

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

MARCEL T. WARE,

Plaintiff,

v.

JEAN KRAINTZ,

Defendant.

OPINION AND ORDER

11-cv-213-slc

On April 15, 2011, this court granted plaintiff Marcel Ware leave to proceed *in forma pauperis* on a claim under 42 U.S.C. § 1983 against the registrar for the Dodge Correctional Institution for failing to give him a sentence credit and keeping him incarcerated too long. Dkt. 5. The parties have consented to my jurisdiction pursuant to 28 U.S.C. § 636(c)(1).

Defendant Jean Kraintz's has moved for summary judgment on the ground that Ware failed to exhaust his administrative remedies on his claims. I am granting this motion and dismissing Ware's claims without prejudice because he has failed to exhaust his administrative remedies.

UNDISPUTED FACTS

In June 2005, plaintiff Marcel Ware was housed at the Sturtevant Transitional Facility. On June 23, 2005, Kenosha County Circuit Court Judge S. Michael Wilk revoked Ware for 8 months in Case No. 02-CF-0893 and ordered that he be reconfined for 6 months and 4 days in Case No. 96-CF-0196. In a letter to Judge Wilk dated June 28, 2005, defendant Jean Kraintz questioned the amount of sentencing credit that should be applied to Ware. Two days later, on June 30, Ware was transferred from Sturtevant to the Dodge Correctional Institution, where he

remained for seven days. Ware then was transferred to the Kenosha County Jail, then released on July 28, 2005.

On December 9, 2010, while incarcerated at the Waupun Correctional Institution in a separate case, Ware filed Offender Complaint WCI-2010-26063, alleging that he served an incorrect amount of prison time on Case Nos. 02-CF-0893 and 96-CF-0196. Ware noted on his complaint that the date of incident was June 23, 2005.

Inmate Complaint Examiner (ICE) Jann Johnston investigated the complaint and confirmed that the date of incident giving rise to this complaint was June 23, 2005, which was well beyond the 14-day time limit to file a complaint with respect to information he received and that had been in his file since that time. Johnston noted that there was nothing presented to show how Ware was denied the use of or inhibited from using the Inmate Complaint Review System (ICRS) since the date of the occurrence.

On December 27, 2010, Johnston rejected the complaint pursuant to Wis. Admin. Code §§ DOC 310.09(6) and 310.11(5)(d). Ware appealed to the Reviewing Authority, Michael Meisner, who received the appeal on January 4, 2011. On January 5, 2011, Meisner found that the ICE's rejection of Ware's complaint was appropriate.

OPINION

Under 42 U.S.C. § 1997e(a), a prisoner must exhaust all *available* administrative remedies before filing a lawsuit in federal court. *Dixon v. Page*, 291 F.3d 485, 488 (7th Cir. 2002). This means that the prisoner must “properly take each step within the administrative process,”¹ which

¹ *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002)

includes following instructions for filing the initial grievance,² as well as filing all necessary appeals,³ “in the place, and at the time, the prison's administrative rules require.”⁴ Thus, 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. *See Dixon*, 291 F.3d 485 (prisoner did not exhaust when, after he did not receive relief he was promised, he did not appeal to next level of review); *Lewis v. Washington*, 300 F.3d 829 (7th Cir. 2002) (prison officials’ failure to respond to prisoner’s previous grievances did not exempt him from having to appeal the grievance they did respond to); *Pozo*, 286 F.3d at 1025; *McCoy v. Gilbert*, 270 F.3d 503, 510-11 (7th Cir. 2001) (determining that prisoner failed to exhaust administrative remedies when he filed grievance after Bureau of Prison's 20-day deadline). When alleging that a plaintiff has not exhausted his available administrative remedies, defendants have the burden to prove that the plaintiff failed to comply with § 1997e(a). *Jones v. Bock*, 549 U.S. 199 (2007).

Wisconsin inmates have access to an administrative grievance system governed by the procedures set out in Wis. Admin. Code §§ DOC 310.01 through 310.18. Under these provisions, prisoners start the complaint process by filing an inmate complaint with the ICE within 14 calendar days after the occurrence giving rise to the complaint. § DOC 309.09(6). There is an exception to the 14-day filing period in cases where the ICE finds good cause for the

² *Cannon v. Washington*, 418 F.3d 714, 718 (7th Cir. 2005).

³ *Burrell v. Powers*, 431 F.3d 282, 284-85 (7th Cir. 2005).

⁴ *Pozo*, 286 F.3d at 1025.

late complaint. *Id.* The ICE may investigate inmate complaints, reject them for failure to meet filing requirements or recommend to the appropriate reviewing authority (the warden or designee) that the complaint be granted or dismissed. § DOC 310.07(2).

In this case, it is undisputed that Ware did not file an inmate complaint within the 14-day time limit. In fact, he filed it over *five years late*. In response to Kraitz's summary judgment motion, Ware argues that administrative remedies were unavailable to him because of his transfer to Dodge Correctional Institution and then the Kenosha County Jail. In support, he cites *Bradley v. Washington*, 441 F. Supp. 2d 97, 102 (D.D.C. 2006), in which the district court held that a state inmate's transfer into federal custody on August 8, 2005, rendered administrative review of his claims regarding incidents that occurred on July 31 and August 8, 2005, at a District of Columbia jail unavailable, precluding dismissal of his claims for failure to exhaust under § 1997e(a). The court in *Bradley* found that the District's grievance procedures made "no provision for the submission of complaints by prisoners no longer detained by the Department." *Id.*

Unlike the situation in *Bradley*, however, Ware was transferred between facilities within the same state government department. The Sturtevant Transitional Facility and Dodge Correctional Institution both are adult correctional facilities within the Wisconsin Department of Corrections. Wis. Admin. Code § DOC 310.02 provides that inmate complaint procedures apply to all inmates confined in a state adult correctional facility. Ware could have filed his complaint either during his two-to-seven day incarceration at Sturtevant or his seven day

incarceration at DCI.⁵ Therefore, Ware's transfer to DCI left his access to DOC grievance procedures intact during most if not all of the limitations period and, as a result, had no impact on his obligation to exhaust his administrative remedies. *Bradley*, 441 F. Supp. 2d at 103 (noting this distinction and citing *Flournoy v. Schomig*, 152 Fed. Appx. 535, 537 (7th Cir. 2005) (unpublished order holding that PLRA's exhaustion requirement not satisfied where administrative procedures provided for pursuit of grievance following prisoner's transfer to another state institution)).⁶ Further, Ware made no attempt to file a complaint during the five years after he was released from the Kenosha County Jail and provided no reasons for this delay when he finally filed his complaint in December 2010.

Because administrative remedies were available to Ware while he was housed at Sturtevant and later at DCI and because Ware failed to exhaust them properly before he filed this federal lawsuit, the court must grant defendants' motion for summary judgment and dismiss his claim without prejudice. 42 U.S.C. § 1997e(a); *see also Ford v. Johnson*, 362 F.3d 395, 401 (7th Cir. 2004) (dismissal for failure to exhaust is always without prejudice).

⁵ It is unclear from the record how long Ware was housed at Sturtevant following the incident that gave rise to his complaint. Kraintz's letter to the state court judge was dated June 28, 2005, but on his December 2010 complaint, Ware noted the date of incident was June 23, 2005.

⁶ The court in *Bradley* also determined that plaintiff failed to timely initiate administrative proceedings with respect to a June 30, 2005 incident and that his August 8, 2005 transfer did nothing to relieve him of his failure. *Id.* at 103 n. 6.

ORDER

IT IS ORDERED that defendant Jean Krintz's motion for summary judgment for failure to exhaust administrative remedies (dkt. 15) is GRANTED. Plaintiff Marcel Ware's 42 U.S.C. § 1983 claim is DISMISSED without prejudice for his failure to exhaust his administrative remedies.

Entered this 19th day of September, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge