

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

JIMMY BRIDGES,

Petitioner,

ORDER

v.

02-C-0300-C

JON E. LITSCHER, Secretary of the Wisconsin Department of Corrections; CINDY O'DONNELL, Deputy Secretary of the D.O.C.; JEFFREY P. ENDICOTT, Warden of Redgranite Correctional Institution; BRUCE THOMURE, Captain at Columbia Correctional Institution; COLLEEN JAMES, Education Director of C.C.I.; and WILLIAM NOLAND, I.C.E. of C.C.I., are sued in their official and individual capacities,

Respondents.

This is a proposed civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner Jimmy Bridges, who is an inmate at the Supermax Correctional Institution in Boscobel, Wisconsin, alleges that while housed at the Columbia Correctional Institution he was denied due process in a disciplinary hearing because the hearing committee lacked impartiality and relied on insufficient evidence.

Although petitioner has no means with which to pay the initial partial payment, he is permitted to bring this action under 28 U.S.C. § 1915(b)(4).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See 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 on three or more previous occasions had a suit 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 seeks money damages from a defendant who is immune from such relief.

Because petitioner failed to exhaust his administrative remedies in a timely fashion, I will deny his request for leave to proceed in forma pauperis.

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

Petitioner Jimmy Bridges is an inmate at the Supermax Correctional Institution in Boscobel, Wisconsin. Respondent Jon E. Litscher is secretary and respondent Cindy O'Donnell is deputy secretary of the Department of Corrections. At the Columbia Correctional Institution, respondent Jeffrey P. Endicott is warden, respondent Bruce Thomure is a captain, respondent Colleen James is education director and respondent

William Noland is an inmate complaint examiner. At all times relevant to this complaint, petitioner was housed at Columbia.

On November 29, 1998, respondent Thomure placed petitioner in temporary lock-up because petitioner allegedly committed a battery against another inmate and staff. While serving petitioner with his temporary lock-up form, respondent Thomure stated, “you think you’re going to go around beating up on our staff” or something to that effect. Petitioner refused to comment or sign the form. Respondent Thomure wrote an incident report fabricating false statements against petitioner intentionally. The report recommended that petitioner be confined administratively based on threats that respondent Thomure alleged petitioner had made when Thomure served him his lock-up form.

On December 18, 1998, respondent Thomure presided over petitioner’s disciplinary hearing. Respondent Thomure recommended that action be taken against petitioner. Respondent Thomure wrote the report in retaliation for the alleged battery. Petitioner lost educational school employment and good time credits, which extended his mandatory release date by 194 days, and was placed in administrative confinement.

On November 29, 1998, petitioner was referred to the Columbia County authorities for criminal prosecution on the alleged battery charge.

On November 30, 1998, petitioner received a major conduct report charging him with battery and disobeying orders.

On December 18, 1998, petitioner received a disciplinary hearing before respondents Thomure and James. Petitioner objected to respondent Thomure sitting in judgment of the proceedings because he had been the officer who placed petitioner in temporary lock-up. Respondent Thomure “refused without explanation.” The hearing continued, petitioner denied the charges and submitted a two-page statement. Respondents Thomure and James presented a photograph of officer Coray that showed Coray’s left eye injury that was grossly inconsistent with the staff statements in the conduct report. Petitioner objected to the photograph because it did not coincide with the statements in the conduct report. Petitioner also objected to the charge of disobeying orders, pointing out that this charge derived from a fight between petitioner and another inmate (Dale James) and that neither he nor the other inmate was charged for fighting.

On December 18, 1998, respondents Thomure and James found petitioner guilty. That afternoon, the Columbia County District Attorney charged petitioner with two counts of felony battery.

On December 25, 1998, petitioner filed an appeal with respondent Endicott challenging the hearing committee’s impartiality and the sufficiency of the evidence used to find him guilty. Petitioner questioned the credibility of the conduct report and the fact that he was charged with battery as opposed to fighting. On January 5, 1999, respondent Endicott affirmed the committee’s actions without an adequate statement of reasons.

On December 29, 1998, respondents Thomure and James gave petitioner a written disposition that stated, "Guilty as charged based on staff statements in the Conduct Report." The conduct report did not contained any staff statements that petitioner caused officer Coray's eye injury and it did not describe any injuries to staff or the other inmate. The disposition contained fabricated statements that petitioner admitted having a physical altercation with officer Coray and causing Coray's eye injury. Petitioner received one year in punitive segregation, eight days' adjustment segregation, restitution, 30 days' loss of recreation and a 10-day extension of his mandatory release date.

On January 10, 1999, petitioner filed an inmate complaint reiterating his contentions as well as pointing out that the committee fabricated false statements against him and found him guilty on the battery charge with no evidence to support that charge.

On January 12, 1999, respondent Noland, inmate complaint examiner, held that petitioner had exhausted his administrative remedies and that he would review the hearing record for procedural errors. Respondent Noland interviewed Ms. Lipinski and respondent Thomure. Respondent Noland concluded that (1) respondent Thomure, the hearing officer, was not directly involved in the incident; (2) it was a harmless error that Thomure signed the wrong area of hearing decision; and (3) it was immaterial that the photographs were not listed in the "reason for decision" because they had been viewed by petitioner and the committee during the hearing. Respondent Noland recommended that petitioner's

complaint be dismissed with the following modifications: changing the hearing record to list the photographs that had been viewed at the hearing as physical evidence and requiring the hearing committee to sign in the appropriate area on the form.

On January 14, 1999, the inmate complaint reviewer (allegedly respondent Endicott) affirmed the respondent Noland's dismissal with modifications. The reviewer's decision stated that petitioner had 10 days to appeal.

In March 1999, petitioner was transferred from the Columbia segregation unit to the Racine segregation unit. While at Racine, petitioner's trial counsel gave him an untitled document, No. 415239, written by respondent Thomure, an incident report, No. 304482, written by officer Coray and a medical report concerning officer Coray's injuries. Shortly thereafter, petitioner was transferred back to the Columbia segregation unit.

On October 28, 1999, petitioner filed an appeal with the Secretary of the Department of Corrections based on this newly discovered material in which he reiterated his previous contentions.

On November 1, 1999, respondent O'Donnell dismissed petitioner's appeal to the Secretary as untimely because it had not been filed within 10 days of the reviewing authority's decision even though Wis. Admin. Code § DOC 310.13(3) provides that the complaint examiner may accept for review an appeal filed later than 5 calendar days after receipt of the decision if the elapsed time has not made it difficult or impossible to

investigate the complaint.

On November 4, 1999, petitioner wrote to respondent Litscher directly, challenging respondent O'Donnell's decision to dismiss his appeal as untimely and reiterating his previous contentions.

On November 11, 1999, respondent O'Donnell replied to petitioner's letter to respondent Litscher, stating that "I received your letter regarding my decision on your inmate complaint appeal #CCI-1999-26660. You have exhausted the appeal process through the Inmate Complaint System. If you are still interested in pursuing this issue, you may seek a legal remedy outside the Inmate Complaint Review System."

DISCUSSION

Petitioner has failed to exhaust his administrative remedies in a timely fashion. Although respondent O'Donnell stated correctly in her second response to petitioner (on November 11, 1999) that he had "exhausted the appeal process," her letter did not reiterate the fact that he failed to do so in a timely manner. Nevertheless, in respondent O'Donnell's earlier response (on November 1, 1999), she informed petitioner that she rejected his appeal as untimely. "[U]nless the prisoner completes the administrative process by following the rules the state has established for that process, exhaustion has not occurred. Any other approach would allow a prisoner to 'exhaust' state remedies by spurning them." Pozo v.

McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002); see also Porter v. Nussle, 534 U.S. 516 (2002). “To exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison’s administrative rules require.” Id. at 1025.

On January 14, 1999, the inmate complaint reviewer (allegedly respondent Endicott) affirmed the inmate complaint examiner’s dismissal with modifications. The reviewer stated explicitly that petitioner had 10 days to appeal the decision. Petitioner did not file an appeal with the Secretary until October 28, 1999, well beyond the 10-day time limit. Petitioner recognizes that his appeal to the Secretary was untimely, but alleges that it should have been accepted pursuant to Wis. Admin. Code. § DOC 310.13(3). However, § 310.13(3) states that the “[corrections complaint examiner] may accept for review an appeal filed later than 5 calendar days after receipt of the decision if the elapsed time has made it difficult or impossible to investigate the complaint. The operative word in the code is “may,” which means that the corrections complaint examiner has discretion to accept or reject an appeal that has not been filed within the required timeframe. See id. (“If the existence of this [discretionary] power [under § 310.13(3)] means that prisoners need not file timely complaints and appeals, then the incentive that § 1997e(a) provides for prisoners to use the state process will disappear.”). In this case, respondent O’Donnell exercised her discretion and rejected petitioner’s appeal as untimely. Interestingly, even though petitioner states that he discovered new evidence in March 1999 (that apparently prompted him to finish the

appeal process), he did not file immediately but rather waited seven months to do so.

Typically, failure to exhaust administrative remedies is an affirmative defense. See Massey v. Helman, 196 F.3d 727, 735 (7th Cir. 1999). However, “when the existence of a valid affirmative defense is so plain from the fact of the complaint that the suit can be regarded as frivolous, the district judge need not wait for an answer before dismissing the suit.” Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002). In this case, it is plain from petitioner’s complaint that his lawsuit is frivolous. Because petitioner failed to exhaust his administrative remedies in a timely manner, I will deny his request for leave to proceed in forma pauperis. Because the Secretary has already rejected petitioner’s appeal as untimely, this denial of leave to proceed will be with prejudice because this is a defect that cannot be cured.

ORDER

IT IS ORDERED that

1. Petitioner Jimmy Bridges’s request for leave to proceed in forma pauperis is DENIED as legally frivolous;
2. The unpaid balance of petitioner’s filing fee is \$150.00; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2) when the funds become available;
3. A strike will be issued against petitioner pursuant to 28 U. S.C. § 1915(g); and

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

Entered this 14th day of June, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge