

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CHARLES E. HENNINGS,

Plaintiff,

v.

DAVE DITTER,

Defendant.

ORDER

06-C-353-C

This case is currently scheduled for trial on August 6, 2007 on plaintiff's claim that defendant retaliated against him for exercising his constitutional right to pursue a disciplinary appeal. In an order dated June 14, 2007, I informed plaintiff that he had two options for calling unincarcerated witnesses: convince them to testify voluntarily or subpoena them. Now before the court is a request from plaintiff for "an order from this court authorizing the issuance of subpoenas to all named witnesses, or in the alternative, asking defendant's counsel to have the named witnesses appear for trial voluntarily."

With respect to obtaining voluntary testimony from the nine witnesses plaintiff lists, that is an issue between plaintiff and counsel (with respect to defendant's appearance) and between plaintiff and the witnesses themselves (with respect to the appearance of the remaining witnesses who are not parties to the case). Plaintiff says that he is afraid to

contact the non-party witnesses because the Wisconsin Department of Corrections has a rule that prohibits prisoners from soliciting staff members, Wis. Admin. Code § DOC 303.26. He says that he could be disciplined under that rule if he sought voluntary testimony from a department employee.

Plaintiff's view of the rule is extremely far-fetched. The purpose of the rule is to prevent "favoritism and bribery," not to prevent prisoners from litigating their cases. The rule does not apply to "anything authorized" by other administrative rules, Wis. Admin. Code § DOC 303.26(2), which includes "reasonable access to the judicial process," Wis. Admin. Code DOC 309.155(1). Thus, it would be highly unlikely that prison administrators would interpret the rule to apply to a situation in which a prisoner asked a staff member to give truthful testimony in a court proceeding. Any contrary interpretation would almost certainly violate the prisoner's right of access to the courts.

However, because time is running short and plaintiff's requested witnesses may not agree to testify voluntarily, I will direct the clerk of court to issue nine signed but blank subpoenas to plaintiff, who is responsible for completing the subpoenas before service. Pursuant to Rule 45(b)(1), service of a subpoena shall be made by delivering a copy of the subpoena to the person to be subpoenaed and tendering to that person the fees for one day's attendance and the mileage allowed by law. This requirement applies to plaintiff even though he is indigent. McNeil v. Lowney, 831 F.2d 1368, 1373 (7th Cir. 1987); 28 U.S.C. § 1915(d) (witnesses shall attend as in other cases . . .). District courts do not have

statutory authority to advance or waive witness fees for indigent litigants. Id.; see also Marozsan v. United States, 90 F.3d 1284, 1290-91 (7th Cir. 1996).

Because plaintiff is proceeding in forma pauperis, service of the subpoenas will be effected by the United States Marshal's Service. Collins v. Gorman, 96 F.3d 1057 (7th Cir. 1996). He will tender to the marshal or other individual serving the subpoena a check or money order made payable to the witness in an amount necessary to cover the daily witness fee and the deponent's mileage, as well as costs for room and meals if the witness's appearance at trial will require an overnight stay. Current rates for daily witness fees, subsistence and mileage are as follows:

daily witness fee - \$40

daily subsistence fee - \$138 (if overnight stay is required)

mileage rate - \$.48.5 per mile

Plaintiff is **not** to submit completed subpoena forms and checks or money orders for witness fees and mileage to this court. The forms and checks are to be sent directly to the United States Marshal at 120 N. Henry St., Suite 440, Madison, WI 53703. Plaintiff should be aware that if his subpoenas and witness payments are not received by the marshal at least two weeks in advance of trial, the marshal may not have insufficient time to serve the subpoenas on plaintiff's witnesses.

ORDER

IT IS ORDERED that the clerk of court is to send nine subpoena forms to plaintiff.

Entered this 3d day of July, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge