

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

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ALGEN M. LAMON,

Plaintiff,

v.

MEMORANDUM AND ORDER  
05-C-350-S

SGT. BELONGY,

Defendant.

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Plaintiff Algen Lamon was allowed to proceed on his Eighth Amendment claims against defendant Sgt. Belongy. Defendant moved to dismiss plaintiff's complaint for failure to exhaust administrative remedies. This motion has been fully briefed and is ready for decision.

FACTS

Plaintiff was incarcerated at the Wisconsin Secure Program Facility (WSPF) on November 13, 2004. On November 14, 2004 plaintiff filed an inmate complaint (WSPF-2004-35970) alleging that Sgt. Belongy had used excessive force on him at the New Lisbon Correctional Institution (NLCI).

The inmate complaint examiner recommended that his complaint be dismissed with modification. Catherine J. Farrey, the warden at NLCI, accepted the complaint examiner's recommendation on January 19, 2005. Plaintiff states in his affidavit that he never received this decision and was, therefore, unable to appeal it.

MEMORANDUM

Defendant moves to dismiss plaintiff's complaint for failure to exhaust his administrative remedies. Pursuant to 42 U.S.C. § 1997e(a), no action shall be brought with respect to prison conditions by a prisoner confined in any jail, prison or other correctional facility until available administrative remedies are exhausted. Prisoners must file their complaints and appeals in the place and at the time the prison's administrative rules require. Pozo v. McCaughtry, 286 F. 3d 1022, 1025 (7<sup>th</sup> Cir. 2002)

In Perez v. Wisconsin Department of Corrections, 182 F.3d 532, 535 (7<sup>th</sup> Cir. 1999), the Court held as follows:

...a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits, even if the prisoner exhausts intra-prison remedies before judgment.

Petitioner argues that he could not exhaust his administrative remedies because he did not receive a copy of the warden's dismissal of his complaint. The regulations provide that an inmate can appeal to the Corrections Complaint examiner where he does not receive a decision from the warden within thirty days. See Wis. Admin. Code § DOC 310.12(3). Accordingly, plaintiff had available administrative remedies which he did not pursue.

The Court has reviewed the record and concludes plaintiff failed to exhaust his administrative remedies as required by the prison's administrative rules before filing this action.

Accordingly, Perez requires dismissal of this action without prejudice.

Plaintiff is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his claim must be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7<sup>th</sup> Cir. 1997).

ORDER

IT IS ORDERED that the defendant's motion to dismiss plaintiff's complaint for failure to exhaust his administrative remedies is GRANTED.

IT IS FURTHER ORDERED that judgment be entered DISMISSING plaintiff's complaint and all claims contained therein without prejudice for failure to exhaust his administrative remedies.

Entered this 16<sup>th</sup> day of August, 2005.

BY THE COURT:

S/

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JOHN C. SHABAZ  
District Judge