, I converted the motion to dismiss to a motion for summary judgment and provided the parties an opportunity to supplement the record. Now before the court are defendants' motion for summary judgment and motion for clarification of the September 23, 2005 order, and plaintiff's renewed motion for Rule 11 sanctions and his motion objecting to consideration of additional evidence regarding plaintiff's failure to exhaust.

From the record and the evidentiary submissions of the parties, I find the following facts to be material and undisputed.

FACTS

A. Parties

Plaintiff is a prisoner at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Defendants Schueler, Linjer, Core, Gilberg and Blackbourn are gang investigators at the facility. Defendant Steven Houser is a contract negotiator employed by the Wisconsin Department of Corrections. Defendants Gary Boughton, C.O. Lange and Sergeant Carpenter are officials employed by the Wisconsin Department of Corrections. Defendant Huibregtse is warden of the Wisconsin Secure Program Facility.

B. Conduct Report #1230298

On February 5, 2001, while plaintiff was incarcerated at the Waupun Correctional Institution, he attempted to post a letter to inmate Thomas Atter. Defendant Schueler confiscated the letter and issued plaintiff a conduct report numbered 1230298, charging him with a violation of Wis. Admin. Code § DOC 303.20, "group resistance and petitions" and Wis. Admin. Code § DOC 303.24, "disobeying orders." Defendant Core approved the conduct report.

A disciplinary hearing was held on February 26, 2001. Plaintiff did not attend the hearing, but provided a written statement in which he accused defendant Schueller of "retaliating against" him for "exercising [his] free speech rights" and of violating his equal protection rights. Specifically, defendant argued:

> It would totally violate my equal protection rights to be punished based on my ideology or expression of my ideology so long as they are not a reasonable threat to security, when Christians and other "sanctioned" groups of inmates go unpunished for spouting their ideology in their mail. Schueler is targeting me because of my ideology plain and simple, with no penological reason.

At the conclusion of the disciplinary hearing, defendant Houser found plaintiff guilty of violating § DOC 303.20 and sentenced him to four days of adjustment segregation and destruction of his letter. Shortly after the disciplinary hearing was held, plaintiff was transferred to the Wisconsin Secure Program Facility.

On April 12, 2001, plaintiff attempted to appeal conduct report #1230298 to the warden of the Wisconsin Secure Program Facility. He attached to his appeal a letter, in

which he challenged the conduct report and alleged: "the [disciplinary] committee and Captain Schueler punished me in a discriminatory manner based on the political/etc. views discussed in my letter, in retaliation for my exercising my First Amend[ment] right to free speech."

In a letter dated April 17, 2001, the Wisconsin Secure Program Facility warden, Gerald Berge, responded to plaintiff's appeal, stating:

> My office has received your appeal of conduct report #1230298. This conduct report was not given at [the Wisconsin Secure Program Facility]. If you wish to appeal this conduct report you must appeal through the institution at which it was written.

Plaintiff did not file an appeal to the warden of the Waupun Correctional Institution. Instead, he filed inmate complaint number SMCI-2001-12299, asking Berge to hear the appeal. Inmate complaint examiner Ellen Ray responded to plaintiff's complaint by telling him again that he needed to appeal the disciplinary decision to the warden of the Waupun Correctional Institution, explaining that "the conduct report was written as a result of behavior [there], the hearing took place there, and the disposition and decision were imposed there." The inmate complaint examiner also suggested that plaintiff "include an explanation . . . why the appeal was not filed with [sic] the ten day time limit." No appeal was filed.

C. Conduct Report #1335594

On March 29, 2002, defendant Linjer intercepted a letter written by plaintiff and addressed to inmate Thomas Atter. Defendant Linjer wrote conduct report #1335594, charging plaintiff with violating § DOC 303.20, "group resistance and petitions." Defendant Boughton approved the conduct report.

A disciplinary hearing was held on April 10, 2002. Plaintiff did not attend the hearing, but provided a written statement in which he argued that there was no evidence that the confiscated letter contained language associating plaintiff with the white supremacist organization Aryan Circle, as defendant Linjer contended. Plaintiff stated: "I'm a white separatist and a racist and, you know what, I have a right to believe in this ideology; an attempt at labeling that group resistance won't fly."

At the conclusion of the disciplinary hearing, defendant Boughton found plaintiff guilty of violating § DOC 303.20 and sentenced him to 360 days in program segregation, 30 days of cell confinement and destruction of the letter and its envelope.

Plaintiff appealed the discipline to the warden, defendant Huibregtse. In his appeal, plaintiff stated: "I reaffirm my written statement to the committee as to why this c[onduct] r[eport] should be dismissed. It violated my free speech and association, equal protection rights." On May 10, 2002, defendant Huibregtse upheld the disciplinary action but reduced plaintiff's sentence to 180 days of program segregation and 30 days of cell confinement.

D. Conduct Report #1351662

On April 19, 2002, defendant Lange conducted a search of plaintiff's cell under the supervision of defendant Gilberg. At defendant Gilberg's direction, defendant Lange confiscated several items, including a copy of the 88 Precepts. The following day, defendant Lange issued plaintiff conduct report #1351662, charging him with violations of Wis. Admin. Code §§ DOC 303.35, "damage or alteration of property," DOC 303.20, "group resistance and petitions," DOC 303.47, "possession of contraband, miscellaneous," and DOC 303.63, "violations of institution policies and procedures." Defendant Boughton approved the conduct report.

A disciplinary hearing was held on May 9, 2002. Plaintiff attended the hearing, along with his appointed staff advocate, defendant Carpenter. Although plaintiff provided defendant Carpenter with a written statement, Carpenter did not submit the statement to the disciplinary hearing committee.

At the conclusion of the disciplinary hearing, defendant Blackbourn found plaintiff guilty of violating Wis. Admin. Code §§ DOC 303.35, DOC 303.20, and DOC 303.47 and sentenced him to 360 days in program segregation, 4 days in adjustment segregation and restitution in the amount of $10.75. Defendant Blackbourn denied plaintiff possession of the 88 Precepts after concluding that it was gang-related.

Plaintiff appealed the discipline to the warden, defendant Huibregtse. In his appeal,

plaintiff stated: "disciplining me for possessing the 88 Precepts is discriminatory, violating . . . both state and federal constitutional free speech, free religion and equal protection rights." On May June 10, 2002, defendant Huibregtse denied plaintiff's appeal of the disciplinary action.

OPINION

A. Defendants' Motion for Clarification

As a preliminary matter, I will address the question raised by defendants in their motion for clarification of the court's September 23, 2005 order. Defendants drew attention to a discrepancy between the court's March 8, 2005 order granting plaintiff leave to proceed on his claim that defendants "conspired to harm him because of his political, philosophical or religious views" in violation of his *equal protection rights* and references in the September 23, 2005 order to plaintiff's claim as a conspiracy to retaliate against plaintiff because of his political, philosophical or religious views in *violation of the First Amendment*. As indicated in the original March 8, 2005 order, plaintiff was granted leave to proceed on his claim that defendants conspired to harm him in violation of his equal protection rights. In fact, on May 2, 2005, in response to plaintiff's motion for reconsideration, I explicitly denied him leave to proceed on his First Amendment claims. Order dated May 2, 2005 at 5. The reference to the First Amendment in the order dated September 23, 2005, was an

inadvertent misstatement and is withdrawn.

To be clear, plaintiff is proceeding in this lawsuit on a claim that defendants conspired to deprive him of his equal protection rights. To avoid dismissal of his claims for failure to exhaust, plaintiff must make it clear that he raised his conspiracy and equal protection claims at both his disciplinary hearings and again on appeal. Failure to do so will be considered failure to exhaust administrative remedies as required by 42 U.S.C. § 1997e(a).

B. Plaintiff's Motions for Reconsideration

In response to the September 23, 2005 order, plaintiff has filed two motions for reconsideration, one objecting to consideration of supplemental evidence on the issue of exhaustion and one renewing his request for Rule 11 sanctions against defendants.

1. Motion objecting to consideration of additional evidence

In the September 23 order, I indicated to the parties that evidence of the content of plaintiff's disciplinary proceedings would be relevant to the decision on defendants' motion to dismiss. Order dated Sept. 23, 2005 at 1. Therefore, I converted the motion to dismiss to a motion to summary judgment and provided the parties an opportunity to supplement the court's record of plaintiff's use of the disciplinary system by submitting any additional

evidence relevant to the question of exhaustion.

Now, plaintiff has filed a motion objecting to the court's decision and asserting that the court's ruling

> reveals a judicial bias and unfairness to the defendants to let them bolster their apparently unsupported argument of failure to exhaust - especially as this court has never given Lindell such second changes in many cases he's argued in this court.

When defendants filed their motion to dismiss, they included with it copies of prison records for each relevant disciplinary hearing and appeal. Defendants have not submitted additional information in response to the September 23 order, presumably because the records they submitted originally are complete. Plaintiff appears to have misunderstood that by permitting *the parties* additional time to supplement the record, the court was providing *plaintiff* with the opportunity to submit documentary evidence. By providing plaintiff with the opportunity to add to the record of the disciplinary hearings and appeals, the court avoided the presumption that defendants' documentary submissions of non-public records were complete. In doing so, the court insured that the parties would be given equal opportunity to submit evidence. Though that fact alone is sufficient ground for denying plaintiff's motion, neither side has submitted any additional documentation on the issue of exhaustion. Therefore, plaintiff's motion will be denied as moot.

2. Renewed motion for Rule 11 sanctions

Plaintiff has asked the court for reconsideration of the September 23, 2005 decision to deny his request for Rule 11 sanctions against defendants. In support of his renewed request, plaintiff begins with the court's assertion that he did not aver he had given defendants 21 days' prior notice of the conduct alleged to violate Rule 11 before bringing his motion in court. Order dated Sept. 23, 2005 at 6. Plaintiff asserts that he certified "in the upper left margin" of his original motion that he had notified defendants as required by Rule 11. Second, plaintiff contends that the court was *required* to issue sanctions against counsel for defendants because plaintiff had to "waste time and resources refuting [defendants'] false and frivolous arguments."

Upon reviewing plaintiff's original motion a second time, I find that he is correct that along the upper left margin of the motion, he scribbled a short, vertically-positioned note indicating he had provided a copy of his motion to defendants' counsel in advance of filing. It is not surprising that this averment of notice was overlooked. In the end, however, I found the lack of notice immaterial. In the September 23 order, I denied plaintiff's motion on its merits and not on the basis of any perceived procedural error.

Plaintiff advances the argument that sanctions are required any time a frivolous argument is made, regardless whether the argument is withdrawn. Fortunately for all litigants, including plaintiff, his interpretation of Rule 11 is mistaken. The primary purpose

of Rule 11 is to discourage unnecessary complaints and other filings, for the benefit of the judicial system as much as the parties. Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073, 1077 (7th Cir. 1987). By requiring a party seeking sanction to provide prior notice to the opposing party of the allegedly frivolous arguments that form the basis for sanction, Rule 11 provides litigants with an opportunity to spare "the parties and the court . . . the effort and expense of litigating a groundless contention." United States v. McIntosh, 198 F.3d 995, 1009 (7th Cir. 2000). In a civil case, if a party acts promptly to withdraws its meritless argument upon receipt of the opposing party's notice, such action typically guarantees the filer of the amended pleading "safe harbor" from sanctions. Id. The safe harbor provision thereby permits a party to correct an error in judgment or law before dragging the court into the dispute.

Under the plain language of Rule 11, a party cannot bring a motion for sanction if the opposing party withdraws its allegedly meritless argument within the safe harbor period. Fed. R. Civ. P. 11(c)(1)(A) ("A motion for sanctions . . . shall not be filed with or presented to the court unless . . . the challenged [defense] is not withdrawn or appropriately corrected.") Plaintiff served his motion upon defendants on July 12, 2005. Defendants responded on July 21, 2005, by withdrawing their argument that plaintiff needed to seek state habeas review before bringing his suit in this court.

As I made clear in the September 23, 2005 ruling, defendants withdrew in a timely

fashion the single frivolous argument advanced in the brief supporting their motion to dismiss. Although plaintiff took issue with many of defendants' remaining arguments, he did not demonstrate that they were lacking in legal merit. In fact, the arguments for which plaintiff requests sanction are the very arguments that have prevailed in this case. For these reasons, plaintiff's motion to reconsider will be denied.

C. Defendants' Motion for Summary Judgment

Defendants contend that plaintiff failed to properly exhaust his administrative remedies prior to filing suit, as required by 42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act, which provides that

> No 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 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).

In this lawsuit, plaintiff contends that defendants conspired to harm him in violation of his equal protection rights by issuing him three "false" conduct reports: CR #1230298,

CR #1335594, and CR #1351662. However, plaintiff failed to exhaust his claim with respect to each of these conduct reports. Therefore, I will grant defendant's motion.

1. Conspiracy claim against defendants Schueler, Core and Houser

At the disciplinary hearing on CR #1230298, plaintiff submitted a written statement in which he accused defendant Schueler of violating his equal protection rights by handling plaintiff's mail differently from other inmates' mail because of plaintiff's racist beliefs. His statement made no reference to defendant Core. Of most serious sequence to plaintiff's claim, however, is the fact that he failed to appeal the committee's decision as required by the administrative code.

Plaintiff argues that he sufficiently exhausted his administrative remedies when he attempted to appeal the disciplinary committee's decision to the warden of the Wisconsin Secure Program Facility. Wisconsin Admin. Code § DOC 303.76(7)(a) states:

> Any time within ten days after either a due process hearing or after the inmate receives a copy of the decision, whichever is later. [sic] An inmate who is found guilty may appeal the decision . . . to the warden.

Plaintiff contends that the Wisconsin Administrative Code does not require that appeals be heard by the warden of the prison at which the conduct report was issued, but simply by "the warden." Although plaintiff's reading of the regulation is reasonable, so is the interpretation offered by the Department of Corrections. Defendant Berge responded to plaintiff's appeal

by instructing plaintiff to appeal directly to the warden of the Waupun Correctional Institution. Instead, plaintiff filed an inmate complaint demanding that defendant Berge consider his appeal. In reply to plaintiff's complaint, inmate complaint examiner Ellen Ray reiterated that plaintiff should appeal to the warden of the Waupun Correctional Institution, explaining that "the conduct report was written as a result of behavior [there], the hearing took place there, and the disposition and decision were imposed there."

Defendants' requirement that plaintiff appeal to "the warden" of the institution at which the conduct report was issued is not unreasonable. Nevertheless, plaintiff chose not to file an appeal with the warden of the Waupun Correctional Institution. When a prisoner is denied an administrative remedy because he has failed to comply with the procedures established by the state, he commits procedural default. Ford v. Johnson, 362 F.3d 395, 397 (7th Cir. 2004). Plaintiff did not attempt to file an appeal as directed by prison officials. Therefore, he did not exhaust his administrative remedies on this claim.

2. Conspiracy claim against defendants Linjer, Boughton, Huibregtse

At the disciplinary hearing on CR #1335594, plaintiff submitted a written statement, accusing defendant Linjer of being an "anti-proud-white racist" and stating that plaintiff was "a white separatist and racist." However, plaintiff did not contend that defendant Linjer censored plaintiff's mail more stringently than he censored the mail of other similarly-

situated inmates who are not perceived to be white racists.

Plaintiff first asserted on appeal that the discipline imposed on him violated his equal protection rights. Even then, although plaintiff invoked the phrase "equal protection," he failed to explain how the discipline imposed on him set him apart from other similarly-situated inmates. To put defendants on notice that their behavior was alleged to infringe his constitutional rights, plaintiff needed to provide them with facts demonstrating that he was being treated unequally. He did not provide any such facts.

Furthermore, plaintiff failed to allege at his hearing or on appeal that defendants had conspired to deprive him of his constitutional rights. Plaintiff suggested only that defendant Linjer was an "anti-proud-white racist" and that plaintiff was a racist. Those facts alone were insufficient to place defendants on notice of the claim which plaintiff wishes to raise in this court; namely, that defendants Linjer, Boughton and Huibregtse conspired to harm him by depriving him of his equal protection rights.

An inmate raises his claim to prison officials when his complaints "alert[] the prison to the nature of the wrong for which redress is sought." Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002). Although the plaintiff was not required to address his complaints to the disciplinary committee using detailed facts and complex legal theories, he did need to "object intelligibly to some asserted shortcoming" in the behavior of prison officials. Id. Plaintiff did not object to any conspiracy or give prison officials any indication that he thought

defendant Linjer or other defendants had singled him out for differential treatment. Therefore, plaintiff failed to exhaust his administrative remedies with respect to this claim.

3. Conspiracy claim against defendants Lange, Gilberg, Boughton, Carpenter, Blackbourn and Huibregtse

Plaintiff attended the disciplinary hearing on CR #1351662, which was held on May 9, 2002. According to the notes contained in the disciplinary record (the accuracy of which plaintiff does contest) plaintiff did not mention of conspiracy or equal protection claims at the hearing. Although plaintiff contends that he submitted a written statement to his staff advocate in advance of the hearing, plaintiff does not indicate what information was contained in the statement and he admits that the statement was not presented to the disciplinary committee.

On appeal to the warden, plaintiff raised for the first time his contention that disciplining him for possessing the 88 Precepts "was discriminatory" and violated "both state and federal constitutional free speech, free religion and equal protection rights." Again, plaintiff did not assert that any prison officials had conspired to deprive him of his constitutional rights and failed to provide any information about how he had been treated differently from other similarly-situated inmates. In failing to raise the issue of conspiracy in any of his disciplinary hearings or appeals, plaintiff did not exhaust his administrative

remedies with respect to this claim.

Plaintiff has failed to exhaust his administrative remedies with respect to each of his claims that defendants Huibregtse, Boughton, Houser, Schueler, Core, Linjer, Gilberg, Blackbourn, Lange and Carpenter conspired to harm him in violation of his equal protection rights. As a result, I cannot entertain his claims on the merits, but must dismiss the suit without prejudice. Ford v. Johnson, 362 F.3d 395, 401 (7th Cir. 2004) (dismissal for plaintiff's failure to exhaust administrative remedies always without prejudice).

ORDER

IT IS ORDERED that

1. Defendants' motion to dismiss plaintiff's claims that his equal protection rights were violated by the issuance of conduct reports 1230298, 1335594 and 1351662 is GRANTED because plaintiff failed to exhaust his administrative remedies with respect to these claims. The dismissal is without prejudice.

2. Defendants' motion for clarification is GRANTED.

3. Plaintiff's motions for reconsideration of this court's order of Sept. 23, 2005 are DENIED.

Entered this 19th day of October, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge