

## STATE OF VERMONT

SUPERIOR COURT  
Washington Unit

CIVIL DIVISION  
Docket No. 253-5-19 Wncv

Pratt vs. Touchette

### ENTRY REGARDING MOTION

Count 1, Review of Governmental Action (253-5-19 Wncv)

Title: Motion to Dismiss (Motion 3)  
Filer: Michael P Touchette  
Attorney: Pamela L.P. Eaton  
Filed Date: September 19, 2019

Response filed on 11/19/2019 by Attorney Patricia M. Lancaster for Plaintiff Leo P. Pratt  
Response filed on 11/27/2019 by Attorney Pamela L.P. Eaton for Defendant Michael P Touchette

Defendant moves to dismiss claiming that Plaintiff failed to exhaust the administrative remedies available to him through the Department of Corrections (DOC's) grievance process. Specifically, Defendant maintains that Plaintiff failed to make a final appeal to the DOC Commissioner before filing suit. Plaintiff counters that he made such an appeal, and the Commissioner did not issue a ruling within the time set out in the applicable DOC Directive. Defendant responds that the factual dispute is not material because Defendant admits that he did not receive a response from the Commissioner, which Defendant argues is a necessary prerequisite to filing suit.

The disagrees with the Defendant that it need not resolve the factual issue. The DOC has issued Directive 320.01, which sets out a grievance procedure and provides specific time period within which DOC officials must make rulings. While there is some allowance for a single continuance, otherwise, the Court believes the timeframes need to be followed. If a timely decision is not issued, the grievant can proceed to the next level of the process. If the Commissioner fails to act in a timely manner, a grievant can proceed to the Superior Court under Vt. R. Civ. P. 75.

Defendant's suggestion that a grievant must simply wait, for some unspecified period, for a DOC official to act is not a reasonable interpretation of the Directive. It is also inconsistent with federal cases that have examined analogous exhaustion requirements that exist under federal law. In *Boyd v. Corr. Corp. of Am.*, 380 F.3d 989 (6th Cir. 2004), for example, the Court stated that:

several circuits have held that the exhaustion requirement is satisfied where prison officials fail to timely respond to an inmate's written grievance. See *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002) (“[W]e agree that the failure to respond to a grievance within the time limits contained in the grievance policy renders an administrative remedy unavailable[.]”); *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002) (“We join the Eighth and Fifth circuits on this issue because we refuse to interpret the PLRA ‘so narrowly as to ... permit [prison officials] to exploit the exhaustion requirement through indefinite delay in responding to grievances.”); *Foulk v. Charrier*, 262 F.3d 687, 698 (8th Cir. 2001) (“[O]nce [the prison] failed to respond to [the prisoner's written grievance], no further administrative proceedings were ‘available’ to him.”); *Powe v. Ennis*, 177 F.3d 393, 394 (5th Cir. 1999) (*per curiam*) (“A prisoner’s administrative remedies are deemed exhausted when a valid grievance has been filed and the state’s time or responding thereto has expired.”). Following the lead of the four other circuits that have considered this issue, we conclude that administrative remedies are exhausted when prison officials fail to timely respond to a properly filed grievance.

380 F.3d at 996.

The Court agrees with the authorities cited in *Boyd* and concludes that DOC officials must comply with the decision-making time limits set out in Directive 320.01. If they fail to do so, a grievant may consider that stage of the process complete.

In light of the foregoing, the motion to dismiss cannot be determined on the present record. Factual issues exist concerning exhaustion. As proper exhaustion remains a threshold jurisdictional issue on which the Court may accept evidence, however, the Court will set this matter for status conference to determine the appropriate next steps.

Electronically signed on December 04, 2019 at 04:10 PM pursuant to V.R.E.F. 7(d).

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Timothy B. Tomasi  
Superior Court Judge

Notifications:

Patricia M. Lancaster (ERN 3725), Attorney for Plaintiff Leo P. Pratt

Stephen J. Soule (ERN 3226), Attorney for party 2 Co-counsel

Pamela L.P. Eaton (ERN 7096), Attorney for Defendant Michael P Touchette