IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIE C. SIMPSON,

Plaintiff,

OPINION AND ORDER[1]

v.

06-C-612-C

MS. GREENWOOD, HSU Director;
MS. THORPE (BHS) Nursing Coordinator;
WILLIAM POLLARD, Warden;
PETE ERICKSON, Security Director;
SARAH COOPER, Program Supervisor;

Defendants.

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Plaintiff Willie Simpson, a prisoner, contends that each of the defendants violated his constitutional right to privacy by giving nonmedical staff access to sensitive medical information. Defendants have moved to dismiss for plaintiff's failure to exhaust his administrative remedies as required by the Prison Litigation Reform Act. 42 U.S.C. § 1997e(a). In the alternative, defendants ask for dismissal on the ground of improper venue.

[1] Previous orders in this case have been sealed because of the sensitive nature of plaintiff's claim. Because it is unnecessary to discuss the details of the substance of plaintiff's claim in this order, I am issuing the opinion unsealed.

Although defendants style their motion as one to dismiss under Fed. R. Civ. P. 12(b)(6), both plaintiff and defendants have submitted documents outside the pleadings. When this happens, Rule 12 requires courts to convert the motion to dismiss into a motion for summary judgment. Fleischfresser v. Directors of School District 200, 15 F.3d 680, 684 (7th Cir. 1994). There is an exception to the rule for public documents, at least in cases in which those documents are subject to judicial notice. General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-83 (7th Cir. 1997) (concluding that it was error for district court to take judicial notice of court record because the facts in that record were not "beyond reasonable dispute"). In past cases, I have concluded that I may take judicial notice of the filing of prisoner grievances and the responses to those grievances by prison administrators (which is to be distinguished from taking judicial notice of the allegations in those documents).

In this case, defendants have submitted not only grievances and their responses, but also a purported summary of all the grievances and appeals that plaintiff has filed. It is doubtful that the summary is subject to judicial notice. It does not appear to be a public record, the preparer of the document is unknown and it is not clear what criteria are used in summarizing the content of the complaints. Therefore, I am converting defendants' motion to dismiss into a motion for summary judgment. This will not prejudice any of the parties because it is clear the facts related to exhaustion are undisputed. Both sides agree

that plaintiff submitted one set of grievances related to the claim in this case. The dispute is a legal one, that is, whether the grievances plaintiff submitted satisfy the requirement under § 1997e(a) to exhaust all available administrative remedies before filing his lawsuit.

I conclude that defendants have met their burden to prove that plaintiff failed to exhaust his administrative remedies. Jones v. Bock, – U.S. – , 127 S. Ct. 910 (2007). It is undisputed that plaintiff's grievance was rejected for including more than one issue. Although plaintiff disagrees with the inmate complaint examiner's conclusion, I must give deference to the examiner's application of a legitimate grievance procedure. Plaintiff had an opportunity to correct the problem with his grievance, but instead of doing that, he jumped the gun by filing this lawsuit. Because plaintiff failed to exhaust all available administrative remedies, defendants' motion to dismiss will be granted. This conclusion makes it unnecessary to decide whether dismissal is appropriate for improper venue.

From the affidavits and exhibits submitted by the parties, I find the following facts are undisputed.

UNDISPUTED FACTS

Plaintiff Willie Simpson is s prisoner at the Green Bay Correctional Institution, in Green Bay, Wisconsin. In a grievance dated September 13, 2006, plaintiff wrote

GBCI staff is violating my privacy and confidentiality rights under . . . the

> Constitution in my medical information by allowing guards to remain in the exam room and disclose my medical info. to the guards and by giving the guards access to my medication to distribute. . . . In the month of August and September I was escorted to seg. (HSU) to be seen by the nurse and or doctor by guards CO2 Potts, Bubbolz and Vincelet to be seen by Nurse Lutsey and Dr. Heidon. On each occasion the guards entered the exam room, remained and the nurse disclosed my medical information to the guards thr[ough] communication to me as did Dr. Heidon when I went to see him. Also, guards are given access to my medication to distribute. Inmates in regular status are seen in (HSU) and communicate their needs without guards being in the exam room and (HSU) staff distribute their medication.

In a decision dated September 13, 2006, the inmate complaint examiner "rejected" plaintiff's grievance on the ground that it contained more than one "issue," in violation of Wis. Admin. Code § DOC 310.09(1)(e). The examiner wrote: "Inmate Simpson complains about Officers in the Exam Room during his examination and also complains that Officer[s] distribute medications in Segregation, thus Inmate Simpson has expressed two issues in this complaint."

Plaintiff appealed the rejection to the warden, as permitted by Wis. Admin. Code § 310.11(6). Plaintiff wrote: "I raised only (1) issue, breach of confidentiality of health information, which is clearly stated, and stated 2 ways that right is being violated." The warden affirmed the rejection without explanation in a decision September 25, 2006.

Before filing this lawsuit, plaintiff did not file any other grievances at Green Bay Correctional Institution relating to confidentiality of medical information.

OPINION

The question in this case boils down to whether plaintiff exhausted all available administrative remedies, as required by 42 U.S.C. § 1997e(a), even though his grievance was rejected for including more than one "issue," in violation of Wis. Admin. Code § DOC 310.09(1)(e). Defendants (and, more important, the officials reviewing plaintiff's grievance) say that plaintiff's grievance included two issues: (1) privacy for medical examinations; (2) privacy in distributing medication. Plaintiff says that his grievance included one issue only: confidentiality of his medical information. Who is right?

If I were making the initial determination, it is likely that I would agree with plaintiff. It is clear from plaintiff's grievance that his overarching concern related to nonmedical staff having knowledge of sensitive medical information. That was the sole "issue" plaintiff asked the examiner to decide, even if plaintiff's concern manifested itself in multiple contexts. Of course, the examiner and the warden saw things differently. Although I would define "issue" as a problem, they apparently consider as a separate issue each context in which the perceived problem arises.

This is where the trouble lies. The department's regulations do not define what is meant by the term "issue" and its meaning is far from self-evident. The dictionary defines "issue" in various ways, including "a point or matter of discussion, debate or dispute," "a misgiving, objection or complaint," "the essential point; crux" and "a personal problem."

American Heritage Dictionary 929 (4th ed. 2000).

The definition is no clearer in the legal context. Authorities have observed that the meaning of "issue" may change from case to case "because issues always occur within a concrete procedural context, and the definition in any given case is inextricably interwoven with specific factual, legal and procedural considerations." 18 Daniel R. Coquilette, et al. Moore's Federal Practice, § 132.02(1), at 132-17 (Matthew Bender 3d ed. 2006). In the context of determining whether the same "issue" has been decided in a previous case, courts consider a number of factors, including whether application of the same rule of law is involved, whether there is substantial overlap in evidence or argument and whether the claims encompassing the issue or issues are closely related. Restatement (Second) of Judgments, § 27 cmt. c (1982).

All this is to say that reasonable people may come to different conclusions regarding where one "issue" ends and another begins. Thus, it is not surprising that plaintiff had difficulty determining in advance how he was supposed to describe his problem without running afoul of the "one issue" rule, particularly without guidance from the Department of Corrections. Further complicating matters is the limitation on the number of grievances that prisoners may file, which of course gives prisoners an incentive to frame their grievances broadly. Wis. Admin. Code § DOC 310.09(2) (prisoners may file no more than two grievances each week).

On the other hand, both the Supreme Court and the Court of Appeals for the Seventh Circuit have held that prison administrators are entitled to impose rules on prisoners relating to the grievance process. Woodford v. Ngo, – U.S. – , 126 S. Ct. 2378, 2386 (2006); Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). In Woodford, 126 S. Ct. at 2386, the Court stated that enforcement of these rules is necessary "because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." Therefore, if prison officials reject a grievance for failing to comply with a procedural requirement and they decline to address the merits of the grievance, the general rule is that the prisoner has not exhausted his administrative remedies and any lawsuit the prisoner later files must be dismissed. Dixon v. Page, 291 F.3d 485 (7th Cir. 2002); Lewis v. Washington, 300 F.3d 829 (7th Cir. 2002); Pozo, 286 F.3d at 1025.

In this case, the question is not quite as straightforward as those presented in Woodford and the other cases cited above, each of which involved a prisoner's undisputed failure to comply with a particular rule. Plaintiff does not deny that prison officials have the authority to impose rules. He says only that the officials were wrong to conclude that he did not comply with those rules.

Neither the Supreme Court nor the court of appeals has provided guidance on how courts should handle a dispute over the interpretation of a particular grievance procedure. However, the general rule is that agencies are granted deference in interpreting their own

regulations, at least when the regulation is ambiguous, as is § DOC 310.09(1)(e). Old Ben Coal Co. v. Director, Office of Workers' Comp. Programs, 292 F.3d 533, 542 n. 8 (7th Cir.2002); Pfeiffer v. Board of Regents of University of Wisconsin System, 110 Wis. 2d 146, 154-55, 328 N.W.2d 279, 283 (1983). This general rule applies no less in the prison setting, particularly in light of the Supreme Court's interpretation of the Prison Litigation Reform Act as an "attemp[t] to eliminate unwarranted federal-court interference with the administration of prisons." Woodford, 126 S. Ct. at 2387. Thus, in the ordinary case, courts must give prison administrators some leeway in applying their own grievance procedures.

This does not mean that a prison official's application of a grievance procedure is unreviewable. As has been suggested by the Supreme Court, the question is whether the prisoner had "a meaningful opportunity" to present his grievance. Id. at 2392. A procedure itself may be invalid if it "serve[s] no purpose other than the creation of an additional procedural technicality," Love v. Pullman, 404 U.S. 522, 526 (1972), or if the rule is so onerous or confusing that it is clear that the rule is an arbitrary barrier to a prisoner's filing of a lawsuit. Strong v. David, 2977 F.3d 646, 649 (7th Cir. 2002) ("[N]o prison system may establish a requirement inconsistent with the federal policy underlying § 1983 and § 1997e(a)."); Johnson v. Johnson, 385 F.3d 503, 517 n.8 (5th Cir. 2004) ("a state could not make grievance rules that prevented the vindication of substantive rights"); Spruill v. Gillis,

372 F.3d 218, 235 (3d Cir. 2004) ("[Grievance procedures] must be consistent with the Federal Constitution and the federal policy embodied in § 1997e(a) to be enforced as grounds for procedural default in a subsequent federal lawsuit."). Cf. James v. Kentucky, 466 U.S. 341, 348 (1984) (holding that state procedural rules will not be enforced in habeas corpus if they do not rest on adequate grounds). Further, courts need not defer to interpretations that are clearly erroneous or inconsistent with the language of the regulation. Pfeiffer, 110 Wis. 2d at 154-55, 328 N.W.2d at 283.

In this case, the requirement to limit the issues of a grievance is reasonable on its face because it may prevent prisoners from filing unwieldy complaints that are difficult to understand or take longer to process. Cf. Vicom, Inc. v. Harbridge Merchant Services, Inc., 20 F.3d 771, 775-76 (7th Cir. 1994) (prolix and confusing complaint should be dismissed because it makes it difficult for defendant to file responsive pleading and for court to conduct orderly litigation). Further, although my understanding of the term "issue" might be different from the examiner's and warden's, I cannot conclude that their interpretation is clearly erroneous, arbitrary or intended to prevent plaintiff from exercising his right of access to the courts.

Plaintiff might argue that § DOC 310.09(1)(e) is too vague to allow a prisoner to know how he can comply with it. As I have stated, the meaning of "issue" is not easy to discern for a prisoner or even a lawyer. If plaintiff had only one chance to guess whether his

grievance contained one issue or more than one, I might well conclude that the rule places an unfair burden on prisoners.

However, Wisconsin prisoners are *not* required to get it right the first time or forever lose their right to pursue the grievance because the regulations do not prohibit a prisoner from filing a new version of a rejected complaint. Although the regulations do not state explicitly whether the deadline for filing a grievance is tolled when a previous grievance is rejected, they do allow untimely grievances to be considered for "good cause." Wis. Admin. Code § DOC 310.09(6). This standard should be satisfied by a good faith but unsuccessful earlier attempt to file a proper grievance. If plaintiff had attempted to file a new grievance and the new grievance was rejected as untimely, I would likely conclude that plaintiff had exhausted all available administrative remedies. Unfortunately, plaintiff did not take an advantage of his opportunity to file a new grievance. Instead, when the warden affirmed the rejection of the complaint, he filed this lawsuit.

Plaintiff's situation is somewhat similar to the prisoner in McCoy v. Gilbert, 270 F.3d 503 (7th Cir. 2001), who chose not to file a grievance because he did not learn of the exhaustion requirement until after the deadline for filing a grievance had passed. The court concluded that the prisoner failed to exhaust all available administrative remedies because the prison grievance procedures allowed for late grievances under some circumstances. In other words, even when a grievance might be rejected, the prisoner must still make the

attempt. See also Booth v. Churner, 532 U.S. 731 (2001) (prisoner must use grievance procedure even if he believes doing so will be futile).

Plaintiff's failure to file a new grievance could be excused if the examiner had failed to identify sufficiently the problem with the grievance so that plaintiff knew how to correct it. If the prisoner is not told what he did wrong, he cannot be expected to fix the problem. Dole v. Chandler, 438 F.3d 804, 809-10 (7th Cir. 2006); Brengettcy v. Horton, 423 F.3d 674 (7th Cir. 2005). But the examiner did explain this to plaintiff. In the examiner's response, he identified the two issues he read the grievance to include: (1) the presence of officers in the medical examination room and (2) the distribution of medication by officers. Thus, regardless whether plaintiff *agreed* with the examiner's assessment, he should have known what he needed to do to satisfy the examiner's expectations in a new grievance.

Finally, if the examiner's instructions were clear, but plaintiff were unable to correct the problem, this would lead to a conclusion that plaintiff was left with no "available" administrative remedy. For example, if a grievance is rejected for failing to provide enough information, a rule requiring the prisoner to file a new grievance would be unfair if the prisoner does not know how to obtain the information requested, such as the name of a particular officer involved. E.g., Brown v. Sikes, 212 F.3d 1205, 1208 (11th Cir. 2000); Freeman v. Berge, 2004 WL 1774737, *4 (W.D. Wis. 2004). However, in this case, the instructions were simple and easily followed: file separate grievances for the examination

room "issue" and the medication distribution "issue."

Certainly, the department could have done more to help plaintiff *before* he filed his grievance by providing guidance on the meaning of "issue," either by expressly defining it in the regulation or perhaps by providing illustrative examples, if not in the regulation itself, then in the appendix to Chapter DOC 310 or in another policy or procedure. Also, the examiner's response could have stated explicitly that plaintiff was permitted to file a new grievance and that failing to do so would mean plaintiff had not successfully completed the grievance process, even if he appealed the rejected grievance to the highest reviewing authority. This would have made the proper procedure unmistakably clear.

Unfortunately for plaintiff, "unmistakably clear" is not the standard under which I must consider the directions provided by the department. The question is whether plaintiff had a meaningful opportunity to present his grievance properly. Although there is room for improvement on the part of the department, I cannot conclude that plaintiff was denied a meaningful opportunity to file a grievance that complied with the department's procedures. Plaintiff had the opportunity and ability to file a new grievance that was limited to one issue, as the examiner defined it, but he failed to take advantage of that opportunity. No one misled plaintiff into believing that he was not required to file another grievance. Lewis, 300 F.3d at 834-35. Accordingly, I conclude that plaintiff failed to exhaust his administrative remedies.

The good news for plaintiff is that he may still have the opportunity to complete the grievance process properly. Although Wis. Admin. Code § DOC 310.09(6) imposes a 14-day deadline for grievances, this deadline should not have any application to ongoing problems. If defendants are still disseminating plaintiff's sensitive medical information to correctional officers, as he alleges they are in his complaint, any grievance he filed on that issue should still be timely.

ORDER

IT IS ORDERED that summary judgment is GRANTED to defendants Ms. Greenwood, Ms. Thorpe, William Pollard, Pete Erickson and Sarah Cooper. This case is DISMISSED WITHOUT PREJUDICE for plaintiff Willie Simpson's failure to exhaust his administrative remedies. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 6th day of April, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge