

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

NATHANIEL ALLEN LINDELL,

Plaintiff,

OPINION AND
ORDER

02-C-021-C

v.

CINDY O'DONNELL, Deputy Secretary
to Litscher; JOHN RAY, Corrections Complaint
Examiner ("C.C.E."); PETER HUIBREGTSE,
Deputy Warden of Supermax; ELLEN RAY, I.C.E.;
C.O. MUELLER and SGT. BOYELSON,

Defendants.

Pursuant to the directive of the Court of Appeals for the Seventh Circuit in Lindell v. Frank, 377 F.3d 655 (7th Cir. 2004), this court granted plaintiff leave to proceed in forma pauperis on his claim that defendants Ellen Ray, Peter Huibregtse, John Ray, Cindy O'Donnell, C.O. Mueller and Sgt. Boyelson arbitrarily confiscated picture postcards from his cell in violation of his First Amendment rights. Now before the court is defendants' motion to dismiss this last remaining claim for plaintiff's failure to exhaust his administrative remedies. In addition, plaintiff has filed a motion to substitute "Sgt. Boyelson" with the name "Lt. Boisen."

In support of their motion to dismiss, defendants submitted documents relating to plaintiff's exhaustion efforts within Wisconsin's inmate complaint review system. I can consider defendants' documentation without converting the motion to dismiss into a motion for summary judgment because such documentation is a matter of public record. Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 455 (7th Cir. 1998); General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997). I will refer to the April 1998 version of the Wis. Admin. Code § DOC Chapter 310 throughout the opinion because this version was in effect during the time plaintiff filed his inmate complaint #SMCI-2001-20078. For the reasons stated below, I conclude that plaintiff has failed to exhaust his administrative remedies as to his First Amendment claim against defendants. Accordingly, I will grant defendants' motion to dismiss this claim. Because I am granting defendants' motion to dismiss, plaintiff's motion to substitute Sgt. Boyelson's name with the name "Lt. Boisen" will be denied as moot.

FACTS

On July 7, 2001, plaintiff filed inmate complaint #SMCI-2001-20078, in which he states,

At approx. 7 pm my cell was search by C.O. Mueller and another C.O. and approx 15 postcards of mine were seized. I was told by one of the cell searchers that "Sgt. Boylson" told them I could not keep the postcards, that

I could only have up to 5 of my postcards. I said the rule book doesn't say this and these cards were mailed to me.

I want to possess these cards as the pictures thereon are meant to convey a message and are thus protected by the constitutional guarantees of free speech. There is no legitimate penological reason to forbid my possession of these postcards. Thus I seek monetary damages from any parties involved in the denial of these cards.

Ellen Ray, the inmate complaint examiner, acknowledged receipt of plaintiff's inmate complaint on July 9, 2001. On July 26, 2001, Ray recommended that the complaint be dismissed. She explained that

[t]he ICE has reviewed inmate Lindell's confiscated postcards and spoken with Sergeant Boisen. The postcards in question do not have a return address on them, nor do they have a postmark on them. As they do not have initial postage affixed to them, Inmate Lindell will not be allowed to send them out.

As postcards are not authorized property listed in the Level 3 Handbook, it is recommended this complaint be dismissed.

This recommendation was then sent to the appropriate reviewing authority, defendant Peter Huibregtse, who accepted Ray's recommendation and dismissed plaintiff's complaint on July 30, 2001. The dismissal advised plaintiff that "[a] complainant dissatisfied with a decision may, within 10 calendar days after the date of the decision, appeal that decision by filing a written request for review with the Corrections Complaint examiner on form DOC-405 (DOC 310.13, Wis. Adm. Code)."

Four months later, on November 26, 2001, plaintiff appealed defendant Huibregtse's

decision to the corrections complaint examiner, stating:

I reaffirm my complaint in its totality, seeking \$20,000 from all involved in this violation of my [First] Amendment right to free exchange of ideas and seeking an injunction so prisoners may possess up to as many postcards or personal letters as they (we) can fit in a 11"x14" manilla envelope.

The corrections complaint examiner, John Ray, acknowledged receipt of plaintiff's appeal on December 4, 2001. On December 12, 2001, Ray recommended dismissal of plaintiff's appeal because the appeal was not filed within 10 days of Huibregtse's decision. On December 13, 2001, defendant O'Donnell, the representative for the Office of the Secretary, accepted Ray's recommendation and dismissed plaintiff's appeal.

OPINION

The exhaustion provision of the 1996 Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), states 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 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). The court of appeals has held also that “if 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, 196 F.3d 727, 733 (7th Cir. 1999). In order to exhaust administrative remedies, an inmate must follow 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).

Wisconsin inmates must comply with the exhaustion procedures set out in Wis. Admin. Code §§ DOC 310.01-310.19. Under the provisions that were in effect at the time of the incident challenged in this lawsuit, an inmate was to use the appropriate complaint form, “include [only] one issue,” sign the complaint and refrain from using “obscene, profane, abusive or threaten[ing]” language, unless such language was necessary to describe the factual basis of the complaint. Wis. Admin. Code § DOC 310.09(1). Upon receipt of a complaint, the inmate complaint examiner was allowed 5 working days to review and acknowledge the complaint in writing. If the complaint did not meet the standards set out in § DOC 310.09(1), or if the complaint was untimely or legally frivolous, the inmate complaint examiner could reject or dismiss the complaint. Wis. Admin. Code §§ DOC 310.09(3) and 310.11(4). Otherwise, the inmate complaint examiner was to investigate the complaint, using his or her discretion to decide the investigatory method best suited to

determine the facts. Wis. Admin. Code § DOC 310.11(3).

If the inmate complaint examiner rejected the complaint, the inmate was permitted to appeal the rejection to “the appropriate reviewing authority.” Wis. Admin. Code § DOC 310.11(4). Rejected complaints could not be appealed to a corrections complaint examiner. Wis. Admin. Code § DOC 310.13(4).

Complaints that were investigated followed a different course. The inmate complaint examiner could attempt to resolve the matter informally, § DOC 310.11(7), or send a formal written report and recommendation together with the complaint file to the appropriate reviewing authority, §§ DOC 310.11(11) and 310.12(1). The appropriate reviewing authority could dismiss the complaint, with or without modifications, affirm the complaint with or without modifications or return the recommendation to the inmate complaint examiner for further investigation, §§ DOC 310.12(2). If the inmate did not receive a decision from the appropriate reviewing authority within 23 working days after the inmate complaint examiner acknowledged receipt of the complaint, the complaint was considered dismissed and the inmate could appeal immediately to the corrections complaint examiner. Wis. Admin. Code § DOC 310.12(3).

If the inmate was not satisfied with the decision of the appropriate reviewing authority, the inmate could appeal the decision to the corrections complaint examiner within 10 calendar days after the date of the decision. Wis. Admin. Code § DOC 310.13(1). If the

inmate filed an appeal later than 5 calendar days after *receiving* the decision, the corrections complaint examiner could accept the late appeal “if the elapsed time ha[d] not made it difficult or impossible to investigate the claim.” Wis. Admin. Code § DOC 310.13(3). The corrections complaint examiner had 5 working days from the date of receipt of the inmate’s appeal to issue a written receipt to the inmate and the inmate complaint examiner, § DOC 310.13(5), and 35 working days from the date of receipt of the appeal in which to recommend a decision to the Secretary of the Department of Corrections, § 310.13(7). If the corrections complaint examiner failed to make a recommendation with the prescribed time, the appropriate reviewing authority’s decision was considered affirmed. *Id.* Otherwise, the secretary’s decision was final. Wis. Admin. Code § DOC 310.14.

Defendants argue that plaintiff did not exhaust his administrative remedies because his appeal to the corrections complaint examiner was dismissed as untimely. Defendants point out correctly that the failure to properly complete each step in the inmate grievance procedure is equivalent to a failure to exhaust available administrative remedies. *Pozo*, 286 F.3d at 1023 (prisoner who filed timely complaint but not timely appeal failed to exhaust his administrative remedies).

Plaintiff argues that his November 26, 2001 appeal should not have been dismissed as late because he did not receive defendant Huibregtse’s decision until November 26, 2001. Even if this is true, plaintiff ignores the fact that he was on notice that if he did not receive

Huibregtse's decision within 23 working days after the inmate complaint examiner acknowledged receipt of his complaint, he was to consider the complaint dismissed and appeal the matter immediately to the corrections complaint examiner. Wis. Admin. Code § DOC 310.12(3). Plaintiff attempts to argue that he could not comply with § DOC 310.12(3) because he wanted to file an "informed appeal," but this argument is unavailing. There is no exemption in the inmate grievance procedure from the requirements of § DOC 310.12(3) for inmates wishing to file an "informed" appeal. In any event, plaintiff's argument is disingenuous.

If plaintiff was intent on making an informed appeal, it is curious why he overlooked entirely in his appeal any argument aimed at Huibregtse's recommendation that the complaint be dismissed on the ground that plaintiff's postcards did not contain return addresses or postage and that they are not authorized property listed in the Level 3 Handbook. Instead, in plaintiff's own words, his appeal simply reaffirms his original complaint "in its totality."

Alternatively, plaintiff argues that defendants should have accepted his late appeal under Wis. Admin. Code § DOC 310.13(3), which allowed corrections complaint examiners to accept late appeals if the delay had not made it "difficult or impossible to investigate the complaint." However, this is neither the time nor the place for plaintiff to make this argument. If plaintiff believes he was entitled to be excused from his late filing, he should

have explained in his appeal to the corrections complaint examiner why his appeal was late. Plaintiff's failure to offer any explanation for his late filing deprived both the corrections complaint examiner and the secretary of facts that may have altered their decision to dismiss plaintiff's appeal as untimely.

Accordingly, I will grant defendants' motion to dismiss the final remaining claim in this lawsuit on the ground that plaintiff failed to exhaust his administrative remedies with regard to inmate complaint #SMCI-2001-20078. Because I am granting defendants' motion to dismiss, I will deny as moot plaintiff's request to amend his complaint to name Lt. Boisen as a defendant in place of Sgt. Boyelson.

ORDER

IT IS ORDERED that

1. The motion of defendants Ellen Ray, Peter Huibregtse, John Ray, Cindy O'Donnell, C.O. Mueller and Sgt. Boyelson to dismiss plaintiff's First Amendment claim is GRANTED on the ground that plaintiff failed to exhaust his administrative remedies;
2. Plaintiff's motion to amend his complaint to name Lt. Boisen as a defendant in place of defendant Sgt. Boyelson is DENIED as moot.

3. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 27th day of October, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge