IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NATHANIEL ALLEN LINDELL,

Plaintiff,

v.

CINDY O'DONNELL, RICK RAEMISCH, SANDRA HAUTAMAKI, JOHN RAY, STEVEN CASPERSON, JEFF HAEN, STEVEN SPANBAUER, KATHLEEN BELLAIRE, CAPT. KURT LINJER, C.O. DEAVER, ELLEN RAY, CAPT. GILBERG, PETER HUIBREGTSE, GERALD BERGE, RICHARD SCHNEITER, SGT. S. GRONDIN, BRIAN KOOL, C.O. D. ESSER, C.O. A. JONES, GARY BOUGHTON, JOHN SHARPE, KELLY TRUMM, C.O. JOHNSON, TIMOTHY HAINES, LT. J. GRONDIN, C.O. BELL, SGT. BARTELS, LT. BRUDOS, CPT. JULIE BIGGAR, C.O. SCHNEIDER, and C.O. KARTMAN[1],

Defendants.

OPINION AND ORDER

05-C-04-C

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This is a civil action for monetary, declaratory and injunctive relief, brought pursuant

[1] It has become clear from defendants' submissions that the surnames of defendants Daniel Kartman and Todd Brudos were misspelled in the original caption for this case. The caption has been corrected accordingly.

to 42 U.S.C. § 1983. Plaintiff Nathaniel Allen Lindell, a prisoner at the Wisconsin Secure Program Facility, maintains that defendants violated his right to free speech under the First Amendment, used excessive force against him in violation of the Eighth Amendment and blocked his access to courts in violation of the Fourteenth Amendment. Originally, plaintiff filed this case in the Eastern District of Wisconsin. Following screening under 28 U.S.C. § 1915A, the court permitted plaintiff to proceed on each of his claims and later transferred to this court on January 4, 2005.

Now before the court are defendants' motion for summary judgment, plaintiff's motion objecting to the court's consideration of additional evidence regarding exhaustion of administrative remedies and his renewed motion for Rule 11 sanctions. I conclude that defendants are entitled to summary judgment on plaintiff's claims that defendants violated his First Amendment rights when they denied him postage stamps obtained from sources outside the prison, persisted in opening inmate mail with equipment that occasionally cut the mail in half, refused to post letters plaintiff wrote on October 1, 2001, October 20, 2003, August 28, 2003, December 2, 2003, and a letter submitted on his behalf on March 14, 2004, and enforced prison policies prohibiting prisoners from receiving used or hardcover books, mailing pictures to other inmates and donating written materials to the prison library. Defendants will be denied summary judgment on plaintiff's claims that defendants violated his First Amendment rights by enforcing prison policies prohibiting

prisoners from possessing magazines with torn covers and possessing copies of material from inmates' personal web sites.

With respect to plaintiff's retaliation claims, I will grant defendants summary judgment with respect to plaintiff's claims that defendants Sandra Grondin, David Deaver Andy Jones, Dane Esser, Gerald Berge, Gary Boughton and John Sharpe violated the First Amendment by issuing him false conduct reports in retaliation for his refusal to consent to destruction of his confiscated personal property, composition of a letter criticizing prison staff, and threats to file grievances. Furthermore, I will grant defendants' motion for summary judgment on plaintiff's claim that defendant Casperson blocked his access to the court by failing to issue a response to his administrative appeal. Because material facts are in dispute, I will deny defendants' motion with respect to plaintiff's claim that defendant Esser used excessive force against plaintiff in violation of the Eighth Amendment.

Finally, because the supplemental materials submitted by defendants had no adverse impact on plaintiff's claims, I will deny plaintiff's motion objecting to consideration of additional evidence regarding exhaustion of administrative remedies as moot. Also, I will deny plaintiff's renewed motion for Rule 11 sanctions.

From the parties' proposed findings of fact and the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Nathaniel Allen Lindell is an American citizen confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin.

Defendant Gerald Berge is the former warden of the Wisconsin Secure Program Facility in Boscobel, Wisconsin. As a warden for over thirteen years, Berge was responsible for the overall administration and operation of the institutions he oversaw and was charged with implementing all Department of Corrections policies, directives and legislative and judicial mandates. Berge is familiar with the security policies of the Wisconsin Secure Program Facility and the general operation of the institution.

Defendants Dane Esser, Andrew Jones, Sandra Grondin, Christian Bell, Ricky Bartels, Richard Schneider, Leonard Johnson and David Deaver are employed as correctional officers at the Wisconsin Secure Program Facility. Defendants Esser, Jones, Bell, Bartels, Schneider, Johnson and Deaver are responsible for supporting unit staff, maintaining institution security and performing general tasks within the housing units and lobby areas. Defendant Grondin works in the mailroom processing the prison's mail.

Defendant Daniel Kartman is employed by the Department of Corrections as a correctional sergeant. He is responsible for the general supervision of inmates and for monitoring housing units and the mail lobby.

Defendant Jeff Haen is employed by the Department of Corrections as a Psychiatric Care Technician at the Wisconsin Resource Center in Winnebago, Wisconsin. His responsibilities include record keeping, observing patients and documenting their behaviors, keeping the program in compliance with required monitoring procedures, and maintaining the security and cleanliness of the units to which he is assigned.

Defendant John Sharpe is currently employed by the Department of Corrections as a "Supervising Officer 2." From December 3, 2000 until July 20, 2002, defendant Sharpe was a Corrections Unit Supervisor. In that role he was responsible for the safety, security, and general living conditions of all inmates assigned to his unit and for the development, implementation and monitoring of institution goals, policies and procedures.

Defendant Timothy Gilberg is employed by the Department of Corrections as a "Supervising Officer 2." His responsibilities include providing supervision to correctional officers and sergeants and maintaining the security, custody and control of inmates at the Wisconsin Secure Program Facility.

Defendants Brian Kool and Timothy Haines are employed by the Department of Corrections as Corrections Unit Supervisors. They are responsible for the safety, security, and general living conditions of all inmates assigned to their units and for the development, implementation and monitoring of institution goals, policies and procedures. They also supervise unit staff.

Defendant Gary Boughton is employed by the Department of Corrections as the Security Director of the Wisconsin Secure Program Facility. He is responsible for the development, implementation and monitoring of overall institution goals, policies and procedures. He is responsible also for the security of the institution, including central control, the armory, towers, perimeter and program areas and for the security of mail and property.

Defendant Kurt Linjer has been employed by the state of Wisconsin since June 25, 1990. He has been employed at the Wisconsin Secure Program Facility since November 2000.

Defendants James Grondin and Todd Brudos are employed by the Department of Corrections and have the title "Supervising Officer 1." Defendant Julie Biggar was previously employed by the Department of Corrections as a "Supervising Officer 1" at the Wisconsin Secure Program Facility. The responsibilities of these defendants have included maintaining the security, custody and control of inmates at the Wisconsin Secure Program Facility and providing supervision to correctional officers and sergeants.

Defendant Peter Huibregtse is employed by the Department of Corrections as Deputy Warden of the Wisconsin Secure Program Facility.

Defendant Steven Casperson has been employed by the Department of Corrections as the Administrator of the Division of Adult Institutions since July 1, 2001. His

responsibilities include overseeing all minimum, medium, and maximum security adult institutions in the State of Wisconsin. He is familiar with the Internal Management Procedures of the Department of Corrections.

Defendant Cindy O'Donnell is the former Department of Corrections deputy secretary. Her successor is defendant Rick Raemisch.

The parties have not identified the job of defendants Sandra Hautamaki, John Ray, Steven Spanbauer, Kathleen Bellaire, Ellen Ray and Kelly Trumm. However, it is clear from the parties' undisputed descriptions of the events described below that at all relevant times these defendants were all employees of the Department of Corrections and were responsible for processing inmate complaints.

B. First Amendment Claims

1. Denial of postage

The Wisconsin Resource Center and the Wisconsin Secure Program Facility require inmates to purchase postage stamps directly from the prison canteen. Inmates are not permitted to obtain stamps from other sources because stamps may contain chemical contraband such as PCP, angel dust and other drugs. Defendant Berge, former warden of the Wisconsin Secure Program Facility, approved the policy that prohibits inmates from receiving stamps from sources other than the prison canteen. In addition to any stamps an

inmate may purchase himself, the prison provides all inmates with one free stamp and sheet of paper each week.

On June 13, 2002, while plaintiff was incarcerated at the Wisconsin Resource Center, a family member sent plaintiff ten stamps. The stamps were considered contraband and were confiscated by defendant Haen, who issued plaintiff a Notice of Non-Delivery of Mail. Plaintiff filed an inmate complaint challenging Haen's decision. His complaint was denied and the denial was affirmed by defendants Spanbauer, Bellaire, John Ray, and O'Donnell.

On March 4, 2002, while plaintiff was incarcerated at the Wisconsin Secure Program Facility, a friend sent plaintiff two stamps. The stamps were considered contraband and were confiscated by defendant Sandra Grondin. Plaintiff appealed the non-delivery of his stamps to defendant Berge. On March 12, 2002, defendant Berge denied plaintiff's appeal, stating that plaintiff's family members or friends could deposit money in plaintiff's prison account. After repaying all his debts, plaintiff could use any money remaining in his account to purchase additional stamps from the canteen.

On April 17, 2002, plaintiff submitted an inmate complaint, challenging the denial of the stamps mailed to him on March 4, 2002. Prison staff refused to process the complaint.

On February 18, 2004, plaintiff asked defendant Kool to permit plaintiff's uncle to send postage to the Wisconsin Secure Program Facility to enable plaintiff to mail eighty

pages of legal paperwork. Defendant Kool denied plaintiff's request.

Plaintiff filed an inmate complaint challenging defendant Kool's decision. Defendant Ellen Ray recommended dismissal of the complaint. Defendant Huibregtse accepted the recommendation and dismissed the complaint. Plaintiff appealed to defendants John Ray and O'Donnell. On April 2, 2004, defendant O'Donnell denied plaintiff's final appeal. Plaintiff has been indigent since February 2001. He is unable to purchase stamps from his own funds. In addition, plaintiff owes $6,000 in legal loans and filing fees. Any money he receives is deducted from his prison account to pay his debts. Plaintiff's family and friends do not send him money.

The parties agree that once stamps are affixed to envelopes, there is less risk that the stamps can be used to transmit dangerous chemicals. Plaintiff believes that defendants could place stamps on outgoing mail for him or replace confiscated stamps with envelopes embossed with postage in an amount equivalent to the value of the confiscated stamps.

2. Interference with outgoing mail

Each night, Wisconsin Secure Program Facility staff collect from inmates all outgoing non-legal mail and review it for compliance with institutional procedures and policies. Incoming mail other than legal mail may be read to insure that it contains no harmful material, escape plans or gang-related content. Mail that complies with institution policy

is forwarded to its intended recipient.

a. October 4, 2001 letter to Jeff Guite

On October 4, 2001, defendant Linjer reviewed an outgoing letter addressed to plaintiff's uncle, Jeff Guite. In the letter, plaintiff wrote:

> Another person who may call is Patricia Rhodes. I used to go to church with her and her son was recently killed by some white punks, anyway, don't be surprised if she calls. She's just a friend, along with her husband. Her son's killers got a care package waiting for them when they arrive.

Defendant Linjer turned the letter over to local law enforcement officials.

On September 12, 2002, plaintiff appealed the non-delivery of his letter to defendant Berge, claiming that he had not received the non-delivery of mail notice dated October 10, 2001. In his appeal to defendant Berge, plaintiff alleged that he first became aware of the non-delivery of his letter on September 12, 2002. At the same time plaintiff filed an appeal of the non-delivery to the warden, plaintiff attempted to file an inmate complaint regarding the non-delivery of his letter. On September 17, 2002, defendant Ellen Ray rejected plaintiff's inmate complaint, stating that it was untimely.

b. October 20, 2003, letter to Glynda Soetebien

While scanning an outgoing letter from plaintiff to his friend, Glynda Soeterbien,

defendant Bell read the statement: "I'll draft some items, send 'em to you for your critique and you can sell 'em and give me a cut if they move." The letter also contained the following sentence, "And I understand that Judge Crabb has upheld the censorship of these items to the plaintiff and prisoners. I, however, am not a prisoner." On October 21, 2003, defendant Bell issued plaintiff a conduct report, numbered 1501173, charging him with a violation of Wis. Admin. Code § DOC 303.32, "enterprises and fraud" and Wis. Admin. Code § DOC 303.27, "lying." Defendant Bartels affirmed the conduct report.

A disciplinary hearing was held on November 20, 2003. Defendant James Grondin found plaintiff guilty of the enterprise charge. Plaintiff was given thirty days of room confinement. On appeal to the warden, the disciplinary decision was found to be unsubstantiated and was dismissed. However, the original copy of the letter was not returned to plaintiff.

c. August 28, 2003, letter to U.S. Postal Inspector

Under the Wisconsin Administrative Code, prison staff cannot open or read mail sent by an inmate to an investigative agency of the federal government unless the security director has reason to believe the mail contains contraband. Sealed letters to investigative agencies must clearly indicate the intended recipient on the outside of the mailing envelope or the mail will be opened and read by mail room staff.

On August 28, 2003, plaintiff tried to mail a sealed envelope addressed to a United States Postal Inspector in Chicago, Illinois. Defendant Biggar searched the internet to confirm the address and informed staff that he had located two Chicago addresses for the postal inspector; neither matched the address plaintiff had written on his envelope. Defendant Biggar instructed defendant Kartman to speak with plaintiff and ask him to explain where he had obtained the address listed on the envelope. Plaintiff did not provide defendant Kartman with the requested information.

d. December 2, 2003, letter to U.S. Postal Inspector

On December 2, 2003, defendant Schneider refused to mail a letter from plaintiff addressed to the United States Postal Inspector. Defendant Schneider reported to plaintiff that defendant Brudos said the envelope would not be mailed because it was sealed. Plaintiff explained to defendants Brudos and Schneider that Supervising Officer Biggar had approved the address on plaintiff's envelope as one to which sealed mail could be sent. On December 3, 2003, plaintiff again tried to mail the sealed letter. Defendant Bartels refused to mail it because it was sealed. On December 8, 2003, plaintiff filed an inmate complaint, numbered WSPF-2003-40086, challenging the decision not to mail his letter. On December 11, 2003, plaintiff's complaint was affirmed and the letter was mailed.

e. March 14, 2004, inmate Bryce Garrett's letter to plaintiff's uncle

On February 28, 2004, Wisconsin Secure Program Facility inmate Bryce Garrett submitted a disbursement request for postage to mail an envelope to plaintiff's uncle, Jeff Guite. The envelope contained eighty pages of plaintiff's legal paperwork and a note from Garrett to Guite stating that the enclosed papers belonged to plaintiff. On March 4, 2004, defendant Gilberg issued Garrett a notice of non-delivery of mail for a violation of Wis. Admin. Code § DOC 303.40, which states that "any inmate who gives, receives, sells, buys, exchanges, barters, lends, borrows or takes property from another inmate without authorization is guilty of an offense." The legal papers were seized as contraband.

Plaintiff asked defendant Gilberg to return his legal papers. Defendant Gilberg denied the request, stating, "I have no factual proof that these items belong to you." Plaintiff filed an inmate complaint, numbered WSPF-2004-7039, challenging the decision not to mail the paperwork and contending that the prison's failure to post the envelope interfered with his ability to litigate two open cases. Plaintiff's complaint was dismissed by defendant Ellen Ray, who asserted "the issues raised d[id] not personally affect" plaintiff. Defendant Huibregtse upheld the rejection of the complaint. Plaintiff appealed the dismissal to defendants Hautamaki and O'Donnell. On April 2, 2004 his final appeal was denied.

3. Damage to mail

The Wisconsin Secure Program Facility houses 470 inmates. Each day, prison staff members collect incoming mail in a large bin provided by the United States Post Office. Once staff and administrative mail has been sorted from inmate mail, an electronic envelope opener is used to open all inmate mail by cutting envelopes along their horizontal fold. From time to time, letters are cut along their folds. Once mail is opened, the contents of the mail are reviewed by mail room staff for security reasons.

Since arriving at the Wisconsin Secure Program Facility, plaintiff has repeatedly received mail that is either cut or missing a portion of its contents as a result of malfunction of the letter-opening machinery used by the institution. This damage has prevented plaintiff from reading the entire contents of his mail. On June 10, 2003, plaintiff received a #10 envelope. Portions of the contents were cut and the second page of the three-page letter was missing.

Plaintiff filed a complaint numbered WSPF-2003-21344, challenging the method used by mail room staff to open incoming mail. Plaintiff asked that mail room employees be better supervised and that envelopes be opened along their vertical fold, thereby decreasing the odds of damage to the contents of mail. Defendant Ellen Ray affirmed plaintiff's complaint, stating:

> [The facility] does have a letter opening machine and from time to time letters do accidentally get cut in half. This is done inadvertently. There were only two pages in the envelope. Inmate Lindell may want to contact the sender

> regarding the [missing] page. The mailroom would have no reason to take a sheet of paper from the inmate's mail. The inmate complaint examiner will recommend this complaint be affirmed for statistical purposes only.

Defendant Huibregtse adopted the affirmation. However, no changes were made in prison procedure. Plaintiff appealed the decision to defendant Hautamaki. Defendant Hautamaki recommended that plaintiff's appeal be denied, stating that cutting the mail in half was "inadvertent and unavoidable." Defendant O'Donnell adopted this recommendation and dismissed the appeal on July 19, 2003. Plaintiff continues to receive damaged mail.

4. Ban on hardcover and used books

The Wisconsin Secure Program Facility forbids inmates from possessing hardcover books. Defendant Berge approved this policy. The facility requires that all books shipped to inmates be sent directly from "the retail outlet where purchased, with a pre-printed or store-stamped label." A receipt must accompany all shipments and list the cost for each item shipped. All property received from retail outlets must be new.

Hardcover books create a serious security problem within correctional institutions by serving as vehicles for contraband, such as weapons and drugs. Weapons such as razor blades and knives can be hidden between the cover and the pages and in the binding of hardcover books. The size, weight and density of hardcover books pose a security problem, since the books themselves could be used as weapons. The time staff spend searching cells

for contraband would greatly increase if staff had to spend extra time handling items like hardcover books.

Used publications sent to prisoners may contain methamphetamines that have been soaked on the pages and are undetectable by sight. Codes, maps and other contraband can be hidden in the pages of books. Restricting publications to those received from approved sources reduces the chances of contraband being smuggled into an institution.

On April 10, 2002, three books were mailed to plaintiff from an organization titled "Books Through Bars." Two of these books, Legal Writing Style and Constitutional Law, had hard covers. The third was a used softcover book titled Liberty Under Law. Because the books were hardcover or used, they were identified as contraband.

On April 30, 2002, plaintiff tried to file an inmate complaint demanding the delivery of his books. The complaint was returned to him unprocessed because he had already filed two inmate complaints that week and because his complaint contained more than one issue.

5. Ban on torn magazines

Prison policy prohibits inmates from damaging, destroying, altering or disposing of their own property without the prior permission of staff on their living units. Inmates frequently alter items to conceal contraband such as weapons, drugs and money. Property can be stolen, traded and altered, which can lead to animosity, jealousy and threats and acts

of violence among inmates, creating a security threat for inmates and staff. Permitting inmates to give, receive, sell, buy, exchange, lend, borrow or take property from other inmates would require staff to search and inventory property as it changes hands to insure that the property is not being misused.

a. October 4, 2003, "Stuff" magazine

On October 4, 2003, defendant Johnson confiscated a copy of "Stuff" magazine, asserting that the magazine's address label had been removed. In fact, the magazine had never possessed a label and was not torn or altered in any way.

Plaintiff filed an inmate complaint, numbered WSPF-2003-33309, challenging the removal of his magazine. Defendant Trumm recommended that the complaint be dismissed, because the magazine had no label and plaintiff could not prove the magazine belonged to him. Defendant Huibregtse dismissed the complaint. Plaintiff appealed the dismissal to defendants John Ray and O'Donnell. His final appeal was denied on November 29, 2003.

b. August 17, 2003, "Tailgate" magazine

On August 17, 2003, correctional officer Jared Barr discovered a magazine with a torn cover in plaintiff's cell and confiscated it. The facility's property department sent plaintiff a memo, telling him that they had received his torn magazine and that plaintiff could either

give the magazine to one of his visitors or mail the magazine to someone. If plaintiff did not dispose of the magazine in one of those ways, the magazine would be destroyed.

Plaintiff wrote to defendant Haines, asking him to return the magazine. Defendant Haines denied the request in a letter dated August 20, 2003, and told plaintiff that the magazine was contraband because it had been altered in violation of prison regulations. Plaintiff could not afford postage to mail the magazine and did not have any visitors to whom he could give the magazine. The magazine was destroyed.

Plaintiff filed an inmate complaint, numbered WSPF-2003-27812, challenging the removal of his magazine. He attached a copy of Haines's letter to the complaint. Defendant Trumm recommended that the complaint be dismissed, because the magazine had been seized pursuant to Wis. Admin. Code § DOC 303.10(1)(e) which designates "property that is damaged or altered" as contraband. Defendant Huibregtse dismissed the complaint. Plaintiff appealed the dismissal to defendants Hautamaki and O'Donnell. His final appeal was denied on September 20, 2003.

6. Ban on internet materials

Wisconsin Secure Program Facility staff open and review incoming mail, other than legal mail, to insure that it contains no harmful material, escape plans or gang-related content. Mail that complies with institution policy is forwarded to the intended recipient.

On July 24, 2002, and July 25, 2002, defendant Sandra Grondin issued plaintiff notices of non-delivery of mail because plaintiff had been sent copies of his personal web page in violation of prison rules. Current prison policy permits inmates to receive downloaded internet materials from family and friends as long as the materials are on standard-size paper and are not email messages or copies of personal web sites. Copies of personal web sites are forbidden because prison officials believe possession of these materials could enable prisoners to victimize the public. Plaintiff appealed defendant Grondin's July 24 and July 25 decisions. Both appeals were denied.

On August 22, 2002, plaintiff filed an inmate complaint, numbered SMCI-2002-29666, challenging the denial of his mail on July 25th. Defendant Ellen Ray recommended the complaint be dismissed because the material had been denied pursuant to prison policy. Defendant Huibregtse adopted the recommendation and dismissed the complaint. Plaintiff appealed the dismissal to defendants Hautamaki and O'Donnell. His final appeal was denied on October 1, 2002.

On August 27, 2002, plaintiff filed an inmate complaint, numbered SMCI-2002-30510 challenging the denial of his mail on July 24th. Defendant Ellen Ray recommended the complaint be dismissed because the material had been denied pursuant to DOC IMP 1. Defendant Huibregtse adopted the recommendation and dismissed the complaint. Plaintiff appealed the dismissal to defendants Hautamaki and O'Donnell. His final appeal was

denied on October 1, 2002.

On August 22, 2003, the Wisconsin Secure Program Facility received a letter that contained seven pages of internet material for plaintiff. Defendant Sandra Grondin reviewed this material and issued plaintiff a notice of non-delivery of mail, noting that the material was contraband. Plaintiff appealed defendant Grondin's decision. Defendant Berge denied the complaint.

Plaintiff then filed an inmate complaint, numbered WSPF-2003-37298, challenging the denial of his mail. Defendant Trumm dismissed the complaint. Plaintiff appealed the dismissal to defendants Huibregtse, Hautamaki, and O'Donnell. His final appeal was denied on February 14, 2004.

7. Ban on sending pictures to other inmates

Prison staff inspect and inventory all property items received by the prison to insure that the items conform to personal property regulations, pose no security concern and contain no contraband. Inventories and searches of inmate property consume staff resources. Permitting inmates to give, receive, sell, buy, exchange, lend, borrow or take property from other inmates would require staff to search and inventory property as it changes hands to insure that the property is not being misused.

Plaintiff filed an inmate complaint, numbered WSPF-2003-35392, challenging the

Wisconsin Secure Program Facility's policy that forbids inmates to mail pictures to other inmates. Defendant Trumm recommended dismissing the complaint, explaining that "any inmate who intentionally gives, sells, buys, exchanges, barters, lends, borrows or takes any property from another inmate without authorization is guilty of an offense. Photos are personal items." Defendant Huibregtse accepted the recommendation and dismissed plaintiff's complaint. Plaintiff appealed to defendants John Ray and O'Donnell. His final appeal was denied on November 29, 2003.

8. Ban on donating used books and magazines

On February 8, 2002, defendant Huibregtse issued a memorandum stating that the Wisconsin Secure Program Facility would no longer accept donations of publications for the prison library from inmates or their families because of concerns that inmates were donating items and then filing complaints alleging that staff members had lost or stolen the donated items.

Other Wisconsin prisons permit inmates to donate written materials. Before defendant Huibregtse issued his 2002 memorandum, inmates at the Wisconsin Secure Program Facility could donate publications to the facility library. Currently, the library receives three newspapers and four periodicals. The facility's librarian is willing to accept additional donated publications from inmates. Other inmates have expressed a desire to

donate their used publications to the prison library.

On February 20, 2004, plaintiff sent a request to defendant Huibregtse, asking him to rescind the ban on donating printed materials to the prison library. Plaintiff wanted to donate past issues of "Prison Legal News" and other materials to the prison library. (Inmates may retain only seven publications in their cells at any given time.) Plaintiff received no reply to his request.

On February 25, 2004, plaintiff filed an inmate complaint, numbered WSPF-2004-6613, challenging the policy. He suggested that the prison could eliminate any risk that inmates would file false complaints regarding the "loss" of donated publications by keeping a record of donations. Defendant Ellen Ray rejected the complaint as untimely. Plaintiff appealed the rejection to defendant Huibregtse, arguing that although the policy had been implemented more than fourteen days before he filed his complaint, the policy not been applied to plaintiff previously. The appeal was denied.

9. Retaliation

a. Defendant Jones

On February 20, 2002, defendant Jones conducted a search of plaintiff's cell. He confiscated two pictures from postcards that had been ripped, eight pages that had been torn from a dictionary and two notepads on which pieces of white paper had been glued. At the

time, plaintiff was on "level two" of the Wisconsin Secure Program Facility level system. Inmates on level two are not permitted to have publications in their cells. Defendant Jones offered to dispose of the items.

Plaintiff told defendant Jones that he was engaged in litigation to retain possession of materials such as the torn cards and dictionary pages. When plaintiff refused to agree to the destruction of the items, defendant Jones issued plaintiff a conduct report numbered 1249776 for alleged violations of Wis. Admin. Code § DOC 303.36, misuse of state or federal property § DOC 303.35, damage or alteration of property and § DOC 303.47, possession of contraband.

A disciplinary hearing was held on March 18, 2002, at which plaintiff submitted a written statement containing the following excerpt: "I can't be hurt for exercising a right. Yet Jones says he issued this c[onduct] r[eport] because I refused to destroy protected property; that is retaliation." Plaintiff was found guilty of all three charges and was given 180 days' program segregation and thirty days' cell confinement.

On March 20, 2002, plaintiff appealed the decision. Plaintiff wrote on the appeal form, "Staff are clearly retaliating against me." To the form, he attached a copy of his disciplinary hearing statement.

b. Defendants Sandra Grondin and Sharpe

On February 14, 2002, plaintiff attempted to mail a letter in a postage-embossed envelope. On the outside of the envelope were stamped the words "confidential legal material." Plaintiff had used a pen to scratch out the words. He had not been authorized to alter the envelope. The letter contained critical remarks about staff at the Wisconsin Secure Program Facility and described plaintiff's plans to sue them. Defendant Sandra Grondin found the envelope and issued plaintiff a conduct report, numbered 1114030, charging him with a violation of Wis. Admin. Code § DOC 303.48, unauthorized use of the mail and Wis. Admin. Code § DOC 303.30, unauthorized form of communication. Defendant Boughton approved the conduct report. When plaintiff complained to defendants Grondin and Sharpe about being issued the conduct report, they told him that he should expect to be disciplined when he disrespected staff and threatens in his letters to sue them.

A disciplinary hearing was held on March 12, 2001. Plaintiff submitted a written statement to the hearing committee asserting:

> This c[onduct] r[eport] is just one of many I've been issued as of late, all due to animosity towards my successful access of the courts on the battery c[onduct] r[eport] that got me here. Those involved in barraging me with illegal c[onduct] r[eport]s will be sued for violating my constitutional rights.

Defendant Sharpe found plaintiff guilty of both violations because "the letter was altered and [the] contents contained a personal letter. Contents of [the] letter [we]re not of a legal

nature." The letter was destroyed and plaintiff was given seven days of room confinement.

On March 14, 2002, plaintiff appealed the decision. Plaintiff attached to the appeal a copy of his original statement. On the appeal form itself he wrote, "This discipline is [] retaliatory." Defendant Berge denied the appeal on April 3, 2002.

c. Defendant Deaver

On September 28, 2000, plaintiff was incarcerated at the Waupun Correction Institution. That day, while plaintiff was waiting to attend a program review committee meeting, defendant Deaver asked whether plaintiff had successfully appealed a conduct report written by another guard. Plaintiff said he had. Defendant Deaver replied, "You know, we heard about that and aren't happy about it."

Plaintiff complained to defendant Deaver about being forced to wait in the reception area. Defendant Deaver told plaintiff to "quit whining." Plaintiff replied, "Who do I file a complaint on?" Defendant Deaver did not reply. Shortly thereafter, Deaver issued plaintiff a conduct report, numbered 1159894-1345. In the report, Deaver accused plaintiff of yelling obscenities at defendant Deaver, thereby violating Wis. Admin. Code § DOC 303.25, disrespect, and § DOC 303.28, disruptive conduct.

A disciplinary hearing was held on October 10, 2000. Plaintiff submitted a written statement, contending that defendant Deaver "either has mistaken me for someone else or

is retaliating against me for stating I would file a complaint." Plaintiff was found guilty of both violations and was given four days' adjustment segregation and 120 days' program segregation. Plaintiff appealed the decision on October 19, 2000. On the appeal form, plaintiff asserted, "I was retaliated against." To the appeal form, plaintiff attached a statement, alleging, "I was lied on [sic] based on my religious affiliation and my threat to complain – both constitutionally protected rights." The appeal was denied on November 1, 2000.

d. Defendant Esser

On November 27, 2001, defendant Esser approached plaintiff's cell to perform a meal tray pick up. Defendant Esser noticed that plaintiff was sitting on the floor of his cell holding the meal tray in his hands. Defendant Esser told plaintiff to stand in full view. (What transpired next is in dispute. Plaintiff contends that when he attempted to turn over the meal tray to defendant Esser, Esser threw it back at plaintiff, bruising his back; defendant Esser avers plaintiff threw the tray at him.) Plaintiff used his intercom to contact the unit sergeant, who identified himself as Sergeant Evers. Plaintiff asked the sergeant to preserve videotape from plaintiff's in-cell camera and to have a supervisor address "the matter" immediately. Sergeant Evers told plaintiff that he was "in no position to make demands" and to "shut up."

Defendant Esser walked away from plaintiff's cell, then returned to demand that plaintiff return the meal tray to defendant Esser. Plaintiff returned the tray and told defendant Esser that plaintiff would sue him as a result of the earlier conduct. Defendant replied, "The more you complain, the worse things will become." Plaintiff asked defendant Esser to send a supervisor to investigate, but defendant Esser refused. Subsequently, defendant Esser issued plaintiff a conduct report, numbered 1335640, charging him with violations of Wis. Admin. Code § DOC 303.12S, battery and § DOC 303.28, disruptive conduct.

A disciplinary hearing was held on December 17, 2001, at which plaintiff submitted a written statement alleging that defendant Esser "habitually assaults prisoners" and asserting his innocence. The statement included a sentence stating, "I can and will go directly to a § 1983 for retaliatory discipline, based on my trying to press charges (access the courts)." Also attached to plaintiff's statement was a copy of a letter he had written to the Grant County District Attorney, describing the incident in question. In that letter, plaintiff wrote:

> On November 27, 2001, C.O. Esser, a guard at [the Wisconsin Secure Program Facility] hit me with my own tray in my back. I handed him my tray, he grasped it, then hit me with it as I turned around. . . I immediately pressed my intercom and told Sgt. Evers I wanted charges pressed against Esser and pictures taken of where I was hit. Evers said, "You're in no position to make demands." Esser then wrote me a conduct report saying I was loud and vulgar and saying I threw my tray out the trap but he blocked it with his hands so it

fell in my cell.

Plaintiff was found guilty of both violations and was given 180 days' program segregation, thirty days' cell confinement and was fed "segregation loaf" for ten days. Plaintiff appealed the decision to the warden on December 17, 2001. Attached to his appeal was a written statement containing the following assertion:

> This conduct report and the committee's finding of guilt are retaliatory, as I demanded and am pressing charges on Esser for hitting me with my tray and complained about this. I have a U.S. Const. 1st Amend. right to complain and press charges and can't be retaliated against for doing so.

The appeal was denied on January 1, 2002. A state court later reversed, vacated and expunged the disciplinary committee's findings from plaintiff's records.

Following the "meal tray incident," plaintiff suffered severe depression, anxiety and paranoia.

D. Access to Courts

When an inmate is placed on administrative confinement, he can challenge the decision by appealing to the prison warden, the coordinator of the Division of Adult Institutions and, ultimately, to a state circuit court. The Wisconsin Administrative Code does not provide a time frame in which appeals to the Division of Adult Institutions coordination must be decided.

On June 17, 2004, plaintiff appealed a disciplinary decision to place him on administrative confinement. In the appeal, plaintiff stated that if defendant Casperson did not provide a reply within twenty days, plaintiff would consider the appeal denied and would sue defendant Casperson for trying to prevent plaintiff from seeking judicial review of his placement in administrative confinement. On July 22, 2004, defendant Casperson denied plaintiff's appeal.

OPINION

A. Renewed Motion for Rule 11 Sanctions

As a preliminary matter, plaintiff moves the court to reconsider its September 12, 2005 decision to deny his request for Rule 11 sanctions against defendants. In support of his renewed request, plaintiff makes two arguments. First, he takes issue with the court's assertion that he did not aver he had given defendants twenty-one days' prior notice of the conduct alleged to violate Rule 11 before bringing his motion in court. Order dated Sept. 12, 2005, at 2. Plaintiff asserts that he certified "in the upper left margin" of his original motion that he had notified defendants as required by Rule 11. Second, plaintiff contends that the court was *required* to issue sanctions against defendants because plaintiff had to "waste time and resources refuting [defendants'] false and frivolous arguments."

Upon reviewing plaintiff's original motion a second time, I find that he is correct that

along the upper left margin of the motion, he scribbled a short, vertically-positioned note indicating he had provided a copy of his motion to defendants' counsel in advance of filing. It is not surprising that this averment of notice was overlooked. In the end, however, I found the lack of notice immaterial. In my order dated September 12, 2005, I denied plaintiff's motion on its merits, not because of any perceived procedural error.

As I made clear in the September 12, 2005 order, I am unwilling to consider in the context of a motion for sanctions under Fed. R. Civ. P. 11 plaintiff's objections to defendants' submissions in support of their motion to dismiss. For these reasons, plaintiff's motion to reconsider will be denied.

B. Motion for Summary Judgment

Plaintiff maintains that defendants violated his First Amendment rights when they denied him postage stamps obtained from sources outside the prison; persisted in opening inmate mail with equipment that occasionally cut inmate mail in half; refused to post letters plaintiff wrote; and enforced prison policies prohibiting prisoners from receiving used or hard cover books, possessing magazines with torn covers, possessing copies of material from inmates' personal web sites, mailing pictures to other inmates, and donating written materials to the prison library. In addition, plaintiff contends that defendants Dane Esser, Andy Jones, John Sharpe, Sandra Grondin and David Deaver violated the First Amendment

by issuing him false conduct reports in retaliation for threatening to file grievances, refusing to consent to destruction of his confiscated personal property, and writing a letter criticizing prison staff. Plaintiff asserts further that his Eighth Amendment rights were violated when defendant Deaver threw a tray at him, resulting in a bruise to his back. Finally, plaintiff contends that his right of access to courts was violated when defendant Casperson delayed issuing a response to his administrative appeal.

A. Immunity of Inmate Complaint Examiners

In addition to requesting judgment as a matter of law, defendants move to dismiss defendants Berge, John Ray, Sandra Hautamaki, Cindy O'Donnell, Steven Spanbauer, Kathleen Bellaire, and Kelly Trumm from this suit, contending that the only connection between these defendants and plaintiff's claims is through their role as inmate complaint review officers.

This court has held previously that persons making recommendations for the disposition of inmate complaints are entitled to absolute immunity for their recommendations and decisions. Borzych v. Frank, 340 F. Supp. 2d 955, 963-65 (W.D. Wis. 2004). In Borzych, I noted that absolute immunity is granted to government officials who perform tasks substantially equivalent to those of judges. In the prison context, courts have held that absolute immunity should be given to parole board members, who decide

whether to place prisoners on community supervision and members of prisoner review boards, who decide whether to revoke the parole of prisoners on supervised release. Wilson v. Kelkhoff, 86 F.3d 1438, 1443-45 (7th Cir. 1996). The purpose of absolute immunity is to shield judicial officers from harrassment and intimidation as they carry out their decision making process. See, e.g., Forrester v. White, 484 U.S. 219, 226 (1988). I concluded that inmate complaint review officials were entitled to absolute immunity because, like other prison officials who are granted absolute immunity, they performed adjudicatory tasks, such as rejecting unmeritorious and untimely complaints. However, in reconsidering the question in connection with this lawsuit, I have decided that the earlier holding cannot stand.

In State v. Greeno, 414 F.3d 645 (7th Cir. 2005), the Court of Appeals for the Seventh Circuit held that an inmate complaint examiner did not demonstrate deliberate indifference to a prisoner's serious medical need when he investigated the prisoner's medical concerns and verified that the prisoner was under the care of a prison physician. Id. at 655. However, the court also cited an earlier unpublished order directing the district court to reverse dismissal of several inmate complaint examiners from the suit. Id. at 656. Although the court found that the defendant inmate complaint examiners were ultimately entitled to summary judgment, it did so not because the complaint examiners were immune from suit but because they had not shown deliberate indifference to Greeno's medical condition. Id. at 657. The court held open the possibility inmate complaint examiners might have been

guilty of deliberate indifference if they "had ignored Greeno's complaints entirely." Id. at 656. Greeno's holding suggests that my earlier holding in Borzych and other cases was errneous.

The Supreme Court of the United States has suggested that several factors are relevant in determining when to apply absolute immunity to government officials. These factors include the need to assure that an individual can perform his decision making functions without harassment or intimidation; the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; the decision maker's insulation from political influence; the importance of precedent in the decision making process; the adversary nature of the process; and the correctability of error on appeal. Cleavinger v. Saxner, 474 U.S. 193, 201-02 (1985).

In Cleavinger, the Court held that prison officials who served on inmate disciplinary review boards are not entitled to absolute immunity from suit. The court stated:

> We do not perceive the discipline committee's function as classically adjudicatory. Surely, the members of the committee, unlike a federal or state judge, are not "independent;" to say that they are is to ignore reality. They are, instead, prison officials, albeit no longer of the rank and file, temporarily diverted from their usual duties. They are employees of the Bureau of Prisons and they are the direct subordinates of the warden who reviews their decision. They work with the fellow employee who lodges the charge against the inmate upon whom they sit in judgment. The credibility determination they make often is one between a co-worker and an inmate. They thus are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee. It is the old situational problem of the relationship between

> the keeper and the kept, a relationship that hardly is conducive to a truly adjudicatory performance._

Id. at 203-04. Disciplinary hearing officers make decisions that can result in loss of good time, placement in segregation and loss of privileges. Their decisions affect the liberty of inmates in a direct way. Regardless of the similarity they share with judges, the Supreme Court has insisted on distinguishing them because of their lack of independence from those whose decisions they review.

The distinctions made by the Court between prison disciplinary hearing officers and judges apply with even greater force to the differences between judges and inmate complaint review officers. In Wisconsin, the inmate complaint review system is administered by prison officials operating in four distinct roles: (1) "inmate complaints examiners," who investigate facts of inmate complaints and offer preliminary recommendations for disposition to the reviewing authority; (2) "reviewing authorities," who receive the recommendations of complaint examiners and either recommend further investigation by the inmate complaint examiner or dispose of the complaints; (3) "corrections complaint examiners," who review decisions of reviewing authorities, conduct independent investigation of the facts underlying the complaint and offer recommendations for disposition to the Secretary; and (4) the "Secretary," who can order further investigation by the corrections complaint examiner, accept recommendations of the corrections complaint examiner (with or without

modification) or reject the recommendation and issue an independent disposition. Wis. Admin. Code §§ DOC 310.11(3) & (11), 310.12(2), 310.13(5)-(6), 310.14(2). Like disciplinary hearing officers, all inmate complaint review officers are employees of the Wisconsin Department of Corrections. See, e.g., Wis. Admin. Code § DOC 310.03(2), (5), (10), (15).

Typically, complaint review officers work within the Department of Corrections as the colleagues and supervisors of officials often named in suits as "offending parties." Although reviewing authorities and the Secretary are responsible for determining the disposition of complaints, which is a task traditionally carried out by judicial officers, all complaint review officials possess the authority to investigate facts or recommend that those under their supervision investigate facts relevant to the resolution of inmate complaints. Wisconsin Admin. Code §§ DOC 310.11(3) and 310.13(5) authorize inmate complaint examiners and corrections complaint examiners to use "discretion in deciding the method best suited to determine the facts [raised by a complaint], including personal interviews, telephone calls and document review." Reviewing authorities and the Secretary are given the authority to order "further investigation" of the complaints that come before them. Wis. Admin. Code §§ DOC 310.12(2)(e), 310.14(2)(d). Therefore, officers within the inmate complaint review system serve as both fact-gatherers and fact-finders. They investigate charges of wrongdoing on the part of their colleagues and recommend or issue decisions on

those charges. Their decisions are made without the benefit of an adversarial process and within an environment that is not impartial or insulated from workplace pressure. Although some similarities may exist between inmate complaint review officers and judicial officers, I find that these officials fail to meet the prevailing standard for absolute immunity as set forth in Cleavinger. Consequently, I will deny the request of defendants Berge, Ray, Hautamaki, O'Donnell, Spanbauer, Bellaire, and Trumm to be dismissed on the ground that they are entitled to absolute immunity.

B. First Amendment Claims

1. Denial of postage

a. Plaintiff's March 4, 2002 denial of postage stamps claim against defendants Sandra Grondin and Berge

Defendants contend that plaintiff has not exhausted his administrative remedies with respect to his claim that defendants Sandra Grondin and Berge refused to deliver two postage stamps mailed to plaintiff on March 4, 2002. It is undisputed that plaintiff tried to file an inmate complaint relating to this occurrence and that the complaint was not processed by prison staff. Neither side has provided documentation or proposed facts stating the reason prison officials refused to process the complaint.

The Prisoner Litigation Reform Act, 42 U.S.C. § 1997e(a), requires prisoners to

exhaust their administrative remedies before bringing suit. However, defendants bear the burden of proving failure to exhaust. Massey v. Helman, 96 F.3d 727, 735 (7th Cir. 1999). In this instance, defendants have not proposed any facts suggesting that there was a legally legitimate reason why plaintiff's complaint was not accepted and processed by prison officials. Prisoners must exhaust only those remedies that are legitimately made available to them. Therefore, defendants have failed to show that plaintiff failed to exhaust his *available* administrative remedies with respect to this claim. Lewis v. Washington, 300 F.3d 829, 833 (7th Cir. 2002); Johnson v. Litscher, 260 F.3d 826, 829 (7th Cir. 2001).

b. Plaintiff's June 13, 2002 denial of postage stamps claim against defendants Berge, Haen, Spanbauer and Bellaire & plaintiff's denial of postage claim against defendants Kool, Ellen Ray, Huibregtse, John Ray and O'Donnell

Plaintiff contends that defendants "unjustifiably" deprived him of postage he did not purchase from the prison canteen. Defendants contend that prison regulations require inmates to purchase postage stamps directly from the prison canteen. The prison does not permit persons outside the prison to mail stamps to plaintiff directly because stamps can contain dangerous and illegal chemicals. Any stamps not purchased from the canteen are considered contraband.

Plaintiff argues that the prison's policy regarding the purchase of stamps does not permit him to attain the level of prolific communication he desires. He emphasizes that any money deposited into his account by friends and family members must first be used to pay his hefty legal debts, leaving no money for postage. Furthermore, he contends, the one free stamp a week provided by the prison does not enable him to engage in indiscriminate written communication with individuals outside prison walls. Plaintiff's concerns are all well-founded. However, there is no requirement that the government subsidize plaintiff's postage costs. Van Poyck v. Singletary, 106 F.3d 1558 (11th Cir. 1997) (indigent inmates do not have right to free postage for personal mail); Hershberger v. Scaletta, 33 F.3d 955, 956-57 (8th Cir. 1994); Dawes v. Carpenter, 899 F. Supp. 892, 899 (N.D.N.Y. 1995) ("[T]he Constitution does not require the State to subsidize inmates to permit [personal] correspondence."). More important, there is no requirement that government officials compromise legitimate safety concerns in order to help plaintiff prioritize letter writing over the payment of his legal debt.

In Walker v. Litscher, 02-C-430-C, Op. & Order dated March 14, 2003, at 10, I concluded that a prison policy forbidding inmates to receive stamps through the mail was a reasonable means of preventing inmates from obtaining drugs. I remain convinced that defendants' policy of requiring inmates to buy stamps from the prison canteen is neither irrational nor arbitrary under Turner v. Safley, 482 U.S. 78, 93 (1987). A rational link

exists between the policy and defendants' desire to limit the opportunities for the introduction of contraband into the prison's controlled environment.

In addition, in Lindell v. Frank, 02-C-21-C (W.D. Wis. May 5, 2003), I addressed a nearly identical claim brought by plaintiff. In that suit, plaintiff contested the decision of prison officials not to provide him with paper mailed to him by friends, family members and legal professionals, requiring him instead to purchase writing paper from the prison canteen. I granted summary judgment in favor of defendants because I found that the prison policy requiring inmates to purchase writing paper from the canteen reasonably furthered the facility's interest in limiting the introduction of contraband to the prison.

Plaintiff has given the pursuit of civil legal action priority over other activities he might pursue with his funds. Like all individuals on tight budgets, he will have to make judicious choices about how he "spends" his weekly stamps. The constitution does not require prisons to permit provision of postage to take priority over payment of debt. Therefore, I will grant defendants' motion for summary judgment on this claim.

2. Interference with outgoing mail

a. Exhaustion of administrative remedies

Defendants argue that plaintiff has failed to exhaust his administrative remedies with

regard to the letters he attempted to post on October 4, 2001, and October 20, 2003. With respect to the October 4, 2001 letter, the parties do not dispute that plaintiff's September 13, 2002 inmate complaint was rejected as untimely. However, they dispute whether the rejection was proper. Plaintiff contends that he did not receive a notice of non-delivery and that it was not until September 13, 2002, nearly a year later, that he discovered his letter had not been mailed.

When an inmate arrives in federal court he must have exhausted his state administrative remedies by availing himself of all available options for redress. 42 U.S.C. § 1997e(a). He cannot circumvent this requirement by failing to follow the procedures established by the state. Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002) ("prisoner[s] must file complaints and appeals in the place, and at the time, the prison's administrative rules require.") When a prisoner is denied an administrative remedy because he had failed to comply with the procedures established by the state, he commits procedural default. Ford v. Johnson, 362 F.3d 395, 397 (7th Cir. 2004) ("[A]dministrative bodies may dismiss grievances for lack of cooperation . . . [T]his procedural default blocks later attempts to litigate the merits.") This court cannot re-examine such defaults and second-guess the application of state procedures by state agencies and courts. For that reason, when the record of an inmate's use of the prison complaint system arrives in federal court, it is what it is.

Plaintiff challenges the decision of prison officials to reject his inmate complaint as untimely and asks this court to find that prison officials wrongly applied Wisconsin regulations regarding the time limits for filing an inmate complaint. Regardless whether plaintiff's challenge is legitimate, it is not a challenge federal courts may address. Pozo, 286 F.3d at 1025 ("If the state stands on its time limits and rejects a filing as too late, then state remedies have not been properly invoked."); Freeman v. Page, 208 F.3d 572, 576 (7th Cir. 2000) (if state court dismisses petition for procedural flaws such as untimeliness, then petition was not properly filed).

Determining whether an inmate complaint has been properly rejected is the responsibility of the reviewing authority designated by Wis. Admin. Code § DOC 310.11(6). If an inmate complaint is rejected improperly and the reviewing authority fails to remedy the violation, an inmate may raise the matter in state court on a writ of certiorari under Wis. Stat. § 893.735(2). However, this court will not re-examine such decisions. Because it is undisputed that plaintiff's complaint regarding the non-delivery of the October 4, 2001 letter was rejected as untimely by prison officials, I conclude that plaintiff failed to exhaust his administrative remedies with respect to this claim.

Next, defendants contend that plaintiff has failed to exhaust his administrative remedies with respect to the non-delivery of his October 20, 2003 letter to Glynda Soeterbein. The facts reveal that plaintiff's letter was confiscated because defendant Bell

believed the letter concerned activity forbidden by prison rules. Defendant Bell issued plaintiff a conduct report charging him with those violations. Defendants concede that plaintiff challenged (and ultimately overturned) the disciplinary report issued in connection with this letter.

Whether plaintiff used the inmate complaint system to challenge the non-delivery of his letter is irrelevant to whether he exhausted his administrative remedies. Because the action plaintiff challenged involved a conduct report, he was required by Wis. Admin. Code §§ 303.76 and 310.08(2)(a), to challenge the decision not to mail his letter at his disciplinary hearing and to raise the same contention on appeal. Defendants have not met their burden of showing that plaintiff failed to do this. Therefore, I will not dismiss ths claim for plaintiff's failure to exhaust his administrative remedies.

Finally, defendants contend that plaintiff failed to exhaust his administrative remedies with respect to his claim that prison officials impermissibly prevented inmate Bryce Garrett from mailing plaintiff's legal papers to plaintiff's uncle. The facts reveal that plaintiff filed an inmate complaint with respect to this claim but that the complaint was rejected on the ground that the denial of postage did not "directly" affect plaintiff.

As I noted above, the rejection of plaintiff's inmate complaint is not open to debate in federal court. Prison officials rejected plaintiff's complaint under Wis. Admin. Code § DOC 310.11(5)(e), which permits inmate complaint examiners to reject complaints when

"the issue raised in the complaint does not personally affect the inmate." It was inmate Bryce, not plaintiff, whose outgoing mail was confiscated. Plaintiff's real grievance in this claim is that prison officials prevented him from giving his legal paperwork to another inmate to mail on his own behalf. Indeed, that is the question he has presented for this court to solve. However, plaintiff did not file an inmate complaint challenging defendants' refusal to allow him to pass his mail to another inmate for posting. He challenged instead the confiscation of inmate Bryce's outgoing mail. If plaintiff believes that prison officials were wrong to reject his complaint, he ought to have raised his concern in state court. To the degree that asks this court to excuse his failure to file a complaint challenging directly the regulation that prohibits inmates from exchanging property, I will decline to do so. I find that plaintiff has failed to exhaust his administrative remedies with respect to this claim.

b. Merits of plaintiff's remaining outgoing mail claims

Plaintiff maintains that his First Amendment rights were violated when defendants Bell, James Grondin, Berge, Kartman, Biggar, Schneider, Brudos and Bartels refused to mail letters he wrote on October 20, 2003, August 28, 2003 and December 2, 2003. Regulations affecting outgoing inmate correspondence to non-prisoners must further "one or more of the substantial governmental interests of security, order, and rehabilitation" and be "no greater than is necessary or essential to the protection of the particular governmental interest

involved." Procunier v. Martinez, 416 U.S. 396, 413 (1974), overruled on other grounds, Thornburgh v. Abbott, 490 U.S. 401, 413 (1989). The implications of outgoing correspondence for prison security are of a categorically lesser magnitude that the implications of incoming materials. Id.

a. October 20, 2003 letter to Glynda Soetebien

Plaintiff challenges the decision of defendants Bell, Bartels and John Grondin not to post a letter he attempted to mail on October 20, 2003. Plaintiff cannot defeat summary judgment on this issue for three reasons. First, the facts reveal that prison officials recognized their error in failing to post plaintiff's letter and vacated the conduct report he received in connection with the letter. Therefore, to the extent plaintiff is seeking a declaration that the letter was mistakenly seized, he has already been given redress. Second, to the extent that plaintiff is seeking the return of his letter, he has apparently obtained a copy already, since he attached a photocopy of the letter to the affidavit he submitted in response to defendants' motion for summary judgment. Finally, to the extent he seeks the return of the stamped envelope in which the letter was submitted, plaintiff is making a property deprivation claim, not a First Amendment claim. If plaintiff wishes to obtain his confiscated property from prison officials, the proper avenue for redress is state court.

The state of Wisconsin provides several post-deprivation procedures for challenging

the taking of property, including replevin and tort remedies. Wis. Stat. Chap. 810 & 893. Section 810.01 provides a remedy for the retrieval of wrongfully taken or detained property. Section 893.51 governs the filing of tort actions for damages related to the wrongful taking of personal property. Because petitioner has post-deprivation procedures available to him through the state courts and has not demonstrated that his First Amendment rights have been violated by defendants Bell, Bartels or John Grondin, I will grant defendants' motion for summary judgment with respect to this claim.

b. August 28, 2003 letter to United States Postal Inspector

The undisputed facts reveal that defendants had a clear security interest in refusing to post plaintiff's August 28, 2003 letter to the United States Postal Inspector. Defendants confirmed that the address plaintiff had written on the outside of the envelope did not match the addresses listed for the postal inspector and plaintiff refused to divulge where he had obtained the address he was using. Under the circumstances, it was proper for defendants to refuse to post plaintiff's sealed letter.

Plaintiff suggests that defendants should have opened his letter if they believed the address was inaccurate. However, to have opened the letter would have been a clear violation of Wis. Admin. Code § 309.04(3), which prohibits prison officials from opening letters addressed to federal investigative agencies unless the prison security director has

reason to believe the letters contain contraband. Instead, prison officials offered plaintiff a chance to dispel their concerns. He chose not to do so. Following plaintiff's refusal to provide information, officials were free to open the letter and inspect it to be certain its "purpose [was] not misrepresented." Procunier, 416 U.S. at 413. However, they were not required to do so and could legitimately refuse to post mail that did not appear to comply with prison regulations. In doing so, they did not violate plaintiff's First Amendment rights.

c. December 2, 2003 letter to United States Postal Inspector

It is unclear what claim plaintiff is making with regard to the December 2, 2003 letter. The undisputed facts are that the letter was a sealed missive to the United States Postal Inspector, containing complaints about prison staff, that defendant Schneider refused to mail the letter because it was sealed, and that plaintiff resubmitted the letter for mailing the following day. The parties agree that Wis. Admin. Code § DOC 309.04(3) permits inmates to send sealed mail to federal investigative agencies.

The parties dispute the date on which the letter was ultimately mailed. Defendants contend that the letter was posted on December 3, 2003. Plaintiff contends that defendant Bartels refused to mail the letter of December 3, 2003, but admits that the letter was posted on December 11, 2003.

Apparently, plaintiff is contesting the nine-day delay between his original submission

of the letter and its posting. A delay of such minor proportions does not transgress plaintiff's constitutional rights. Therefore, I will grant defendants' motion for summary judgment with respect to plaintiff's claim that defendants interfered with his December 2, 2003 outgoing letter to the United States Postal Inspector.

3. Damage to mail

a. Exhaustion of administrative remedies

Defendants contend that plaintiff failed to exhaust his administrative remedies with respect to his claim that his mail is repeatedly cut by the letter opening machine in the prison mailroom because his inmate complaint named "mailroom staff," instead of defendant Sandra Grondin specifically, as the party responsible for the destruction of his mail. Defendants do not suggest that plaintiff failed to file and appeal inmate complaints regarding the alleged destruction of his mail. Although some courts "demand that [an inmate's] administrative grievance name each person who ultimately becomes a defendant" in a subsequent civil action, the Seventh Circuit has not required specificity in inmate administrative complaints greater than the specificity required by the state's administrative system. Strong v. David, 297 F.3d 646, 649 (7th Cir. 2002).

In Freeman v. Berge, 03-C-21-C, Order dated Jul. 28, 2004 at 5, I stated that "the purpose of administrative exhaustion is not to protect the rights of officers, but to give

prison officials a chance to resolve the complaint without judicial intervention." I found that Wisconsin's administrative regulation did not require inmates to specify prison officials by name in an inmate complaint so long as their complaints provided fair notice to officials of the alleged violations. Id. Wisconsin Admin. Code § DOC 310.09 requires only that inmate complaints be: (1) typed or written legibly on forms; (2) signed; (3) free of abusive or profane language; (4) filed under the inmate's proper name; and (5) related to only one issue. Wisconsin has not established any other rule or regulation prescribing the contents of a grievance or the necessary degree of factual particularity that must be provided in an inmate complaint. Plaintiff alerted defendants to his claim and appealed all adverse decisions. Therefore, he has exhausted his administrative options with respect to his destruction of mail claim.

b. Merits of plaintiff's damage to mail claim

Plaintiff contends that defendants are violating his First Amendment rights by using an automated mail-opening process that periodically results in damage to his incoming mail. Defendants agree that the process can sometimes cut paper inside an envelope, but assert that the damage is unintentional and unavoidable given the amount of mail associated with the prison's 470 inmates.

Plaintiff filed an inmate complaint regarding the damage to his mail, suggesting that

envelopes might be opened along their vertical fold to decrease the chance of damage to envelope contents. Inmate complaints reviewing officers "affirmed" the complaint to acknowledge that plaintiff's mail had been damaged. However, they contend that the damage was "unavoidable." Although plaintiff's suggested change in the mail-opening process may be reasonable, defendants' failure to adopt his good ideas is not a violation of his constitutional rights.

When exercise of a right requires a tradeoff between the orderly administration of prisons and the rights of inmates, "the choice made by corrections officials—which is, after all, a judgment peculiarly within their province and professional expertise—should not be lightly set aside by the courts." Turner v. Safley, 482 U.S. 78, 92 (1987). Here, prison officials must balance the rights of inmates to receive their mail in a timely fashion against the prison's limited staff resources. The facts reveal that plaintiff's mail is "repeatedly" "cut or missing a portion of its contents." However, plaintiff does not explain what he means when he uses the word "repeatedly." He has provided only one example of an instance in which contents of his mail were missing. Therefore, I will assume that plaintiff's mail is sliced considerably more often than pieces of it are lost. Although general contentions may be sufficient to state a claim at the onset of a lawsuit, they are not sufficient to defeat a motion for summary judgment. Schacht v. Wisconsin Dept. of Corrections, 175 F.3d 497, 504 (7th Cir. 1999) ("Summary judgment is not a dress rehearsal or practice run; it is the

. . . [moment] when a party must show what evidence it has that would convince a trier of fact to accept its version of the events.") Because plaintiff has made no showing that defendants' envelope opener did more than periodically cause minor damage to his incoming mail, I cannot find that defendants' mail opening system violates the First Amendment. Therefore, I will grant defendants' motion for summary judgment on plaintiff's damage to mail claim.

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4. Ban on hardcover and used books

On April 10, 2002, defendants refused to deliver three legal books mailed to plaintiff from the organization "Books Through Bars." Defendants contend that plaintiff has not exhausted his administrative remedies with respect to this claim.

It is undisputed that on April 30, 2003, plaintiff attempted to file an inmate complaint. The complaint was returned to him because he had already filed two prior complaints in the same week in violation of Wis. Admin. Code § DOC 310.09(6) and because the complaint raised more than one issue in violation of Wis. Admin. Code § DOC 310.09(1). As stated earlier, this court will not second guess state officials' application of state regulations regarding the timeliness of inmate complaints. Because plaintiff failed to file a complaint as required by prison rules he has failed to exhaust his administrative remedies. Therefore, I will grant defendants' motion for summary judgment with respect to

plaintiff's claim that defendants violated his First Amendment rights by denying delivery of three legal books.

5. Ban on torn magazines

a. Exhaustion of administrative remedies

Defendants acknowledge that plaintiff has exhausted his administrative remedies with respect to his claims that his magazines were wrongfully confiscated on August 17, 2003 and October 4, 2003. However, they contend that plaintiff has not exhausted his remedies with respect to defendant Haines's participation in the August 17, 2003 confiscation.

Defendants first state that "plaintiff appears to have exhausted his administrative remedies with respect to the claim alleged in paragraph 79 of the complaint." Dfts.' Br. at 18. Paragraph 79 of the plaintiff's complaint states, "On August 17, 2003, C.O. Barr decided to take a "Tailgate" magazine from Lindell because the front cover was torn." Complaint at 12. Paragraph 80 goes on to state, "Lindell wrote to Gerald Berge, objecting to the forenoted taking of his 'zine [sic], but Timothy Haines replied to this request on August 20, 2003, and refused to let Lindell have the 'zine [sic]." Id.

It is undisputed that plaintiff filed inmate complaint number WSPF-2003-27812, challenging the taking of his magazine and attached to it a copy of defendant Haines's August 20, 2003 letter refusing to return plaintiff's magazine. Nevertheless, defendants

argue: "The plaintiff alleges that defendant Haines refused to let him have a "Tailgate" magazine because the front cover was torn. However, plaintiff has not filed an offender complaint regarding this claim." Dfts.' Br. at 18. It is unclear whether defendants have misread plaintiff's claim (believing him to have alleged the taking of two separate magazines) or misunderstand the requirements for exhaustion. Regardless, the undisputed facts show plaintiff has exhausted his remedies with respect to both of his confiscated magazine claims. His complaint and the materials attached to it are sufficient to have put defendants on notice of the wrong for which he was seeking redress. Strong, 297 F.3d at 650.

b. Merits of plaintiff's confiscated magazine claims

Plaintiff contends that defendants Johnson, Haines, Trumm, Huibregtse and Hautamaki violated his First Amendment rights when they confiscated copies of his "Tailgate" magazine on August 17, 2003, and "Stuff" magazine on October 4, 2003. Defendants contend that both magazines were confiscated pursuant to Wis. Admin. Code § DOC 303.35(2), which states that any inmate who damages or alters his own property without the permission of designated staff is guilty of an offense. Defendants assert that prison official Jared Barr confiscated plaintiff's "Tailgate" magazine because its cover was torn and defendant Johnson confiscated plaintiff's "Stuff" magazine because it was missing its label and could not be identified as belonging to plaintiff.

Although the court recognizes that prison officials must be given broad deference in crafting regulations that promote legitimate penological purposes, they are not free to circumscribe inmates' constitutional rights arbitrarily. In assessing the validity of a prison regulation that limits a constitutional right, I must consider whether (1) the regulation has a valid, rational connection to a legitimate government interest; (2) alternative means exist for the vindication of the petitioner's alleged rights; (3) the regulation could be changed with minimal impact on guards, inmates and prison resources; and (4) respondents have ready alternatives that would accommodate petitioner's asserted rights while not imposing more than a minor cost to the prison's valid penological goals. Turner, 482 U.S. at 89-91.

Defendants explain that a general policy prohibiting inmates from damaging, destroying, altering or disposing of their own property without the prior permission of staff on their living units serves a penological interest in security. They have found that inmates can conceal contraband in damaged or altered property and that "stolen, traded and altered" property leads to animosity, jealousy and threats and acts of violence among inmates. They observe also that inventories and searches of inmate property consume staff resources.

In order to grant summary judgment with respect to a practice that restricts the exercise of a constitutional right, "the governmental interest asserted in support of a restrictive policy must be sufficiently articulated to allow for meaningful review of the regulation in question and its effect on the inmate's asserted rights." Caldwell v. Miller, 790

F.2d 589, 598 (7th Cir. 1986). Although defendants could have been more explicit in their explanation of the purpose of the policy, I accept their assertion that a legitimate penological interest in security underlies defendants' refusal to allow inmates to possess magazines with missing mailing labels. A mailing label serves to identify the owner of the magazine and its presence makes it more difficult for other inmates to obtain magazines through theft or trade. In addition, a label allows prison officials to determine easily whether the inmate in possession of the magazine is its rightful owner. Therefore, I will grant defendants' motion for summary judgment with respect to plaintiff's claim that defendant Johnson confiscated plaintiff's "Stuff" magazine on October 4, 2003.

However, it is not at all apparent from defendants' explanation of the purpose of the policy at issue how plaintiff's August 17, 2003 issue of "Tailgate" constituted "altered" property that threatened the security of the institution. In particular, defendants have not explained how a magazine with a torn cover is more amenable to the concealment of contraband or more likely to be stolen or traded than a magazine with an intact cover. In the absence of such an explanation, I cannot find that the decision to refuse plaintiff possession of his "Tailgate" magazine was in furtherance of a legitimate security interest. Therefore, I will deny defendants' motion for summary judgment on plaintiff's claims that his First Amendment rights were violated when defendants Haines, Trumm, Huibregtse and Hautamaki confiscated and destroyed his torn magazine.

6. Ban on internet materials

Plaintiff contends that defendants Sandra Grondin, Berge, Ellen Ray, Huibregtse, Hautamaki, O'Donnell and Casperson violated his First Amendment rights by denying him copies of web pages and email messages on July 24, 2002, August 14, 2002, and August 22, 2003.

a. Copies denied prior to May 5, 2003

To the extent that plaintiff's claims relate to actions taken by defendants before this court decided Lindell v. Frank, 2003 WL 23198509 (W.D. Wis. May 5, 2003), he is precluded from litigating them. In the May 5, 2003 order in Lindell v. Frank, I held that the Wisconsin Secure Program Facility's policy of forbidding *all* copies of internet material was not reasonably related to a legitimate penological goal. Id. at 57. However, I expressly stated that defendants were free to craft rules or regulations limiting the quantity of such materials that inmates could receive in incoming correspondence. Id. at 57. In the same order, I granted defendants qualified immunity, concluding that neither the United States Supreme Court nor the Seventh Circuit had ruled previously that a prison policy prohibiting inmates from receiving photocopies of internet or other materials in the mail violates the First Amendment and that defendants were therefore not "on notice" that their policy was

unconstitutional. Id. at 39-40.

In this case, plaintiff is suing defendants Sandra Grondin, Berge and other Wisconsin Secure Program Facility staff for actions taken under the challenged regulation before May 5, 2003. Plaintiff cannot benefit from declaratory or injunctive relief with respect to these actions because he has made no showing that the blanket ban remains in effect. He cannot recover money damages because I have found already that defendants are entitled to qualified immunity. Because plaintiff cannot obtain any form of relief for his pre-May 5, 2003 claims, I will grant defendants' motion for summary judgment on these claims.

b. Exhaustion of administrative remedies on post-May 5, 2003 claims

Defendants contend that plaintiff has failed to exhaust his administrative remedies with respect to his claim that on August 22, 2003, defendants Grondin and Berge denied him photocopies of internet materials. The facts reveal that defendant Sandra Grondin refused to deliver to plaintiff printed copies of material from his web site that had been mailed to him. Plaintiff appealed the non-delivery to defendant Berge, who denied the appeal. Plaintiff filed inmate complaint number WSPF-2003-37298, challenging defendant Berge's decision. Defendants contend that plaintiff failed to exhaust his claim because he did not explicitly name defendant Sandra Grondin. As noted earlier, Wisconsin's regulations do not require inmates to specify individuals in their complaints. They require only that an

inmate provide enough information in his complaint to alert the prison to the nature of the wrong for which he sought redress. Wis. Admin. Code § DOC 310.09; Strong, 297 F.3d at 650. Defendants do not contend that prison officials were unclear about the nature of plaintiff's complaint. Therefore, they have failed to carry their burden with respect to this affirmative defense.

c. Merits of plaintiff's denial of internet materials claim

Defendants contend that inmates are permitted to receive copies of internet material from friends and family as long as the materials are printed on standard size paper and are not copies of electronic mail messages or copies of inmate's personal web sites. Defendants prohibit these materials because they believe prisoners could "victimize the public" with this information. Defendants do not indicate how copies of email messages, presumably *from* the public, permit victimization of the public, or why copies of an inmate's own web site would cause any safety concerns. It would seem a far more sensible plan to protect the public from victimization by forbidding inmates from creating personal web sites, rather than by forbidding them from seeing a copy of the finished product after it has been posted online.

When inmates' constitutional rights are circumscribed in order to promote alleged governmental security interests, "it is critically important that the record reveal the manner

in which security considerations are implicated by the prohibited activity." Caldwell, 790 F.2d at 597. In order to grant summary judgment with respect to a practice that restricts the exercise of a constitutional right, a court must be able to find that "the governmental interest asserted in support of a restrictive policy . . . sufficiently articulated to allow for meaningful review of the regulation in question and its effect on the inmate's asserted rights." Id. at 598. Defendants have provided no such details. Therefore, I must deny their motion for summary judgment on plaintiff's claim that his rights were violated when defendants Sandra Grondin, Berge, Trumm, Huibregtse, Hautamaki and O'Donnell denied him a printed copy of material from his personal Web page.

7. Ban on sending pictures to other inmates

Plaintiff contends that defendants Trumm, Huibregtse, John Ray and O'Donnell are violating his First Amendment right to free expression by forbidding inmates to send each other any pictures by mail. Before bringing suit, a plaintiff must demonstrate that he has suffered "an 'injury in fact'—a harm that is both concrete and actual or imminent, not conjectural or hypothetical." Vermont Agency of Natural Resource v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000). Without a showing that he has suffered such an injury, a plaintiff fails to meet the "irreducible constitutional minimum" requirement of standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

Plaintiff has proposed no facts to show he has been injured as a result of defendants' policy prohibiting the exchange of pictures, such as having been prevented from mailing pictures on any specific occasions. Without an injury, plaintiff lacks standing to litigate this claim. Therefore, I will grant the motion of defendants Trumm, Huibregtse, John Ray and O'Donnell with respect to plaintiff's challenge to the prison policy prohibiting the exchange of pictures between inmates.

8. Ban on donating used books and magazines

a. Exhaustion of administrative remedies

Defendants contend that plaintiff has failed to exhaust his administrative remedies on his challenge to a prison policy forbidding inmates from donating their used books, periodicals and newsletters to the prison library. It is undisputed that plaintiff attempted to file a complaint on February 25, 2004, and that the complaint was rejected as untimely because the challenged policy had been effect for more than fourteen days at the time plaintiff filed his complaint. Wisconsin Admin. Code § DOC 310.11(5)(d) states that an inmate complaint may be rejected if an inmate submits a complaint "beyond fourteen calendar days from the date of the occurrence giving rise to the complaint." The policy plaintiff challenges took effect in February 2002.

Again, I will not second guess the decision of prison officials to reject a complaint they

deem to be untimely. This decision does not render defendants' policy unreviewable. If petitioner challenges the application of a policy, rather than the policy itself, he can exhaust his state administrative options with respect to the alleged violation of his constitutional rights and then, if necessary, raise his claim in federal court. For example, if plaintiff attempted to donate a book to the library and the request was denied, he could file an inmate complaint regarding the incident. Presumably, defendants would deny the complaint, citing the prison policy that prohibits donation of books. Once plaintiff appealed the matter through the state court system, he would be free to raise his claim in federal court. For now, however, I will grant defendants' motion to dismiss plaintiff's claim that defendants Huibregtse and Ellen Ray violated his First Amendment rights by prohibiting him from donating materials to the prison library on the ground that plaintiff failed to exhaust his administrative remedies.

9. Retaliation

a. Failure to state a claim

In his complaint, plaintiff contends that defendant Deaver retaliated against him by issuing conduct report #1159894-1345 because plaintiff (1) "complained to Deaver about being made to wait to attend a program review committee meeting [he] didn't need to be at" and (2) "successfully challenged a c[onduct] r[eport] that C.O. Watson wrote up concerning

[plaintiff]." Cpt., dkt. #1, at 16. Before turning to the parties' arguments regarding plaintiff's retaliation claims, I note at the outset that plaintiff has failed to state a claim with respect to his first theory of retaliation against defendant Deaver.

A prisoner can sufficiently state a claim for relief by alleging that prison officials issued baseless disciplinary tickets against him in retaliation for his pursuit of administrative grievances. Black v. Lane, 22 F.3d 1395, 1402-03 (7th Cir. 1994). However, a plaintiff does not state a claim for retaliation by asserting merely that prison officials issued baseless tickets in retaliation for his verbal complaints. Although inmates have a constitutionally protected interest in filing formal complaints regarding prison conditions, they have no similarly protected interest in complaining about the inconveniences of life.

In order to receive First Amendment protection, an inmate's speech must relate to a matter of public concern. McElroy v. Lopac, 403 F.3d 855, 858 (7th Cir. 2005); Sasnett v. Litscher, 197 F.3d 290, 292 (7th Cir.1999) (imputing to inmate free speech claims requirement of public employee line of cases that protected speech must be about a "public concern"). The fact that plaintiff was made to wait for a meeting he did not wish to attend is a matter of solely personal concern. Plaintiff has failed to state a retaliation claim against defendant Deaver based on the theory that Deaver issued conduct report #1159894-1345 in response to plaintiff's generalized complaints about being made to wait for a meeting.

b. Exhaustion of administrative remedies

Defendants argue that plaintiff failed to exhaust his administrative remedies with respect to each of his retaliation claims because he failed to file inmate complaints for each alleged act of retaliation by defendants Jones, Sandra Grondin, Sharpe, Berge, Boughton, Deaver and Esser. However, plaintiff contends that defendants issued him conduct reports in retaliation for various protected acts plaintiff claims he undertook. Wis. Admin. Code § DOC 310.08 prohibits an inmate from using the inmate complaint review system to challenge "any issue related to a conduct report." If an inmate challenges a conduct report, he must do so at the time of his disciplinary hearing and again on appeal to the warden, assuming the matter is not resolved at the disciplinary hearing stage. Wis. Admin. Code § DOC 303.76.

Failure to exhaust administrative remedies is an affirmative defense that defendants have the burden of proving. Massey v. Helman, 196 F.3d 727 (7th Cir. 1999). Defendants have submitted documentation relating to plaintiff's disciplinary hearings on conduct reports 1159844-1345, 1335640, 1114030 and 1249776. They demonstrate that plaintiff exhausted his administrative remedies on his retaliation claims against defendants Esser and Jones. At plaintiff's disciplinary hearing and on appeal of conduct reports 1335640 and 1249776, plaintiff clearly raised the same retaliation claims to prison officials that he raises

now in this court. Thus, plaintiff put defendants properly on notice of his claims at each level of the administrative process. I conclude that plaintiff exhausted his administrative remedies with respect to each of these claims.

However, the record reveals that plaintiff did not exhaust his administrative remedies with respect to his retaliation claims against defendants Sandra Grondin, Gary Boughton, John Sharpe, Gerald Berge and David Deaver. In the disciplinary hearing and appeal of conduct report 1114030, plaintiff alleged that defendant Sandra Grondin issued him the conduct report in retaliation for his successful appeal of a prior conduct report. In this court, plaintiff has alleged that defendants Sandra Grondin, John Sharpe, Gary Boughton and Gerald Berge issued conduct report 1114030 "because the letter [plaintiff attempted to post] contained critical comments about prison staff." Cpt., dkt. #1, at 4. Plaintiff's retaliation theory in this court does not match the theory of retaliation he raised at his disciplinary hearing.

Similarly, plaintiff's second theory of retaliation in his claim against defendant Deaver is that Deaver retaliated against him because he "had successfully challenged a c[onduct] r[eport]" written by another staff member. However, in the disciplinary hearing and appeal of conduct report 1159894-1345, plaintiff asserted that defendant Deaver "[wa]s retaliating against [him] for stating [he] would file a complaint." Again, the theory of retaliation raised

at the disciplinary hearing is not consonant with the theory plaintiff is pursuing in this case.

In order to exhaust his claims, plaintiff must have alleged sufficient facts to put respondents on notice so they could respond to his complaints. In the context of retaliation claims, this minimal requirement is satisfied when a prisoner specifies the protected conduct and the act of retaliation in which defendants are alleged to have engaged. See, e.g., Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). "The exhaustion doctrine acknowledges the commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court." McCarthy v. Madigan, 503 U.S. 140, 145 (1992), superseded by statute on other grounds. Plaintiff did not provide the disciplinary committees considering conduct reports 1114030 and 1159894-1345 with an opportunity to address the retaliation claims he is raising in this lawsuit. Therefore, plaintiff did not exhaust his administrative remedies with respect to his claims against defendants Sandra Grondin, Gary Boughton, John Sharpe, Gerald Berge and David Deaver.

b. Merits of plaintiff's remaining retaliation claims

Defendants' alternative argument is that they are entitled to judgment in their favor on the merits of plaintiff's retaliation claims. To prevail on a retaliation claim, a prisoner

must prove that his constitutionally protected conduct was a substantial or motivating factor behind a prison official's adverse actions; that is, that the prisoner's protected conduct was one of the reasons the official took action against him. Mt. Healthy Board of Education v. Doyle, 429 U.S. 274, 287 (1977); Johnson v. Kingston, 292 F. Supp. 2d 1146, 1153 (W.D. Wis. 2003).

First, plaintiff must show that he was engaged in a protected activity at the time adverse action was taken against him. Cygan v. Wisconsin Dept. of Corrections, 388 F.3d 1092, 1098 (7th Cir. 2004). Plaintiff has alleged that defendant Jones retaliated against him when plaintiff refused to consent to the destruction of materials the prison deemed to be contraband and that defendant Esser retaliated against him when plaintiff threatened to sue Esser for throwing a tray at him.

It is undisputed that on February 20, 2001, defendant Jones searched plaintiff's cell and discovered several torn items, including two pictures that had been ripped from postcards. These items were considered contraband. Defendant Jones offered to destroy the pictures. When plaintiff refused to consent to the destruction of the pictures, defendant Jones issued plaintiff a conduct report for several violations, including possessing contraband and damaging or altering property. Plaintiff contends that his refusal to consent to the destruction of his torn postcards was an exercise of his First Amendment rights and that

defendant Jones' decision to issue a conduct report was an act of retaliation.

Plaintiff does not contest his possession of the items. He does not deny that the cards violated prison policy. Rather, he challenges the policy itself. Although plaintiff remains free to litigate prison policies he considers unconstitutional, he has no constitutional right to disregard prison rules.

Inmates' First Amendment rights are limited to those that are consistent with prison discipline. Ustrak v. Fairman, 781 F.2d 573, 580 (7th Cir. 1986). Refusing to follow prison rules is not a constitutionally protected action. Smith v. Campbell, 250 F.3d 1032, 1037 (6th Cir. 2001) ("If a prisoner violates a legitimate prison regulation, he is not engaged in protected conduct."). Therefore, it is not sufficient for plaintiff "merely to show that the needs of the prison did not require that the regulation be enforced in the particular case against a particular prisoner and by means of the particular sanction chosen by the prison authorities." Hale v. Scott, 371 F.3d 917, 919 (7th Cir. 2004). Such allegations, even if true, would not justify federal judicial intervention. Id.

Plaintiff contends that his refusal to consent to the destruction of contraband should be protected, since he was legally challenging the policy that prohibited him from possessing the torn postcards. It would be wholly unreasonable to permit inmates to violate prison regulations based on asserted, but not yet adjudicated claims. To do so would undermine

the ability of prison officials to maintain the secure and orderly administration of the institution and would undermine the "substantial deference" this court must give to the regulations established by prison administrators. Cf. Overton v. Bazzetta, 539 U.S. 126, 132 (2003). Therefore, because plaintiff has not asserted that he was engaged in a constitutionally protected activity at the time defendant Jones issued him a conduct report, I will grant defendants' motion for summary judgment on plaintiff's claim that defendant Jones retaliated against him.

Plaintiff contends also that defendant Esser retaliated against him for threatening to file a grievance charging defendant Esser with abuse. The filing of inmate complaints and lawsuits is protected activity. Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002). Whether threatening to file an inmate complaint or initiate legal action is a similarly protected activity is a question of first impression in the Seventh Circuit. I conclude that speech indicating an intention to file an inmate complaint about a matter involving prison abuse is constitutionally protected speech.

It is well established that prison officials violate the Constitution when they retaliate against a prisoner for filing grievances or initiating lawsuits. Bounds v. Smith, 430 U.S. 817, 821 (1977); Walker, 288 F.3d at 1008-09. Under the First Amendment, inmates are entitled to file grievances and lawsuits. Id. Prison officials may not restrict the exercise of

this right except to the extent necessary for security or efficient administration. Buise v. Hudkins, 584 F.2d 223, 231 (7th Cir. 1978).

Retaliation is constitutionally impermissible because it inhibits individuals from exercising their constitutional rights. Crawford-El v. Britton, 523 U.S. 574, 589 n. 10 (1998); see also Pickering v. Board of Ed. of Township High School Dist. 205, Will County, Illinois, 391 U.S. 563, 574 (1968). It stands to reason that an inmate is more likely to be dissuaded from filing an inmate complaint or lawsuit when his verbalized intention to do so is met with retaliation than when an act of retaliation follows the filing of the grievance or lawsuit. If inhibition is the evil the law seeks to avoid, there is no reason to find anticipatory retaliation more permissible than reactive retaliation. If anything, retaliatory actions taken in advance of the exercise of constitutionally protected rights are more likely to inhibit the exercise of those rights than are subsequent acts of retaliation. Furthermore, plaintiff's threat to sue defendant Esser was protected speech because it involved a matter of public concern, namely, plaintiff's plan to draw to attention the alleged abuse of an inmate by a prison guard. McElroy, 403 F.3d at 858. For these reasons, I find that plaintiff's speech indicating his intention to file an inmate grievance or lawsuit regarding prison abuse was protected under the First Amendment. Therefore, plaintiff's threat to sue defendant Esser was a constitutionally protected act.

Having established that he engaged in constitutionally protected activity, plaintiff must introduce some evidence that his threats to file grievances or initiate legal action were a substantial or motivating factor behind defendants' adverse actions against him. Mt. Healthy Board of Education, 429 U.S. at 287. "Once the plaintiff proves that an improper purpose was a motivating factor, the burden shifts to the defendant . . . to prove by a preponderance of the evidence that the same actions would have occurred in the absence of the protected conduct." Spiegla v. Hull, 371 F.3d 928, 943 (7th Cir. 2004).

In this case, plaintiff contends that defendant Esser retaliated against him by issuing him a "false conduct report" resulting in sanctions through the prison disciplinary process. Although almost all of the facts surrounding plaintiff's retaliation claim against defendant Esser are in dispute, the parties agree that on November 27, 2001, defendant Esser approached plaintiff's cell and that during this encounter plaintiff threatened to file an inmate complaint against Esser regarding events in dispute. Shortly thereafter, defendant Esser issued plaintiff a conduct report, charging him with battery and disruptive conduct. It is possible to infer from these facts that plaintiff's threat to sue Esser was a motivating factor in the issuance of the conduct report.

Defendants contend the conduct report was issued validly in response to a violation of prison rules and would have been issued even in the absence of plaintiff's threat to sue

defendant Esser. However, defendant Esser's motivation in issuing the conduct report is a material element of plaintiff's retaliation claim and it is disputed.

Nevertheless, even if I assume that plaintiff's version of the events underlying his retaliation claim against defendant Esser is true, I find that defendants are entitled to summary judgment on the ground that they are qualifiedly immune from liability. In their answer to plaintiff's complaint, defendants asserted the affirmative defense of qualified immunity to all plaintiff's claims. Ans., dkt. #5, at 23. Qualified immunity insures that "officers are on notice their conduct is unlawful" before they are subject to suit. Saucier v. Katz, 533 U.S. 194, 206 (2001). The doctrine "gives public officials the benefit of legal doubts." Id. Defendants will be denied qualified immunity only when the rights that have been violated are sufficiently particularized to have put potential defendants on notice that their conduct was unlawful. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

In Hope v. Pelzer, 536 U.S. 730, 739 (2002), the United States Supreme Court held:

> For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

As discussed above, neither the United States Supreme Court or the Seventh Circuit has ruled specifically that threats to file lawsuits constitute constitutionally protected speech.

Therefore, even if defendant Esser issued conduct report 1335640 in retaliation for plaintiff's threat to sue him, defendant Esser would not have been on notice that in doing so he was violating plaintiff's First Amendment rights. Because I conclude that defendants were not on notice that assertions of intent to engage in constitutionally-protected behavior are protected by the First Amendment, I will grant their motion for summary judgment with respect to plaintiff's retaliation claim against defendant Esser on the ground that Esser is qualifiedly immune.

C. Excessive Force

1. Exhaustion of administrative remedies

Defendants contend that plaintiff failed to exhaust his administrative remedies with respect to his excessive force claim because he did not file an inmate complaint directed to Esser's alleged violation of his constitutional rights. However, because plaintiff's claim was related to a disciplinary report, his administrative remedy did not lie in the inmate complaint system. Rather, plaintiff had to raise his excessive force claim at the time of his disciplinary hearing and again on appeal to the warden. Defendants have not proposed facts relating to the issues raised at plaintiff's disciplinary hearing. Therefore, they have not shown that plaintiff failed to exhaust his administrative remedies before bringing this lawsuit.

2. Merits of plaintiff's excessive force claim

Plaintiff contends that defendant Esser threw a meal tray at plaintiff, causing bruising, depression and anxiety. Defendants contest plaintiff's assertion that defendant Esser threw a meal tray. However, they assert that they cannot be liable to plaintiff even if defendant Esser had thrown the tray, because the injuries plaintiff asserts are de minimus and are therefore insufficient to sustain an Eighth Amendment claim.

What constitutes an injury that is sufficiently serious to invoke the Constitution is neither static nor absolute. Instead, it should be "applied with due regard for the differences in the kind of conduct against which an Eighth Amendment objection is lodged." Hudson v. McMillian, 503 U.S. 1, 8 (1992). The Supreme Court has described the injury requirement in the excessive force context as follows:

> When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury. Such a result would have been as unacceptable to the drafters of the Eighth Amendment as it is today.

Id. at 9. In determining whether prisoner officials used excessive force, the core judicial inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline,

or maliciously and sadistically to cause harm." Id. at 7. Relevant factors to consider include the need for application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the responsible officials, and any efforts made to temper the severity of a forceful response. Id. The absence of serious injury is relevant to the Eighth Amendment inquiry, but does not end it. Id.

In support of their position, defendants cite three cases in which the Court of Appeals for the Seventh Circuit has held that malicious acts by prison officials did not implicate the Eighth Amendment. In Outlaw v. Newkirk, 259 F.3d 8333, 839 (7th Cir. 2001), an inmate's hand was bruised when a guard slammed it in the cuffport hatch while plaintiff was trying to throw trash out of the hatch. In that case, the court found that the prison guard had a legitimate security interest in closing the hatch door. Id. Similarly, defendants cite Lunsford v. Bennett, 17 F.3d 1574, 1582 (7th Cir. 1994), in which prison guards cleaning flooded cells poured a bucket of water over the head of a prisoner who was shouting and splashing them with water, causing a disturbance. Id. The court held that "pouring a bucket of water over the head of a prisoner who is already standing ankle-deep in water, while it may be seen as unnecessary in retrospect, [wa]s a minor use of force that does not offend the conscience." Id. In both Outlaw and Lunsford, security concerns either excused or explained the conduct of prison guards. No similar security concern would be raised by plaintiff's version of the facts underlying his claim.

Finally, defendants rely on DeWalt v. Carter, 224 F.3d 607, 620 (7th Cir. 2000), in which a guard's single unprovoked act of shoving a prisoner into a doorway was found to be de minimus. DeWalt is more closely analogous to plaintiff's case, insofar as the excessive force used by the prison guard in DeWalt was limited to a single incident. Id. Nevertheless, in DeWalt the prisoner was not bruised; plaintiff has averred that he was bruised by defendant Esser's action.

Because material facts are in dispute, defendant's motion for summary judgment with respect to this claim must be denied.

3. Qualified immunity

Defendants contend that they are entitled to qualified immunity if plaintiff's constitutional rights were violated by defendant Esser's actions. Again, I will reserve a ruling on the question of qualified immunity until the facts have been resolved at trial. However, defendants should be aware that if plaintiff succeeds in proving that he was the victim of the use of excessive force, such a motion would not be granted. Although neither the United States Supreme Court nor the Seventh Circuit has ruled specifically that it is illegal for a prison guard to throw a tray at a prisoner without provocation and with the intention of causing harm, the Court has held that contemporary standards of decency always are

violated when prison officials maliciously and sadistically use force to cause harm. Hudson, 503 U.S. at 9. Defendants should have been on notice that random acts of cruelty to incarcerated persons are not permissible under existing law.

D. Access to Courts

Plaintiff contends that defendant Casperson unconstitutionally blocked plaintiff's access to courts when Casperson refused to issue a decision on plaintiff's appeal of his placement in administrative confinement in June 2004. Prisoners have a constitutional right of access to the courts for pursuing post-conviction remedies and for challenging the conditions of their confinement. Lehn v. Holmes, 364 F.3d 862, 865-66 (7th Cir. 2004). In order to show that he has been denied access, a prisoner must allege facts suggesting that he "has suffered an injury over and above" the denial of access to a court. Walters v. Edgar, 163 F.3d 430, 434 (7th Cir. 1998). At a minimum, he must allege facts showing that the "blockage prevented him from litigating a nonfrivolous case." Id.

Although plaintiff alleges that he challenged his placement in administrative confinement by appealing first to the prison warden and then to defendant Casperson, as required by Wis. Admin. Code § DOC 308.04(10), plaintiff has not alleged any facts demonstrating that defendant Casperson's failure to issue a timely response interfered in any

way with plaintiff's litigation of a nonfrivolous lawsuit. Plaintiff has not averred that he tried to file for review of the administrative confinement decision in state court and was denied access because of defendant Casperson's inaction. In fact, in the appeal he submitted to defendant Casperson, plaintiff stated clearly that he would consider the appeal denied if Casperson did not issue a response within twenty days. Presumably, Casperson's failure to issue a decision within twenty days was a denial of plaintiff's request and therefore constituted exhaustion of plaintiff's administrative remedies. Plaintiff has failed to show how he was prejudiced by defendant Casperson's actions and how his access to court was blocked in any way. Therefore, I will grant defendants' motion for summary judgment on this claim.

ORDER

IT IS ORDERED that defendants' motion for summary judgment is GRANTED as to the following claims by plaintiff Nathaniel Allen Lindell:

1) Defendants Haen, Sandra Grondin, Spanbauer, Bellaire, John Ray and Cindy O'Donnell confiscated stamps mailed to him by persons outside the prison in violation of the First Amendment;

2) Defendants Kool, Ellen Ray, Huibregtse, John Ray and O'Donnell refused to

permit plaintiff's uncle to pay plaintiff's postage costs;

3) Defendants Sandra Grondin, Ellen Ray, Huibregtse, Hautamaki, and O'Donnell endorse prison policies permitting use of equipment that occasionally damages inmate mail;

4) Defendants Bell, Bartels, Linjer, Kartman, Berge, Biggar, John Grondin, Schneider, Ellen Ray, Hautamaki and O'Donnell refused to post plaintiff's letters on October 4, 2001, October 20, 2003, August 28, 2003, December 2, 2003, and a letter submitted on plaintiff's behalf on March 14, 2004;

5) Defendants Berge, John Grondin and Trumm enforce prison policies prohibiting prisoners from receiving used or hardcover books;

6) Defendant Casperson blocked plaintiff's access to the court by failing to issue a response to plaintiff's administrative appeal;

7) Defendants Huibregtse and Ellen Ray enforce prison policies prohibiting prisoners from donating written materials to the prison library;

8) Defendants Trumm, Huibregtse, John Ray and O'Donnell enforce prison policies prohibiting prisoners from mailing pictures to other inmates;

9) Defendant Jones retaliated against plaintiff for refusing to consent to the destruction of plaintiff's confiscated property;

10) Defendants Sandra Grondin, Sharpe, Boughton and Berge retaliated against plaintiff for writing a letter criticizing prison staff;

11) Defendant Deaver retaliated against plaintiff for threatening to file an inmate complaint; and

12) Defendant Esser retaliated against plaintiff for threatening to file an inmate complaint.

The complaint is dismissed with respect to defendants Rick Raemisch, John Ray, Steven Casperson, Jeff Haen, Steven Spanbauer, Kathleen Bellaire, Kurt Linjer, Ellen Ray, Timothy Gilberg, Richard Schneiter, Brian Kool, Andy Jones, Leonard Johnson, Timothy Haines, John Grondin, Christian Bell, Ricky Bartels, Todd Brudos, Julie Biggar, Richard Schneider, David Deaver and Daniel Kartman.

FURTHER, IT IS ORDERED that defendants' motion for summary judgment and plaintiff's motion for summary judgment are DENIED with respect to the following claims:

13) His First Amendment rights are violated by the decision of defendants Berge, Johnson, Trumm, Huibregtse, John Ray and O'Donnell to enforce prison policies prohibiting prisoners from possessing magazines with torn covers;

14) His First Amendment rights are violated by the decision of defendants Sandra Grondin, Berge, Trumm, Huibregtse, Hautamaki and O'Donnell to enforce prison policies

prohibiting prisoners from possessing copies of material from inmates' personal web sites; and

15) His Eighth Amendment rights were violated when Defendant Esser used excessive force against him.

FURTHER, IT IS ORDERED that plaintiff's motion objecting to consideration of additional evidence regarding exhaustion of administrative remedies is DENIED as moot.

FURTHER, IT IS ORDERED that plaintiff's renewed motion for Rule 11 sanctions is DENIED.

Entered this 21st day of October, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge