IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL LEE RAUNIO,

ORDER

Petitioner,

06-C-163-C

v.

WISCONSIN DEPARTMENT OF CORRECTIONS; New Lisbon Correctional Institution's Hospital/HSU STEPHANIE HAHN and C. WARNER; JILL SWEENEY (Complaint Examiner); WARDENS CATHERINE J. FERREY and LIZZIE TEGELS and Wisconsin Secure Program Facility's CHRISTINE BEERKIRCHER and the ICRS (Examiner) and Warden RICHARD SCHNIETER,

Respondents.

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This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner Michael Lee Raunio, who is presently confined at the Wisconsin Secure Program Facility in Boscobel, 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 fee for filing this lawsuit. He has made 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. 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.

Along with his complaint, petitioner has submitted several inmate complaints he filed and responses he received to those complaints. Because the contents of those documents are necessary to understand his claims, I will consider the inmate complaints and responses as part of his complaint. Fed. R. Civ. P. 10(c). From these materials, I understand petitioner to allege the following facts.

ALLEGATIONS OF FACT

On October 14, 2005, petitioner Michael Lee Raunio was transferred from the New Lisbon Correctional Institution to the Marathon County jail because he was scheduled to testify for the state in a criminal case. Before he was transferred, petitioner was taking Zafirkulast, a long-term preventive medicine for asthma, and Naproxen, an anti-

inflammatory, for his lower back pain and migraine headaches, twice daily. In addition, petitioner was on a low bunk restriction because of his back pain. Two days before his transfer, respondent Stephanie Hahn, a nurse at New Lisbon, prepared a "Health Transfer Summary" for petitioner. In the section entitled "Current Medications," the following writing appears: "did not have his Naproxen 500mg or his Zafirlukast 20 mg available to send."

According to an intake form completed at the jail on October 14, 2005, petitioner arrived with the following items: Metamucil, T-Gel (a medicated shampoo), Advair Dikus inhaler, Albuteral inhaler and Docuste (a laxative). The form shows also that petitioner answered "yes" to the questions, "Are you currently taking any medication?" and "Do you have the medication with you?" Had petitioner answered "no" to the latter question, the form states, "If no, attempt to retrieve."

Petitioner stayed at the jail from October 14, 2005 until October 24, 2005. During this time, he did not receive his daily doses of Zafirkulast or Naproxen. He experienced labored breathing and believed he was going to have an asthma attack on two occasions. He used an entire Albuterol inhaler for relief and sold his meal trays to purchase coffee, which helped him breathe. He was assigned an upper bunk. He experienced pain and discomfort because he did not receive Naproxen or any substitute. He submitted a request to see the jail's doctor, but she was absent that week and his symptoms were not serious enough to

send him to the hospital.

On October 24, 2005, petitioner returned to New Lisbon. Immediately after returning, he submitted a health services request asking why his medications and his lower bunk restriction had not been transmitted to the jail. Petitioner did not receive a reply to this request. On October 25, 2005, petitioner filed inmate complaint #NLCI-2005-33019, in which he stated the following:

> On Friday, October 14, 2005, I had to leave New Lisbon Corr. Inst. and go to Marathon Co. to testify against a Scott A. Meyer, also a prison inmate. My 2, which I believe to be, somewhat more important medications never came w/ me! I am referring to my "Naproxen" 500 mg. (for lower back pain and migraines) and my "Zafirlucast" [sic] (Accolate) 20 mg. (for asthma management). For 1½ wks. I did w/out these despite my pleas for a substitute that was never given, nor did this place send them upon noticing them still here. For 1½ wks. I had labored breathing, had 2 big doozies of headaches and I had to sleep on top bunk which was an event to witness. This was uncalled for and my 1½ wks. went by in somewhat uncomfortable of a status! Enclosed is from my writing to supervisor and his written response. I can always get another form the said supervisor because I <u>am</u> going to attempt a suit here. I believe I have one as well as Marathon County saying I do and will assist in. As you can see of the enclosed. This was my health and what would've happened if I had an asthma attack? Especially in the middle of the night? The "accolate" is to stay in the system to prevent this. This was unprofessional and should pay for their "mistake" or however they want to look at it as! I know "something" needs to be done. Yall want to be "petty" w/us, I will also in return be petty.
>
> You get me out of segregation and into another medium until my recall date of 2006 (Feb.) and I won't press anything and you'll save $ trying to defend it, but I will attempt to do so if this is not granted.
>
> I thank you for your time and attention in reading this!

Petitioner's complaint #NLCI-2005-33019 was acknowledged on October 26, 2005.

On November 2, 2005, petitioner was transferred from New Lisbon to the Wisconsin Secure Program Facility. On November 8, 2005, respondent Jill Sweeney, an institution complaint examiner at New Lisbon, rejected petitioner's inmate complaint #NLCI-2005-33019. A rejection form completed by respondent Sweeney indicates that the issue identified was "Meds not sent with him on trip out of Inst" and that respondents Hahn and Warner were contacted. However, in the summary of respondent Sweeney's reasons for rejecting the inmate complaint, Sweeney wrote:

> Inmate complains about his medication not being sent, having to sleep on a top bunk while in the Marathon County jail and threatens a lawsuit unless he is taken out of segregation and placed at another medium security institution. These are all separate issues.
>
> Complaints are limited to one issue per DOC 310.09(1)(e), Wis. Adm. Code. This complaint contains more than one issue or the issue is not clearly identified; therefore, it will not be addressed.

The same day petitioner received respondent Sweeney's rejection, he filed a "Request for Review of Rejected Complaint," in which he wrote the following:

> I am being told that this is more than one issue! I do not understand how when my complaint is all Medical/HSU related? It is one issue no matter how you look at it. Further more, "if" this complaint was to be "rejected," why were 2 people "contacted" (C. Warner and S. Hahn) if this was to be "rejected." I smell something kind of "foul" here Ms. Farrey. This makes no sense at all and now I'm being told I'm being "played" around w/. I have folks (various C/Os and deputies at Marathon Co.) telling me I have the makings

> of a lawsuit — and I will attempt this. It is my opinion that the "ICRS"/Examiner made contact w/ these 2 people, realized their error — a very negligent and life-threatening error, and the complaint dept. is now trying to aid them by giving some buffalo-chip excuse that I have more than one issue. Regardless "if" your decision is "final," I will re-submit on and on and on again until I get an answer. What's funny is the fact that this institution placed me in a 360 program segregation/disc. separation for "missuse [sic] of prescribed meds" yet, when the "HSU" makes a screw-up of meds — nothing happens. As wrote, I "smell" something!!

The next day, on November 9, 2005, petitioner filed a second inmate complaint (unnumbered) in which he wrote the following:

> This is in response to the enclosed! I have one issue: Why did my Zafirlucast (Accolate) and my Naproxen not travel w/ me for the wk and a ½ at Marathon Co.? Nor my copy of "lower bunk" restriction either? Dates of 10-14-05 until 10-24-05 I was at Marathon Co. w/ none of these meds and no substitutions were given!

On November 14, 2005, respondent Christine Beerkircher, an institution complaint examiner at the Secure Program Facility, returned petitioner's complaint to him. In a memorandum to petitioner explaining this action, she wrote the following:

> Your complaint materials received November 14, 2005 are being returned because of failure to meet the filing requirements as stated in DOC 310, Wis. Adm. Code:
>
> - Complaints shall contain only one issue and that issue shall be clearly identified [DOC 310.09(1)(e)].

Instead of filing an appeal of this rejected complaint, petitioner filed a third inmate complaint (also not numbered) on November 16, 2005, in which he stated

> THIS IS ONE ISSUE: WHY DID MY 2 MEDS, ALONG WITH MY LOWER BUNK RESTRICTION NOT TRAVEL W/ ME TO MARATHON CO. JAIL? THE SAME INFOR AS ON OTHER SUBMITTED ICE FORM. ONE ISSUE! MY MEDS (2) DIDN'T COME W/ME. ONE ISSUE (HSU!!) IF THIS GETS "RETURNED" AGAIN, I'M GOING TO WARDEN BERGE W/ THIS COMPLAINT TO GET IT ACKNOWLEDGED!

On November 18, 2005, respondent Beerkircher returned this complaint to plaintiff, along with a memorandum stating that his complaint again violated Wis. Admin. Code § DOC 310.09(1)(e), "Complaints shall contain only one issue and that issue shall be clearly identified."

Instead of appealing the rejection, on November 21, 2005, petitioner filed a fourth inmate complaint, #WSPF-2005-35735, in which he states,

> This is ridiculous and I believe you may be "skirting" from this issue. WHY WAS MY TRANSPORT MEDS FROM NLCI TO MARATHON COUNTY NOT ALL ACCOUNTED FOR AND SENT W/ ME?
>
> NOTE:
> If there was a complaint form to fill out on the "ICRS" complaint process, I would LOVE to fill one out!

This complaint was acknowledged on November 22, 2005. That same day, respondent Sweeney rejected complaint #WSPF-2005-35735 for being "Beyond 14 calendar day limit." Respondent Sweeney stated further that petitioner's inmate complaint provided no good cause for extending the 14-day deadline.

On November 24, 2005, petitioner filed a "Request for Review of Rejected

Complaint" with respondent Catherine Ferrey, the warden at New Lisbon, in which he asked for review of the rejection of both of his numbered complaints, NLCI-2005-33019 and WSPF-2005-35735. In this request, petitioner summarized his efforts to secure review of his grievance:

> I have submitted three (3) "offender complaints" to the "ICE" office. My 1st one was while at "NLCI" and that was on 10-25-05. It came back "rejected." My 2nd and 3rd ones were while here at "WSPF", those were on the dates of: 11-8-05 and 11-16-05 — both were "rejected" again! Finally, on a 4th try, which I believe was on 11-21-05, it was again "rejected." For 4 of my attempts at filing this simple, yet legitimately major complaint, it was to no avail by this method. All of my responsed [sic] rejection letters all state the same thing: "Complaints shall contain only one issue and that issue shall be clearly identified" etc." How much more clearer can I make my complaints be and also, this is one issue — medical!! HSU!! "My 2 meds did not travel w/ me nor my lower bunk restriction." That is one issue! It all revolves around HSU. They screwed up and I was w/out my asthma and pain medication for 11 days! And, this was at NLCI! Now, on this 4th one, the response was: "That it was not timely" and "Inmate submitted the complaint 14 beyond days/calendar days from the date of the occurrence and provides no good cause for the "ICE" to extend the time lines." This is wrong!! It's [sic] not fair!! And I'm led to believe that this was petty and purposely done to "skirt" and "delay" my issue.

The next day, on November 25, 2005, petitioner filed a "Request for Corrections Complaint Examiner Review" and included all of his inmate complaints on the subject of his medication and low bunk restriction.

On November 30, 2005, respondent Schneiter, the warden of the Wisconsin Secure Program Facility, responded to a letter petitioner had sent him on November 21, 2005. In

his response, Schneiter stated:

> I have received your memo regarding your returned complaints. Upon review, I am in agreement with Ms. Beerkircher that your complaints contain multiple issues. Both complaints, returned to you on 11/14/05 and 11/18/05, reference your medications and your lower bunk restriction. These are two separate issues. In accordance with Wisconsin Administrative Code DOC 310.09(1)(3), "Complaints shall contain only one issue."
>
> I trust this has addressed your concerns at this time.

On December 6, Karen Gourlie, who works in the Corrections Complaint Examiner's Office, returned petitioner's November 25, 2005 request for a corrections complaint examiner review, together with his rejected inmate complaints, and informed him that the corrections complaint examiner does not review rejected complaints. On December 20, 2005, respondent Lizzie Tegels, the deputy warden at New Lisbon, affirmed rejection of inmate complaint #WSPF-2005-35735 because petitioner had filed it beyond the 14-day limit.

Earlier, on November 23, 2005, petitioner submitted a health services request form in which he asked the following questions:

> Is it wise to "discontinue" abruptly [Zafirkulast (Accolate)]?
> What "harm" can manifest, along w/ potential dangers "if" this medication is not taken at prescribed times? And/or for a lengthy time period, say like 11 days w/out it?

Several days later, a nurse at the Secure Program Facility provided the following answers to petitioner's questions:

> It is not wise to abruptly stop your accolate. If it [is] working why risk an

> asthma attack? . . . The only way your medication WILL work is if you take it as ordered. Abruptly stopping the medication may cause serious respiratory complications.

DISCUSSION

A. Eighth Amendment

I understand petitioner to allege that respondent Hahn violated the Eighth Amendment by failing to transfer to the Marathon County jail two medications petitioner was taking, Naproxen and Zafirkulast. Petitioner does not allege any facts suggesting what respondent C. Warner might have done or failed to do that would amount to a violation of his constitutional rights. Therefore, petitioner will not be allowed to proceed against her. In addition, petitioner's only allegations concerning respondents Sweeney, Ferrey, Tegels, Beerkircher and Schneiter are that these individuals rejected or sustained rejections of his inmate complaints after he had already been deprived of his medication and returned from the county jail. However, even if these respondents applied the grievance procedures improperly, their actions do not violate the constitution. An inmate has no constitutional right to an error-free grievance procedure. Because respondents Sweeney, Ferrey, Tegels, Beerkircher and Schneiter are not alleged to have participated directly or even indirectly in preventing petitioner from obtaining his medications and receiving a low bunk assignment while petitioner was confined at the Marathon County jail, they cannot be sued for violating

petitioner's constitutional rights and will be dismissed from the case. Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985) (liability under § 1983 requires causal connection or affirmative link between misconduct complained of and the official sued). Finally, respondent Wisconsin Department of Corrections will be dismissed because the department is not a suable entity. Fed. R. Civ. P. 17(b); Majerus v. Milwaukee County, 39 Wis. 2d 311, 314-15, 159 N.W.2d 86 (1968); Sullivan v. Board of Regents of Normal Schools, 209 Wis. 242, 244, 244 N.W.2d 563 (1932).

The Eighth Amendment protects prison inmates from cruel and unusual punishment. The amendment has been interpreted also to require the government to provide for inmates' basic human needs such as food, clothing, shelter and medical care. Higgason v. Farley, 83 F.3d 807, 809 (7th Cir. 1996). With respect to medical care, the Supreme Court has held that "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs" to state an Eighth Amendment claim. Estelle v. Gamble, 429 U.S. 97, 106 (1976).

This standard contains objective and subjective components. First, an inmate's medical need must be objectively serious. A condition meets this standard if it is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would perceive the need for a doctor's attention." Greeno v. Daley, 414 F.3d 645, 653 (7th Cir. 2005). In addition, the Court of Appeals for the Seventh Circuit

has held that the phrase "serious medical needs" encompasses not only conditions that are life-threatening or that carry risks of permanent serious impairment if left untreated, but also those in which the deliberately indifferent withholding of medical care results in needless pain and suffering. Gutierrez v. Peters, 111 F.3d 1364, 1371 (7th Cir. 1997).

The subjective element of a denial of medical care claim requires that the prison official act with a sufficiently culpable state of mind. Id. at 1369. This state of mind, known as deliberate indifference, requires at a minimum that a prison official be aware of and disregard a substantial risk to the inmate's health. Greeno, 414 F.3d at 653. In other words, the official "must 'both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists' and 'must also draw the inference.'" Id. (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)). However, "a prisoner claiming deliberate indifference need not prove that the prison officials intended, hoped for, or desired the harm that transpired." Haley v. Gross, 86 F.3d 630, 641 (7th Cir. 1996). On the other hand, inadvertent error, negligence, gross negligence and ordinary malpractice do not constitute deliberate indifference. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes v. DeTella, 95 F.3d 586, 590-91 (7th Cir. 1996).

The first question is whether petitioner faced a risk of serious medical harm if he did not receive Naproxen or Zafirkulast for the time he was detained at the Marathon County jail. Petitioner's complaint includes a health services request he submitted on November 23,

2005 in which a nurse at the Secure Program Facility informed him that stopping his Zafirkulast "may cause serious respiratory complications." This suggests that petitioner faced a risk of serious harm when he was not given Zafirkulast at the jail, although petitioner concedes that he used another inhaler and coffee to compensate for the lack of this medication. At this stage of the proceedings, I will assume that petitioner faced a risk of serious harm by not having his Zafirkulast at the jail. Moreover, petitioner has alleged that he suffered "2 doozies" of a headache from not receiving his Naproxen, and it is possible to infer from his allegations that he suffered needless pain by having to climb to an upper bunk for his 10-day stay at the Marathon County jail. This is enough to conclude that he faced a risk of serious harm if he did not receive his pain medication or was not continued on his lower bunk restriction.

The next question is whether petitioner has alleged that respondent Hahn was deliberately indifferent to the risk of harm to his health. Petitioner alleges repeatedly that the failure to convey necessary and important information about his medical needs to the Marathon County jail was an error or a negligent act. Neither innocent mistakes or negligent acts of prison officials meet the standard for deliberate indifference. However, from petitioner's allegation that a nurse at the Wisconsin Secure Program Facility told him in response to his inquiry that failure to take Zafirkulast would raise a risk of serious respiratory complications, I cannot say at this early stage of the proceedings that respondent

Hahn, also a nurse, did not know that petitioner's health would be at risk if his Zafirkulast was omitted from the medications she was sending along with him to the Marathon County jail. Nor can I say that respondent Hahn did not know that if petitioner did not receive his pain medication or remain on a lower bunk, he would suffer needless serious pain. However, to succeed on his claim ultimately against respondent Hahn, petitioner will have to prove 1) that Hahn was aware that petitioner faced the risk of serious respiratory complications and needless pain if his Zafirkulast and Naproxen were not available to him for 10 days; 2) that it was her responsibility to see to it that petitioner's medications and low bunk restriction accompanied him to the jail; and 3) that she deliberately refused to take the action necessary to insure that petitioner received his medications and a lower bunk restriction.

B. Exhaustion of Administrative Remedies

Finally, I note that the documentation petitioner submitted with his complaint makes it clear that he attempted to exhaust his administrative remedies with respect to his Eighth Amendment claim, and that prison officials rejected three of his complaints as containing more than one issue and the fourth because it was untimely. The 1996 Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), provides 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 Court of Appeals for the Seventh Circuit has held that "[e]xhaustion of administrative remedies, as required by § 1997e, is a condition precedent to suit" and that district courts lack discretion to decide claims on the merits unless the exhaustion requirement has been satisfied. Dixon v. Page, 291 F.3d 485, 488 (7th Cir. 2002); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999). "[I]f a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim." Massey v. Helman, 96 F.3d 727, 733 (7th Cir. 1999). Exhaustion has not occurred unless an inmate follows the rules that the state has established governing the administrative process. Dixon, 291 F.3d at 491; Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). The inmate complaints and responses petitioner submitted suggest that petitioner was unable to pursue his grievances through all of the steps of Wisconsin's inmate complaint review process. However, the responses petitioner received to his inmate complaints suggest that his failure to obtain a complete review of his claim against respondent Hahn may be the fault of prison officials. Therefore, if respondent Hahn moves to dismiss petitioner's claim for failure to exhaust, she should be prepared to explain why the responses petitioner received to his second and third inmate complaints (that each raised more than one issue) was appropriate.

ORDER

IT IS ORDERED that:

- Petitioner Michael Lee Raunio is GRANTED leave to proceed in forma pauperis against respondent Stephanie Hahn on his claim that she deliberately failed to insure that petitioner's prescribed medications and lower bunk restriction were made known to officials at the Marathon County jail in violation of his Eighth Amendment rights; and
- Petitioner is DENIED leave to proceed in forma pauperis on his claim that the remaining respondents violated his constitutional rights by failing to grant him relief on his inmate complaints.
- Respondents Wisconsin Department of Corrections, C. Warner, Jill Sweeney, Catherine Ferrey, Lizzie Tegels, Christine Beerkircher and Richard Schnieter are DISMISSED from this action.
- For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondent, he should serve the lawyer directly rather than respondent. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

- Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.
- The unpaid balance of petitioner's filing fee is $245.67; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).
- Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's complaint and this order are being sent today to the Attorney General for service on the state defendant.

Entered this 14th day of April, 2006.

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