IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JEFFREY D. BALL,

Petitioner, ORDER

v. 04-C-205-C

GARY R. McCAUGHTRY;
SGT. McCARTHY;
C.O. YUNTO; CAPT.
STEVE SHUELER and
MARC W. CLEMENTS,

Respondents.

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This is a proposed civil action for injunctive relief brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Waupun Correctional Institution in Waupun, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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 had three or more lawsuits or appeals 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 asks for money damages from a defendant who by law cannot be sued for money damages.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner is a prisoner at the Waupun Correctional Institution. Respondent Gary McCaughtry is the warden at Waupun. Respondents Sergeant McCarthy and C.O. Yunto are corrections officials in charge of the institution's property room. Respondent Capt. Steve Shueler is a corrections official at Waupun and respondent Marc W. Clements is the security director.

Sometime prior to November 20, 2003, petitioner was placed in program segregation. On November 20, 2003, he filled out an "Interview/Information Request" form for someone in the property room saying,

> I need to know if the following things are in my g.p. property 1 "g.i.c. tip journal" from Lakewood Co. and how many and how many! and how many photos! do I have? and any other gay material" I have in my g.p. property! I

would like it! as soon as you can!

In response, respondent Yunto wrote, "I don't have the time to look for this stuff." Petitioner then filed inmate complaint WCI-2003-38448, complaining that respondent McCarthy was denying him his gay materials. On November 21, 2003, the institution complaint examiner recommended rejection of petitioner's complaint saying,

> Ball's complaint states that the date of incident is 4/24/03 but he does not state what it was that was denied other than "gay material." The ICE also reviewed Ball's property file and found a DOC 237 form, dated 3/30/03 that had several items listed as contraband, but all the items were destroyed on 3/31/03 and signed by Ball and Officer Yunto. It would only be speculation but if the item Ball is referring to is on that list it would be beyond the time limits to file a complaint pursuant to DOC 310.11(5)(d), the "inmate submitted the complaint beyond 14 calendar days from the date of the occurrence giving rise to the complaint and provides no good cause for the ICE to extend the time lines." There is not enough information to address the issue without this speculation so it is recommended that this complaint be rejected pursuant to DOC 310.11(5)(c), Wis. Adm. Code, because the "inmate does not allege sufficient facts upon which redress may be made." No further action is recommended through the ICRS.

Petitioner's complaint was rejected on December 9, 2003.

The complaint petitioner filed on November 21, 2003 "had nothing to do with [petitioner's] property that was . . . destroyed on 3-31-03." It had to do with "the remainder of [petitioner's] 'gay material' . . . in [his] g.p. property. . ," such as "books, files and paperwork." According to the rejection decision, petitioner had 10 calendar days in which to appeal the rejection to the warden on form DOC 2182, "Request for Review of Rejected

Complaint."

OPINION

Petitioner does not allege that he filed an appeal to the warden from the rejection of his complaint, but even if he had, I would have to conclude that he has not exhausted his administrative remedies on his claim.

The Prison Litigation Reform Act requires prisoners to exhaust their administrative remedies before filing an action in federal court. 42 U.S.C. § 1997e(a). To exhaust administrative remedies, a prisoner must observe the procedural requirements of the system. Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002); Strong v. David, 297 F.3d 646 (7th Cir. 2002). "[A] prisoner who does not properly take each step within the administrative process has failed to exhaust state remedies, and thus is foreclosed by § 1997e(a) from litigating. Failure to do what the state requires bars, and does not just postpone, suit under § 1983." Pozo, at 1024.

Although failure to exhaust administrative remedies is an affirmative defense, the Court of Appeals for the Seventh Circuit has held that courts have discretion to raise affirmative defenses on their own "if it is so plain from the language of the complaint and other documents in the district court's file that [the affirmative defense] renders the suit frivolous." Gleash v. Yuswak, 308 F.3d 758, 760-61 (7th Cir. 2002). In Walker v.

Thompson, 288 F.3d 1005, 1009-10 (7th Cir. 2002), the court held that a court may dismiss a claim if it is plain from the face of the complaint that the plaintiff failed to exhaust his administrative remedies.

Grievances must contain the sort of information that the administrative system requires. Strong v. David, 297 F.3d at 649. In this case, the information petitioner provided to the inmate complaint examiner was so vague that the examiner could not determine what petitioner wanted. In rejecting the grievance, he ventured a guess that possibly petitioner was looking for papers that had been destroyed in March, and that if this is what petitioner was complaining about, his complaint was untimely. He went on to say, however, that petitioner had not provided enough information to address the issue without speculation. It was his recommendation that the complaint be rejected for petitioner's failure to allege sufficient facts as required by Wis. Admin. Code § DOC 310.11(5)(c) to allow the examiner to investigate his complaint and it was this recommendation that was accepted.

It appears that all petitioner had to do to get the papers he wanted from the property room was to identify them in more specific terms than his "gay material." Petitioner refused to be more specific. Indeed, even in his complaint in this court, petitioner does not explain what "gay material" he is talking about except to describe it as "books, files and paperwork." Instead, he takes offense at the examiner's reference to the papers that had been destroyed

in March, contending that the examiner speculated about the March papers so that he could dismiss the grievance. Petitioner ignores the fact that his complaint was not rejected as untimely. It was rejected for lack of specificity.

In Ford v. Johnson, No. 01-3709, slip op. at 2-3 (7th Cir. Mar. 24, 2004), the Court of Appeals for the Seventh Circuit held that "just as courts may dismiss suits for failure to cooperate, so administrative bodies may dismiss grievances for lack of cooperation; in either case this procedural default blocks later attempts to litigate the merits." Petitioner's failure to provide the inmate complaint examiner with sufficient information to enable him to investigate petitioner's complaint reveals his lack of cooperation in the administrative grievance process. Because petitioner did not file an inmate complaint containing the modest specificity that the Wisconsin administrative grievance procedure requires, he is barred from raising his claim in this court.

There is a remote chance that petitioner did appeal the dismissal of his grievance to the warden and in the appeal, provided sufficient information to investigate his complaint. If so, and if the warden's final decision was a decision on the *merits* of petitioner's complaint and not simply an agreement that petitioner's complaint lacked sufficient facts to allow an investigation into his complaint, then petitioner may avoid dismissal of this action for his failure to prosecute. Therefore, I will give petitioner until May 20, 2004, in which to make a showing that he made a clearer statement of his grievance in an appeal to the warden and

that the warden responded on the merits to petitioner's complaint. If petitioner does not show that his claims in this lawsuit were considered administratively on their merits, this case will be dismissed.

ORDER

IT IS ORDERED that petitioner Jeffrey D. Ball may have until May 20, 2004, in which to make a showing that he made a clearer statement of his grievance in an appeal to the warden and that the warden responded on the merits to petitioner's complaint. If, by May 20, 2004, petitioner fails to show that his claim in this lawsuit was considered administratively on its merits, the clerk of court is directed to enter judgment dismissing this case for petitioner's failure to exhaust his administrative remedies.

Entered this 6th day of May, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge