

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

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CEASAR R. BANKS,

Petitioner,

v.

B. McCREEDY, MICHAEL DITTMAN,  
JANE GAMBLE and HAYLEY HERMANN,

Respondents.  
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ORDER

04-C-737-C

In an order dated October 6, 2004, I gave petitioner Ceasar Banks until October 27, 2004, in which to pay \$5.75 as an initial partial payment of the \$150 fee for filing his case. Now petitioner has filed a document titled, "Plaintiff's Request to Waive All Filing Fees." In this document, plaintiff states that he recently filed a petition in the Circuit Court for Waukesha County and that he was ordered to pay \$153 to that court. He states that any money deposited into his prison account is being taken to make payments toward that fee. Given this circumstance, petitioner contends, this court should waive his payment of an initial partial payment in this case pursuant to 28 U.S.C. § 1915(b)(4). Without additional facts, I cannot agree that petitioner is correct.

28 U.S.C. § 1915(b)(4) provides:

In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

In Newlin v. Helman, 123 F.3d 429, 435 (7th Cir. 1977), rev'd on other grounds by Lee v. Clinton, 209 F.3d 1025 (7th Cir. 2000) and Walker v. O'Brien, 216 F.3d 626 (7th Cir. 2000), the Court of Appeals for the Seventh Circuit held that

Section 1915(b)(4) comes into play only when “the prisoner has no assets *and no means* by which to pay the initial partial filing fee.” A prisoner with periodic income has “means” even when he lacks “assets.”

(Emphasis in original.) According to Newlin, when a prisoner receives periodic income, deciding how much the prisoner owes and how it will be collected is “determined entirely by the statute and is outside the prisoner’s and the prison’s control.” Id. at 436. Section 1915(b)(1) requires that an initial partial payment is to be collected when funds “exist.”

Petitioner has means. His trust fund account statement shows that he is regularly receiving a small paycheck. Under the law established in Newlin, funds “exist” in his account. The difficulty in making the payment stems solely from the decision of prison officials to give priority to petitioner’s state court filing fee.

The Court of Appeals for the Seventh Circuit has not ruled definitively on the question of what priority if any prison officials must give to a federal court order directing

the payment of an initial partial payment under the 1996 Prison Litigation Reform Act. However, Judge Easterbrook suggested in dicta in Newlin that prison officials are required by the statute to give federal court filing fees priority. Id. at 435-36 (“assessment should have come off the top of the next deposit of prison wages, followed by 20 percent of each succeeding month’s income until \$150 has been paid”). I conclude that I cannot decide the matter definitively without allowing the state an opportunity to address the issue.

The office of the Attorney General for the State of Wisconsin has the ability to investigate whether petitioner is mistaken about his understanding that prison officials will not send this court the initial partial payment he has been assessed. It also can determine whether a prison financial officer made a mistake in handling petitioner’s request for payment of the initial partial payment or, if no mistake was made, what authority prison officials at the Green Bay Correctional Institution are relying upon to pay petitioner’s state court filing fee over his federal court filing fee. Therefore, I am sending a copy of this order to Assistant Attorney General Charles Hoornstra, and requesting that he look into the matter and advise this court, in writing, no later than November 5, 2004, of the status of petitioner’s request for withdrawal of the initial partial payment in this case. If Assistant Attorney General Hoornstra determines that a state statute, a state court order or prison policy is guiding the decision to give priority to petitioner’s state court obligation to the exclusion of his federal court obligation, then the Attorney General is requested to advise the

court whether, in the state's opinion, the supremacy clause of the United States Constitution would require that the state's statute, order or policy give way to the requirements of the 1996 Prison Litigation Reform Act.

#### ORDER

IT IS ORDERED that petitioner may have an enlargement of time to November 26, 2004, in which to submit a check or money order made payable to the clerk of court in the amount of \$5.75.

Further, IT IS REQUESTED that no later than November 5, 2004, the Office of the Attorney General is to advise this court of the status of petitioner's request for withdrawal of the initial partial payment in this case. If the Attorney General determines that a state statute, a state court order or prison policy is guiding the decision to give priority to petitioner's state court obligation to the exclusion of his federal court obligation, then the Attorney General is requested to advise this court whether, in the state's opinion, the supremacy clause would require that the state's statute, order or policy give way to the requirements of the 1996 Prison Litigation Reform Act.

Although a reply is not required, if petitioner wishes to respond to the Attorney

General's submission, he may have until November 15, 2004, in which to do so.

Entered this 25th day of October, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge