IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JONATHON M. MARK,

Plaintiff,

v.

Off. IMBERG; Capt. HANSON; Capt. SCHULTZ; Off. GUSTAFSON; Sgt. McARTHUR; Chaplain OLSON; UNIT PSYCHOLOGIST (Melrose- JANE DOE); Lt. DOHMS; Unit Manager DOUGHERTY; Mr. BROWN (head of PRC); STEVEN M. PUCKETT; Sgt. MESHUM; UNIT PSYCHOLOGIST (Oxbow - JOHN DOE),

Defendants.

OPINION AND ORDER

05-C-279-C

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This is a civil action for declaratory, injunctive and monetary relief brought under 42 U.S.C. § 1983. At the time he filed this lawsuit, plaintiff Jonathon M. Mark was confined at the Chippewa Valley Correctional Treatment Facility in Chippewa Falls, Wisconsin. The case is now before the court on the motions of defendant Imberg and defendants Hanson, Schultz, Olson, Gustaffson, McArthur and Meshun to dismiss plaintiff's claims against them for plaintiff's failure to exhaust his administrative remedies.

Although plaintiff was given ample time to oppose defendants' motions, he did not

do so.[1] Therefore, the motions will be decided on the basis of documentation defendants submitted regarding plaintiff's use of the inmate complaint review system and the allegations in plaintiff's complaint, which I accept as true. I can consider the inmate complaint review system documents without converting the motion to dismiss into a motion for summary judgment because such documents are a matter of public record. See General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997). However, I decline to consider documents defendants submitted relating to plaintiff's Program Review Committee proceedings, because these documents are not public documents that may be considered on a motion to dismiss and, in any event, do not reveal whether plaintiff exhausted his administrative remedies with respect to his conspiracy claim against defendant Dougherty.

FACTS

[1]On November 8, 2005, plaintiff filed an objection to this court's order of October 19, 2005, denying his second request for an extension of time in which to oppose defendants' motions. In the October 19 order, I noted that plaintiff had already received one extension of the deadline and that his request for at least 60 additional days was not reasonable. Because plaintiff did not serve a copy of his November 8 objection on defendants' counsel, it cannot be considered. Even if I could consider it, however, I would not change my decision to refuse to grant plaintiff an indefinite extension of time to oppose defendants' motion to dismiss, which is what plaintiff appears to be asking the court to do.

At the time he filed this action, plaintiff Jonathon M. Mark was an inmate at the Chippewa Valley Correctional Treatment Facility in Chippewa Falls, Wisconsin. Plaintiff also has been incarcerated at the Milwaukee Secure Detention Facility and the Jackson Correctional Institution. Defendants are employed in various positions within the Wisconsin Department of Corrections.

A. Denial of Religious Publication

In his complaint, plaintiff alleges that while he was confined at Jackson Correctional Institution, defendants Imberg, Hanson, Schultz and Olson violated his rights under the First Amendment and Imberg and Olson violated his rights under the Fourteenth Amendment equal protection clause when they denied him a religious publication entitled "Llewellyn." On January 22, 2003, plaintiff filed a two-page inmate complaint numbered JCI-2003-3162. On the first page of the complaint plaintiff complained that on January 19, 2003, prison officials had improperly withheld a religious publication sent to him by his sister. Plaintiff did not identify this publication by its title. On the second page of the complaint, plaintiff complained that between "11-28 thru 12-12-02" he was denied a religious publication entitled "Llewellyn."

On January 24, 2003, institution complaint examiner Jodi Krutke recommended dismissal of plaintiff's inmate complaint saying,

> Inmate Mark complains that the "religious book" he had his sister order for him is being held for further review. He alleges that the book is part of his Wiccan religion. He also complains that the book has not been reviewed by one of the chaplains.
>
> The book in question, "The Key of Solomon, the King" was reviewed by Capt. Schultz. A memo was sent to Inmate Mark from Capt. Schultz explaining the reason the book was denied. Specifically the book's main focus was about the occult, and it is not religious in nature.
>
> In agreement with the findings and decision by Capt. Schultz, it is recommended to dismiss the complaint. Inmate Mark is advised to notify the Property Department regarding the disposition of the book (i.e. return to the vendor, mail out, or send out with a visit).

On January 28, 2003, the reviewing authority accepted the institution complaint examiner's recommendation and dismissed complaint JCI-2003-3162. On February 20, 2003, plaintiff filed two requests for Corrections Complaint Examiner Review. In both requests, plaintiff complained that he was being denied "The Key of Solomon the King." He did not renew his complaint that he had been denied "Llewellyn" or point out that the institution complaint examiner had ignored that part of his inmate complaint entirely. On February 25, 2003, Corrections Complaint Examiner John Ray recommended dismissal of the appeal because plaintiff had not filed it within ten days of the reviewing authority's dismissal of complaint JCI-2003-3162. On March 2, 2003, Cindy O'Donnell accepted the Corrections Complaint Examiner's recommendation on behalf of the Secretary of the Department of Corrections and dismissed plaintiff's complaint as untimely.

B. Destruction of Magical Seals

In his complaint in this court, plaintiff alleges that defendants Gustaffson and McArthur violated his rights under the First Amendment by destroying "magical seals" that plaintiff had made for a specific purpose related to the practice of his religion. On February 28, 2003, plaintiff filed inmate complaint JCI-2003-7820, in which he complained,

> Room Search (Routine): I had religious "seals" on the door and walls of my room. They were taken down. I showed sergeant MacAurther "the Religious Land Use & Institutionalized Persons Act of 2000." I told him that under this act, I may use my room any way, which is deemed "religious" in nature. He said I was not a lawyer and I should not quote "law" to him. He is right. I am not a lawyer. I told him that this was federal law by "Congress," enacted by the "Senate & House of Representatives." He said, along with another officer under him (female Asian) that JCI does not follow this "act," which is federal law. So it is my understanding that "JCI" does not support or follow this act, as quoted by it, "an 'act' to protect 'religious' liberty & for other purposes." I obeyed the sgt's command to not put "religious seals" on my room's walls & doors. ICI was the appropriate measure.

On March 3, 2003, institution complaint examiner Jodi Krutke recommended dismissal of plaintiff's complaint as follows:

> Inmate Mark complains that Sgt. McArthur would not allow him to place his religious seals on his door and walls of his cell. He contends that per the Religious Land Use and Institutionalized Persons Act of 2000, he is "permitted to use his cell any way which is deemed religious in nature."
>
> The complainant's attention is directed to page 9 of the JCI Handbook, which states," Nothing is to be placed on the cell lights, windowsill, window bars, or between the window and the screen. Tape, tacks, glue, etc. may not be used to attach anything to the interior of the cell (for example, on walls, the ceiling, the door, furniture or fixtures)."

> The Religious Land Use and Institutionalized Persons Act of 2000 makes no mention that institutions are required to allow inmates to place religious items on their cell walls or doors.
>
> It is recommended to dismiss. Provided the religious materials that inmate Mark refers to in this complaint are not considered contraband (i.e. altered), he is permitted to keep them in his possession. However, he is still required to follow institution rules regarding cell standards.

On March 3, 2003, the reviewing authority accepted the institution complaint examiner's recommendation and dismissed plaintiff's complaint. On March 5, 2003, plaintiff appealed this decision to the Corrections Complaint Examiner. In his appeal, plaintiff pressed his argument that the Religious Land Use and Institutionalized Persons Act gave him the right to "convert" his room for religious practice "by putting religious seals . . . on [his] door (south) & wall (north)." On March 13, 2005, Corrections Complaint Examiner John Ray recommended dismissal of plaintiff's appeal as follows:

> In agreement with and based on the report of the Institution Complaint Examiner, it is recommended this complaint be dismissed. I believe complainant's assertion that he can deface his cell (state property) under the cloak of RLUIPA is erroneous and ludicrous.

On that same day, Cindy O'Donnell accepted the recommendation on behalf of the Secretary of the Department of Corrections and dismissed the appeal .

C. Retaliation

1. Defendant Olson

In his complaint in this court, plaintiff alleges that defendant Olson retaliated against him for filing an inmate complaint against him by delaying plaintiff's receipt of some of his religious publications or losing them.

On April 30, 2003, plaintiff filed inmate complaint JCI-2003-15463 in which he complained that defendant Olson had been reviewing three religious books he had purchased from "Asure Green" for three months and that he believed that "this incident is in further compliance with the 'retaliatory' tactics of the JCI staff, to discriminate [against] me & my religious beliefs." On May 20, 2003, the institution complaint examiner recommended dismissal of plaintiff's complaint after finding that Olson had denied plaintiff one of the three books and that there was no mandatory time limit for reviewing the other two "questionable publications." The examiner noted also that

> Inmate Mark is asked to be patient. He may also send an Interview/Information Request to the chaplain if he has further questions, and to give his decision for disposition of the book not allowed at this time.

That same day, the reviewing authority accepted the examiner's recommendation and dismissed plaintiff's complaint.

On May 26, 2003, plaintiff appealed the dismissal of JCI-2003-15463 to the Corrections Complaint Examiner. In his appeal, plaintiff repeated his contention that it was

taking too long for defendant Olson to review his books. He did not assert that Olson's delay in deciding whether the books would be allowed was retaliatory. In response to his appeal, Corrections Complaint Examiner Sandra Hautamaki agreed with plaintiff that the time delay was unreasonable. She recommended that plaintiff's complaint be affirmed and that "JCI staff be directed to complete the review and decide whether the publications should be delivered upon receipt of the Secretary's decision." On June 2, 2003, Cindy O'Donnell accepted Hautamaki's recommendation and affirmed plaintiff's complaint.

2. Defendant Meshun

In his complaint in this court, plaintiff alleges that defendant Meshun changed his room assignment and transferred him off the unit in retaliation for his having complained that Meshum was showing favoritism toward another inmate.

On May 25, 2003 plaintiff filed inmate complaint JCI-2003-18132. In it he stated,

> JCI staff violated 310.16(b) by moving me from Melrose unit to Oxbow Unit. The reason for moving me was "I don't have a job." This is correct, but twenty-some other people on Melrose Unit also don't have jobs. A handfull of inmates on Melrose Unit haven't had a job for almost a year & haven't been moved. Out of all of them, I used the ICRS system the most. . . .Let's say it isn't my use of the ICRS. The only possible conclusion is by me expressing my 1st Amendment right to free speech, about my constitutional rights being violated by multiple JCI staff I have expressed my rights through letters & memos to various head staff at JCI & also outside the institution. Is it my understanding JCI doesn't want me to express my rights by way of state & federal law? Which guarantee these "rights". . . .

On May 28, 2003 Institution Complaint Examiner Jodi Krutke recommended dismissal of the complaint, acknowledging plaintiff's statement that he believed the transfer was motivated by his having "expressed his rights through letters and memos to various head staff at JCI and also outside the institution." However, examiner Krutke recommended dismissal of plaintiff's complaint stating,

> . . . [inmate Mark's] attention is directed to the first paragraph [of the Oxbow Unit Handbook, Unit Description and Philosophy] which states, "The Oxbow Unit is a facility that has many different functions. Some inmates living on the unit are general population inmates, like those in any other housing unit. These inmates participate in the life of the institution just like any other inmate."
>
> When a person receives his sentence to the care and custody of the Warden of the prison, they are without standing in control of their placement. JCI has and continues to have the right to house inmates where it deems most appropriate. The Warden has final authority to direct inmate movement and make placements as appropriate and necessary. No violation of the administrative code exists.

On May 29, 2003 the reviewing authority accepted the recommendation and dismissed plaintiff's complaint. Plaintiff appealed the dismissal to a Corrections Complaint Examiner. Although he dated the appeal June 13, 2003, it was not received by the office of the corrections complaint examiner until June 20, 2003. On June 23, 2003, Corrections Complaint Examiner John Ray recommended dismissal of the appeal on the ground that it was not filed within the ten-day time frame required under Wis. Admin. Code § DOC 310.13(1). On June 28, 2003, Cindy O'Donnell accepted Ray's recommendation and

dismissed plaintiff's appeal as untimely.

D. Lack of Mental Health Care

In his complaint in this court, plaintiff alleges that two unnamed defendants, one of whom is a Unit Psychologist on Melrose Unit and the other of whom is a Unit Psychologist for the Oxbow Unit, violated plaintiff's Eighth Amendment right to be free from cruel and unusual punishment by not providing him with sufficient treatment and medication for his schizophrenia.

Plaintiff did not file any inmate complaint regarding inadequate mental health treatment or medication for schizophrenia.

E. Conspiracy to Violate Right of Access to the Courts

In his complaint in this court, plaintiff alleges that defendant Dougherty, together with defendants Dohms, Brown and Puckett, conspired to violate his right of access to courts by transferring him to a correctional institution that lacked legal resources he needed to initiate this lawsuit and to pursue his motion for post-conviction relief.

On June 20, 2003, plaintiff filed inmate complaint 03-21105 dated June 11, 2003. In this complaint, plaintiff asserts,

My complaint is that of my transfer from JCI to M.S.D.F. on the basis of

> "retaliation" by the administrative staff; more specifically, by Thomas Karlen-Warden. The reason being, he is the only one who has the capability to transfer inmates from unit to unit, as well as the power to sign the transfer papers for inmates coming & going from JCI. He is also knowledgeable about the events surrounding me. To prove "retaliation," I must prove a "set" of "chronological set of events." First, Thomas Karlen knew about my struggle with my religious views with staff members underneath him, with JCI, & with the DOC (refer: past ICI's & memo's). Second, [the Program Review Committee] gave me a bed date for June 13 at M.S.D.F. for my program. I told them (PRC) I had "pending" litigation (postconviction relief). I made them aware of this at PRC. I re-enforced my need of "legal materials" to Mr. Brown, through letter form. I re-enforced that with a letter to Steven M. Puckett about the fact that I'm a "pro se" litigant & spend between 6 to 8 hours a day on studying law, for my pending as well as upcoming litigation. I asked to be moved to the next cycle so that I may finish, or at least begin my filing process. I needed 3 months. Third, my frequent use of the ICRS about staff & other violations. Fourth, my move from Melrose to Oxbow, on a Friday. Everyone knows transfers occur on Tuesday, Thursday & Saturday. I can call many witnesses to this fact. Fifth, I wrote to Capt. Tegels about Sgt. Meshun showing "favoritism" towards inmate Moya. I can call witnesses to this "fact." Sixth, my denial of canteen on Oxbow unit, twice. Seventh, my denial of the "law library." A violation of my 1st & 14 Amendment rights. My postconviction has been postponed as a result of this act. I receive a letter from Judge Nuss on 6-10-03 to this fact. Eighth, I was stopped "cold-in-my-tracks from bringing a civil suit against JCI for "many" violations against me, by denying me the "law library."

Also on June 20, 2003, inmate complaint examiner Jodi Krutke rejected plaintiff's complaint explaining,

> Inmate Mark complains about his transfer to MSDF. He feels that the Warden made this decision and believes it was in "retaliation" for several reasons. (Inmate Mark lists the reasons in his complaint.)
>
> Upon review of his most recent Classification Summary, dated 05/01/03, Inmate Mark was recommended by his social worker and the PRC committee

> for minimum security. In addition, there is a comment regarding his "positive institution adjustment."
>
> This complaint is rejected pursuant to DOC 310.08(2)(b), Wis. Adm. Code, because decisions made by the program review committee are not appealable through the inmate complaint review system.

On June 22, 2003, plaintiff appealed the rejection of his complaint. On October 7, 2003, Warden Karlen confirmed that the complaint had been rejected appropriately as outside the scope of the inmate complaint review system.

DISCUSSION

The 1996 Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." The Court of Appeals for the Seventh Circuit has held that "[e]xhaustion of administrative remedies, as required by § 1997e, is a condition precedent to suit" and that district courts lack discretion to decide claims on the merits unless the exhaustion requirement has been satisfied. Dixon v. Page, 291 F.3d 485, 488 (7th Cir. 2002); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999). The Wisconsin Department of Corrections has an administrative system for hearing inmate grievances related to prison conditions or the

actions of prison officials. Wis. Admin. Code § 310.01 *et seq.* To exhaust his remedies, an inmate must first use the inmate complaint system to attempt to resolve his issues and also must "file complaints and appeals in the place, and at the time, the prison's administrative rules require." Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). This exhaustion requirement "provides the prison system with prompt notice of problems," giving prison officials "an opportunity to address a situation internally." Smith v. Zachary, 255 F.3d 446, 450 (7th Cir. 2001). Requiring administrative exhaustion also helps insure a complete development of the factual record before a prisoner may bring a case to the courtroom. Id. Wis. Admin. Code § DOC 310.04 details the exhaustion requirement for claims involving prison conditions: "[B]efore an inmate may commence a civil action . . . the inmate shall file a complaint under s. DOC 310.09 or 310.10, receive a decision on the complaint under s. DOC 310.12, have an adverse decision reviewed under s. DOC 310.13, and be advised of the secretary's decision under s. DOC 310.14." However, complaints concerning actions by the Program Review Committee fall outside the scope of the inmate complaint review system. Wis. Admin. Code § DOC 310.08(2)(b). If an inmate objects to decisions made by the committee concerning his custody classification, transfer, institution placement, or program or treatment assignments, he may file an appeal to the director of the Bureau of Offender Classification and Movement in the Department of Corrections or his or her designee within 30 days of the inmate's receipt of the written decision of the Program

Review Committee. Wis. Admin. Code § DOC 302.18.

A. First and Fourteenth Amendment Claims against Imberg, Hanson, Schultz and Olson

There is no question that plaintiff failed to exhaust his administrative remedies with respect to his claim that defendants Imberg, Hanson, Schultz and Olson violated his constitutional rights by denying him a religious publication entitled "Llewellyn." In the first place, plaintiff buried his complaint about the withholding of the publication "Llewellyn" on the second page of a complaint that appeared to be devoted to his inability to receive a publication titled "The Key of Solomon, the King." Although plaintiff did not identify "The Key of Solomon, the King" by name in his inmate complaint, he noted that the incident had occurred on January 19, 2003. From this information, the examiner appears to have determined that the publication at issue was "The Key of Solomon, the King," and plaintiff did not object to this determination when he filed his appeal. Not surprisingly, the institution complaint examiner missed entirely plaintiff's reference to "Llewellyn" which, according to plaintiff, had been denied "between '11-28 thru 12-12-02." Plaintiff failed to insure in his inmate complaint and his appeal that prison officials understood the nature of his complaint so that it could be investigated and possibly resolved before he would need to file a federal court action. This failure requires a finding that plaintiff has failed to exhaust his administrative remedies with respect to his claim about the withholding of "Llewellyn."

Even if plaintiff had made it clear in his complaint and his appeal that his objection was to the withholding of the publication "Llewellyn," the corrections complaint examiner dismissed his appeal as untimely. This, too, supports a conclusion that plaintiff failed to exhaust his administrative remedies. He is required to take every step in the administrative process within the time the administrative rules require. Pozo v. McCaughtry, 286 F.3d at 1024.

Because plaintiff did not exhaust his administrative remedies with respect to his First and Fourteenth Amendment claims against defendants Hanson, Schultz and Imberg and Olson, these claims will be dismissed.

B. First Amendment Claim Against Gustaffson and McArthur

When I granted plaintiff leave to proceed on his claim against defendants Gustaffson and McArthur, I accepted as true his assertion in his complaint that Gustaffson and McArthur had "destroyed" his 'magical seals,' which were necessary to the practice of his religion. In support of their motion to dismiss this claim, defendants argue that the complaint plaintiff pursued through the inmate complaint review system expressed his objection to the removal of the seals from his cell walls and door and that nowhere in his complaint or appeal did he complain that the seals were confiscated or destroyed.

It is true that plaintiff's complaint to prison officials focuses entirely on plaintiff's

assertion that defendant McArthur should not have forced to him to remove his magical seals from his walls and door. His comment in his complaint that "I may use my room any way which is deemed 'religious' in nature" and his argument in his appeal that he has a right under the Religious Land Use and Institutionalized Persons Act to "convert" his room for religious practice "by putting religious seals . . . on [his] door . . . & wall" do not put defendants on notice that his seals were "destroyed," if they were. Nevertheless, I am not persuaded that this claim should be dismissed for plaintiff's failure to exhaust his administrative remedies. Whether plaintiff's seals were "destroyed" figuratively or literally when they were removed from his walls and door, plaintiff's inmate complaint and his claim in this court can be construed as a claim that his inability to view the seals interferes with his ability to practice his religion. Defendants have been put on sufficient notice of this claim.

Because plaintiff properly took each step in the administrative grievance system with respect to his claim that defendants Gustaffson and McArthur interfered with his right to practice his religion by removing his magical seals from his cell walls and door, plaintiff has exhausted his remedies for this claim. I will not dismiss it on this ground.

C. Plaintiff's First Amendment Retaliation Claim Against Chaplain Olson

In his complaint in this court, plaintiff alleges that defendant Olson delayed his

receipt of three religious publications in retaliation for plaintiff's *filing of inmate complaints* against defendant Olson. This claim was not presented to prison officials in the administrative grievance system in such a way as to allow the inmate complaint examiner to investigate plaintiff's grievance and resolve it before litigation became necessary. In particular, plaintiff told prison officials that Olson was withholding his religious publications as part of a scheme of retaliation against plaintiff because of *his religious beliefs*. Plaintiff may not assert one protected constitutional activity as the basis for his retaliation claim in his complaint in this court and assert a different protected constitutional activity as the basis for a retaliation claim in his administrative complaint.

As I explained in the order in which I screened plaintiff's complaint, to state a claim of retaliation, a prisoner must identify the alleged retaliatory acts of the defendant *as well as the protected act* that prompted the retaliation. McElroy v. Lopac, 403 F.3d 855, 858 (7th Cir. 2005) (per curiam); Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). I allowed plaintiff leave to proceed on this claim because plaintiff identified both the protected act (filing a complaint against defendant regarding the denial of a religious publication) and the alleged retaliatory act (delay or loss of three religious publications). As noted above, the whole idea of requiring exhaustion is to allow prison officials an opportunity to investigate the facts relating to a prisoner's claims of wrongdoing, correct the problem and avoid the need for litigation. Alternatively, the administrative process insures a complete development

of the factual record before the prisoner brings suit. For this reason, a prisoner cannot have prison officials investigating one retaliatory motive or one retaliatory act in the administrative process and then claim another retaliatory motive or retaliatory act in his federal lawsuit. The internal investigation of plaintiff's complaint and the system's ability to resolve the matter and avoid litigation turns on these key assertions.

Because plaintiff did not exhaust his administrative remedies with respect to his claim that defendant Olson delayed his receipt of three publications in retaliation for his having exercised his right to file complaints against Olson, I will dismiss this claim.

D. Plaintiff's Retaliation Claim Against Meshum

Plaintiff's retaliation claim against defendant Meshum must be dismissed for plaintiff's failure to exhaust his administrative remedies. The facts reveal that plaintiff filed inmate complaint JCI-2003-18132, alleging that he was moved from Melrose unit to Oxbow Unit for several reasons: his loss of a job; his use of the inmate complaint review system; and his expression about his constitutional rights being violated "by multiple JCI staff." This inmate complaint falls far short of putting prison officials on notice that plaintiff believed his transfer was motivated by an earlier complaint he had filed that caused defendant Meshum to be investigated for showing favoritism toward another inmate. Even if plaintiff had made clear to prison officials that he believed Meshum to have orchestrated his transfer

because of his earlier complaint about Meshum, defendants have shown that plaintiff did not file a timely appeal of the dismissal of this complaint and that the appeal was dismissed on that ground. Because plaintiff did not make clear his claim against Meshum or take each step he was required to take under the prison administrative rules, defendants are entitled to dismissal of this claim.

E. Plaintiff's Eighth Amendment Claim Against Jane and John Doe

Despite the existence of evidence supplied by the moving defendants that plaintiff did not exhaust his administrative remedies with respect to his claims against the Doe defendants, the Doe defendants have not moved for dismissal of plaintiff's claims against them. I presume this is because they have not been served with plaintiff's complaint. However, I will dismiss plaintiff's claims against the Doe defendants on the court's own motion.

The record reflects that in a preliminary pretrial conference order dated September 28, 2005, Magistrate Judge Stephen Crocker set a deadline of October 11, 2005 for defendants to file a letter identifying all "John Doe" defendants who fit the description provided in plaintiff's complaint. In addition, the magistrate judge set a deadline of October 21, 2005, within which plaintiff was to file an amended complaint naming the "John Doe" defendants. Judge Crocker cautioned plaintiff that if he did not file an amended

complaint naming the Doe defendants by October 21, his claims against them would be dismissed.

Defendants provided plaintiff with a letter dated October 7, 2005, in which they described to the best of their abilities the names of the individuals who fit the description of the Does provided in plaintiff's complaint. Plaintiff did not file an amended complaint by the October 21 deadline, and he has not attempted to amend his complaint to do so in the six weeks following that date. Presumably, plaintiff chose not to amend his complaint because he agrees he has not exhausted his administrative remedies with respect to his claims against them. Whatever the reason for plaintiff's failure to amend his complaint to identify the Doe defendants, I will dismiss plaintiff's claims against defendants Unit Psychologist (Melrose - Jane Doe) and Unit Psychologist (Oxbow - John Doe) for his failure to prosecute his case against them.

F. Plaintiff's Conspiracy Claim Against Dohms, Dougherty, Brown and Puckett

Plaintiff is proceeding in this case on a claim that defendants Dohms, Dougherty, Brown and Puckett conspired to violate his right of access to courts by transferring him to a correctional institution that lacked the legal resources he needed to initiate this lawsuit and to pursue his motion for post-conviction relief. Defendant Dougherty moved to dismiss this claim as to him on the ground that plaintiff did not exhaust his administrative remedies.

However, the facts reveal that plaintiff could not use the inmate complaint review system to allege his conspiracy claim against Dougherty and his co-conspirators because plaintiff's transfer apparently occurred upon the recommendation of a program review committee, and challenges to program review committee actions fall outside the scope of the ICRS.

Although defendant Dougherty supported his motion to dismiss with certain records from the Program Review Committee and the Office of Offender Classification and Movements, these records are not public records that can be judicially noticed. Moreover, I have chosen not to consider them and convert defendant's motion to a motion for summary judgment, because the documents do not reveal whether plaintiff raised his conspiracy claim in connection with his program review and again in an appeal to the director of the bureau of offender classification and movement. Thus, these documents are inadequate to show that plaintiff failed to exhaust his administrative remedies with respect to his conspiracy claim against defendant Dougherty. Defendant Dougherty is free to move for summary judgment on this claim by the deadline established for filing dispositive motions, which is January 27, 2006.

ORDER

IT IS ORDERED that defendants' motion to dismiss is GRANTED as to the following claims:

1) Defendants Imberg, Hanson, Schultz and Olson violated his First Amendment rights by denying him a religious publication entitled "Llewellyn."

2) Defendants Imberg and Olson violated his rights under the equal protection clause of the Fourteenth Amendment by denying him a religious publication entitled "Llewellyn."

3) Defendant Olson withheld plaintiff's religious publications in retaliation for plaintiff's filing of inmate complaints against defendant.

4) Defendant Meshum retaliated against plaintiff for causing Meshum to be investigated for showing favoritism toward another inmate by changing plaintiff's room assignment and transferring him "off the unit."

Further, IT IS ORDERED that defendants' motion to dismiss is DENIED as to plaintiff's claims that:

1) Defendants Gustaffson and McArthur interfered with plaintiff's ability to practice his religion when they "destroyed" his magic seals.

2) Defendant Dougherty conspired to violate plaintiff's right of access to courts by transferring him to a correctional institution that lacked legal resources he needed to initiate this lawsuit and to pursue his motion for post-conviction relief.

Finally, IT IS ORDERED that plaintiff's claim that defendants Unit Psychologist (Melrose - Jane Doe) and Unit Psychologist (Oxbow - John Doe) failed to provide him with sufficient treatment and medication for his schizophrenia is DISMISSED on the court's own

motion for plaintiff's failure to prosecute.

There being no claims remaining against defendants Off. Imberg, Capt. Hanson, Capt. Schultz, Chaplain Olson, Unit Psychologist (Melrose - Jane Doe) and Unit Psychologist (Oxbow - John Doe), these defendants are DISMISSED from this action.

Entered this 28th day of November, 2005.

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