IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL TRISTANO,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS,
UNITED STATES OF AMERICA,
RICARDO MARTINEZ,
MICHAEL NALLEY,
HARLEY LAPPIN,

Defendants.

OPINION AND ORDER

07-C-113-C

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In this civil action for declaratory and injunctive relief, plaintiff Michael Tristano, a federal prisoner, challenges the validity of 28 C.F.R. §§ 570.20 and 570.21, which limit the time a prisoner may reside at a halfway house before his release to a maximum of 10% of his sentence. Because plaintiff received a sentence of one year and one day, he is scheduled to be transferred to a halfway house approximately one month before his predicted release date, which is in July 2007. Plaintiff contends that, under 18 U.S.C. § 3621(b), he is entitled to be considered for transfer to a halfway house as early as six months before his release date. With his complaint plaintiff filed a motion for a preliminary injunction, which is now before

the court.

This is not the first time I have considered the validity of a Bureau of Prisons rule that restricts a federal prisoner's eligibility for transfer to a halfway house. In Hendershot v. Scibana, No. 04-C-291 (Oct. 15, 2004 W.D. Wis. 2004), a group of federal prisoners filed a petition for a writ of habeas corpus, challenging a BOP policy that predated §§ 570.20 and 570.21 but was substantively similar to those regulations. I concluded that the policy conflicted with § 3621(b) and granted the petition, ordering the warden to consider the prisoners for a transfer to a halfway house six months before their release date.

However, soon after I decided Hendershot, the Court of Appeals for the Seventh Circuit held in another case that the BOP policy at issue in Hendershot could not be challenged through a petition for a writ of habeas corpus because the prisoners would not be guaranteed release even if they were successful with their petition. In other words, the prisoners were not challenging their "custody" so as to qualify for relief under the habeas corpus statute, 28 U.S.C. § 2241. The court concluded that the Administrative Procedure Act was the only mechanism by which the policy could be challenged and that the action would have to be dismissed rather than converted because of the differences between the two types of suits. Richmond v. Scibana, 387 F.3d 602 (7th Cir. 2004). In accordance with Richmond, I vacated the judgment in Hendershot and dismissed the case. Hendershot v. Scibana, 343 F. Supp. 2d 745 (W.D. Wis. 2004).

Plaintiff has learned the lesson from Richmond, or at least one of them, because he has brought this action under the Administrative Procedure Act. Unfortunately, however, he did not learn another of Richmond's lessons, which is that prisoners challenging prison conditions in a suit under the Administrative Procedure Act must comply with the administrative exhaustion requirement of the Prison Litigation Reform Act. Because plaintiff concedes that he had not completed the exhaustion process when he filed this lawsuit, I must deny his motion for a preliminary injunction and dismiss the case for plaintiff's failure to exhaust his administrative remedies.

The PLRA provides that "[n]o action [under federal law] shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). In this case, plaintiff had an available administrative remedy under 28 C.F.R. §§ 542.10-19, which "allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement." 28 C.F.R. § 542.10(a). The process includes three steps, beginning with a grievance filed with the warden, followed by appeals to the regional director and general counsel if the prisoner is dissatisfied with any of the earlier decisions. 28 C.F.R. § 542.15(a). In his complaint, plaintiff concedes that he has not yet received a response from his appeal to general counsel. Dkt. #2, ¶17.

In cases governed by the PLRA, exhaustion is mandatory; when a prisoner brings an unexhausted claim to federal court, the court must dismiss that claim. Jones v. Bock, 127

S. Ct. 910, 919 (2007); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999). Further, as a general matter, a prisoner does not satisfy § 1997e(a) unless he has exhausted "properly," which includes "using all steps that the agency holds out." Woodford v. Ngo, 126 S. Ct. 2378, 2385 (2006) (quoting Pozo v. McCaughtry, 286 F.3d 1022, 1024 (7th Cir. 2002)), and doing so "in the place, and at the time, the prison's administrative rules require." Pozo, 286 F.3d at 1025.

Despite plaintiff's concession that he has not completed "all steps that the agency holds out," he advances several arguments why he believes the case should not be dismissed for a failure to exhaust administrative remedies. Unfortunately for plaintiff, I must reject each of them.

First, plaintiff says that the response to his final appeal was due on March 11, 2007 and that general counsel's failure to file a response by this date means that exhaustion is now complete. However, even if I accepted this argument, it would not help plaintiff. The court of appeals has stated without qualification that exhaustion must be complete *before* filing. Perez, 182 F.3d at 535("a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed"); see also Johnson v. Jones, 340 F.3d 624, 627-28 (8th Cir. 2003); Neal v. Goord, 267 F.3d 116, 122 (2d Cir. 2001). The district court is required to "dismis[s] a suit that begins too soon, even if the plaintiff exhausts his administrative remedies while the litigation is pending." Ford v. Johnson, 362 F.3d 395, 398 (7th Cir.

2004). Thus, in Ford, the court held that it was proper to dismiss a case for failure to exhaust when the prisoner filed his lawsuit *two days* before he received the decision on his final administrative appeal. Although I agree with plaintiff that judicial economy is not served by dismissing a case that will almost certainly be refiled immediately, I must follow the law of the circuit. Completing the exhaustion process during litigation does not save the case from dismissal.

Second, plaintiff points out that failure to exhaust is an affirmative defense, Jones, 127 S. Ct. at 919, and that defendants have not moved to dismiss the case on that ground. Siding with plaintiff on this argument would likely be detrimental to his case in the long run. Even if I agreed that the case should not be dismissed at this time, I would have to deny plaintiff's motion for a preliminary injunction because plaintiff's failure to exhaust shows that he is unlikely to succeed on the merits. Further, it would simply delay the inevitable dismissal to a time that would cause even greater prejudice to plaintiff.

In any event, it does not matter whether defendants have filed a motion to dismiss. Under 28 U.S.C. §1915A, in cases like this one in which "a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity," the district court must screen the complaint to determine whether it states a claim upon which relief may be granted. This is true regardless whether the prisoner has paid the filing fee. Compare 28 U.S.C. § 1915A with 28 U.S.C. § 1915. As the Court recognized in Jones, 127 S. Ct. at

920-21, if the complaint demonstrates that the action is barred by an affirmative defense, the complaint fails to state a claim upon which relief may be granted. See also Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 670 n.14 (7th Cir. 1998) (plaintiff may plead himself out of court by pleading facts showing that action is barred by affirmative defense). As noted above, plaintiff alleged in his complaint that he had not completed the exhaustion process before filing the lawsuit. Thus, it is appropriate to dismiss the case for plaintiff's failure to exhaust his administrative remedies under 28 U.S.C. § 1915A.

Finally, plaintiff argues that prison officials have prevented him from exhausting by failing to timely respond to his grievance and first appeal. Certainly, "[p]rison officials may not take unfair advantage of the exhaustion requirement. . . . [A] remedy becomes 'unavailable' if prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting." Dole v. Chandler, 438 F.3d 804, 809 (7th Cir. 2006). See also Dale v. Lappin, 376 F.3d 652, 656 (7th Cir. 2004) (prison officials refusal to provide prisoner with grievance forms required conclusion that prisoner exhausted all "available" remedies). However, a failure of a prison official to respond to a grievance eliminates the need for the prisoner to complete the exhaustion process only when the prison rules do not instruct the prisoner what to do when he does not receive a response by the deadline. Dole, 438 F.3d at 811-12; Brengettcy v. Horton, 423 F.3d 674 (7th Cir. 2005).

In this case, the BOP regulations are clear. If a prisoner does not receive a response within the deadline, he is not left scratching his head wondering what to do next. Rather, "the inmate may consider the absence of a response to be a denial at that level" and proceed to the next level. 28 C.F.R. § 542.18. Thus, to the extent plaintiff was kept waiting for a response past the deadline, this was time he need not have wasted.

Plaintiff may see the ruling in this case to be harsh. I acknowledge that in some cases it is difficult to see the benefit of the PLRA's exhaustion requirement. But "[t]his circuit has taken a strict compliance approach to exhaustion," Dole, 438 F.3d at 809, an approach I am not free to ignore. Because plaintiff's own complaint shows that he failed to complete the exhaustion process before filing, I must dismiss the case for his failure to exhaust his administrative remedies.

ORDER

IT IS ORDERED that plaintiff Michael Tristano's motion for a preliminary injunction is DENIED and this case is DISMISSED WITHOUT PREJUDICE for plaintiff's

failure to exhaust his administrative remedies before filing the suit.

Entered this 20th day of March, 2007.

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