

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

GABLE D. HALL,

Plaintiff,

v.

C.O. KLEMP,

Defendant.

OPINION AND ORDER

11-cv-0093-slc

This is a civil action for monetary relief brought under 42 U.S.C. § 1983. Plaintiff Gable Hall was granted leave to proceed on his claim that defendant Allen Klemm, a correctional officer at the New Lisbon Correctional Institution, deliberately interfered with Hall's legal mail. Klemm has moved for summary judgment on the ground that Hall failed to exhaust the administrative remedies available to him. dkt. 30.

Because the undisputed evidence shows that Hall failed to comply with the Prison Litigation Reform Act's exhaustion requirement, I am granting the state's motion and dismissing the complaint without prejudice.

Before setting out the facts, I note that Hall's defense to the state's motion consists of statements in his brief and various DOC forms attached to the brief. Although he has not submitted a declaration attesting to the truth of his statements or the authenticity of these documents, I will give him the benefit of the doubt and assume that he could do so upon request. Furthermore, even if the court accepts Hall's informal submissions, it does not change the outcome: Hall's own documents show that he did not properly exhaust his administrative remedies.

FACTS

At all relevant times Plaintiff Gable Hall was an inmate at the New Lisbon Correction Institution in New Lisbon, Wisconsin. Defendant Allen Klemp was a correctional officer at the institution. Hall alleges in this lawsuit that in November 2010, Kemp deliberately refused to mail a manila envelope containing Hall's request for a pardon from then-Governor Doyle to the governor's Pardon Committee.

On December 2, 2010, Hall filed inmate complaint No. WSPF-2010-25075, accusing Klemp of refusing to mail Hall's pardon request. NLCI Inmate Complaint Examiner Lynn Washetas investigated Hall's allegation. On December 21, 2010, Washetas recommended that Hall's complaint be dismissed. Hall appealed this recommendation to the warden, Ana Boatright, who dismissed Hall's complaint on December 28, 2010. At the bottom of Boatright's dismissal notice, Hall was informed that "[a] complainant dissatisfied with a decision may, within 10 calendar days after the date of this decision, appeal that decision by filing a written request for review with the Corrections Complaint Examiner on form DOC-405." This meant that Hall had to file a DOC-405 with the corrections complaint examiner by January 7, 2011.

Hall did not do this. Instead, on or about January 4, 2011, Hall submitted a "Request for Review of Rejected Complaint" Form, form DOC-2182, relating to his complaint about Klemp's alleged interference with his mail. Although it is unclear to whom he sent this form, it was returned to him with a note written on it, stating, "Complaint was dismissed—not rejected." The note was initialed "CB" and dated January 6, 2011.

On or about January 16, 2011, Hall corrected his error and submitted a DOC-405 requesting Corrections Complaint Examiner Review of his inmate complaint about Klemp. That

form was received by the Office of the Secretary, Wisconsin Department of Corrections, on January 19, 2011. Hall said nothing on the form about why he was filing it nine days late. There is nothing in the record showing whether the corrections complaint examiner accepted this DOC-405 or took any action on it.

OPINION

I. Exhaustion under the PLRA

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 taken a strict approach to exhaustion, holding 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). Further, "[s]ection 1997e(a) requires 'proper exhaustion'; that is, the inmate must file a timely grievance utilizing the procedures and rules of the state's prison grievance process." *Maddox v. Love*, 655 F.3d 709, 720 (7th Cir. 2011). *See also Woodford v. Ngo*, 548 U.S. 81, 93 (2006). Substantial compliance is insufficient. *Lewis v. Washington*, 300 F.3d 829, 833-34 (7th Cir. 2002). However, if prison officials impede a prisoner from using a remedy, then that remedy is deemed "unavailable." *Dale v. Lappin*, 376 F.3d 652, 656 (7th Cir. 2004); *Dole v. Chandler*, 438 F.3d 804, 811-12 (7th Cir. 2006). Not ruling on a grievance, not providing necessary forms and otherwise preventing access to administrative remedies have been found to

render administrative remedies unavailable-even when the act or inaction was by a prison official not directly involved in the grievance process. *Dale*, 376 F.3d at 656 (listing cases).

Exhaustion is an affirmative defense that defendants have the burden of pleading and proving. *Dole*, 438 F.3d at 809. Factual issues regarding the defense of exhaustion of administrative remedies under the PLRA are questions for the court, not the jury, to decide. *Pavey v. Conley*, 544 F.3d 739, 741-742 (7th Cir. 2008).

II. Wisconsin's Prison Grievance System

Wisconsin inmates have access to an administrative grievance system governed by the procedures set out in Wis. Admin. Code §§ DOC 310.01-310.18. Under these provisions, known as the Inmate Complaint Review System (ICRS), prisoners start the complaint process by filing an inmate complaint with the institution complaint examiner. An institution complaint examiner may investigate inmate complaints, reject them for failure to meet filing requirements or recommend to the appropriate reviewing authority that they be granted or dismissed. Wis. Admin. Code § DOC 310.07(2).

What happens next depends on whether the institution complaint examiner rejected the complaint for procedural defects or reached a decision on the complaint's merits. If a complaint is rejected, the inmate may appeal the rejection to the appropriate reviewing authority, which can review only the reason for the rejection, not the merits of the complaint. Wis. Admin. Code § DOC 310.11(6). This decision is final. Wis. Admin. Code § DOC 310.13(3). However, if the institution complaint examiner makes a recommendation that the complaint be granted or dismissed on its merits, then the appropriate reviewing authority has the authority to dismiss,

affirm, or return the complaint for further investigation. Wis. Admin. Code § DOC 310.12. This decision is not the end of the chain: an inmate who disagrees with the decision of the reviewing authority may appeal to a corrections complaint examiner. Wis. Admin. Code § DOC 310.13.

An appeal to the corrections complaint examiner must be filed within 10 calendar days after the reviewing authority's decision, and it must be filed on a form supplied for that purpose. Wis. Admin. Code § DOC 310.13(1). However, the corrections complaint examiner may accept for review an appeal filed outside this 10-day window upon a showing of good cause. Wis. Admin. Code § DOC 310.13(2). If the inmate's appeal is accepted, then the corrections complaint examiner is required to conduct additional investigation where appropriate and then to make a recommendation to the secretary of the Wisconsin Department of Corrections. Wis. Admin. Code § DOC 310.13. Within ten working days following receipt of the corrections complaint examiner's recommendation, the secretary must accept the recommendation in whole or with modifications, reject it and make a new decision, or return it for further investigation. Wis. Admin. Code § DOC 310.14.

III. Did Hall Exhaust?

The state contends that Hall's complaint must be dismissed for lack of exhaustion because he did not follow the proper procedure for raising his complaints about Klemp's alleged interference with his mail. As the state points out, Hall failed to properly appeal the warden's decision on his inmate complaint to the corrections complaint examiner: instead of submitting a DOC-405, which is the form that is used to appeal a *dismissed* complaint, he submitted a DOC

DOC-2182 form, which is used for appealing *rejected* complaints. By the time Hall did submit the proper form, on January 16, nine days after the deadline.

Hall does not deny that he used the wrong form and he does not deny that he understood what he needed to do to appeal the warden's decision on time. Hall asserts that his misstep was simply an honest mistake caused by sleep deprivation, a prison transfer and the fact that he had received multiple pieces of correspondence from the warden in the same envelope. Hall points out that he corrected his mistake and submitted the proper form only nine days late.

Unfortunately for Hall, it is not for this court to say that his attempt to comply with the state's rules for appealing inmate complaints was good enough to pass the exhaustion requirement. As noted above, the PLRA does not have a substantial compliance exception. Rather, to exhaust his remedies, a prisoner must file complaints and appeals "in the place, and at the time, the prison's administrative rules require." *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002). A good faith attempt is not enough.

At the administrative level, Hall might have been able to persuade the corrections complaint examiner to accept his untimely appeal by making a showing of good cause. But Hall made no attempt to explain why he was filing his DOC-405 nine days late: he said nothing on his form about the form mix-up, prison transfer or sleep deprivation. I infer that because Hall offered no excuse for his untimeliness, the corrections complaint examiner did not accept Hall's appeal or otherwise take action on it. Indeed, Hall does not say what, if any, response he received from the corrections complaint examiner regarding his untimely appeal.

Accordingly, because the undisputed evidence shows that Hall failed to timely appeal the warden's decision to the corrections complaint examiner, I find that Hall failed to exhaust his administrative remedies.

ORDER

IT IS ORDERED that defendant's motion for summary judgment, dkt. 30, is GRANTED. The clerk of court is directed to dismiss plaintiff Gable Hall's complaint without prejudice for Hall's failure to exhaust his administrative remedies.

Entered this 6th day of July, 2012.

BY THE COURT:

/s/

STEPHEN CROCKER
Magistrate Judge