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A MODEL OF FUTILITY:
The PLRA and Wisconsin's Inmate Complaint System

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Introduction

In 1996 Congress passed the Prison Litigation Reform Act (PLRA) in response to a few highly publicized--but isolated and over-exaggerated--instances of prisoner abuse of the judicial process.

The PLRA was designed as a tool to curb those abuses by making it more difficult for prisoners to seek judicial review of their grievances in Federal Courts. To achieve this goal, one of the primary requisites of the PLRA is for prisoners to exhaust all administrative remedies available to them in their respective prisons.

Exhausting administrative remedies means filing a grievance at the prison level. With few exceptions, this requires some type of complaint examiner--who is often an employee of the prison--to investigate the facility where they work and which may include their bosses, coworkers, or even family members.

State legislatures quickly created their own versions of the PLRA modeled after 42 U.S.C. § 1997. State exhaustion remedies vary from state to state.

For the purpose of this essay the focus will be on the State of Wisconsin, and the Wisconsin Department of Corrections (WDOC) and their Inmate Complaint Review System (ICRS), its processes and shortcomings.

Wisconsin's Complaint Process

Any prisoner civil action filed in the State of Wisconsin is first reviewed by a Court's PLRA representative to determine if the prisoner exhausted administrative remedies in compliance with the State's PLRA statute and its requirements.

As in Federal Courts, in all but a few exceptions, a failture to exhaust

administrative remedies prior to beginning a court action is fatal to the prisoner's request for judicial review.

There are several layers to Wisconsin's inmate complaint process and each must be followed in a timely manner or a prisoner may forfeit his right to address that grievance. The process is governed by Wisconsin's Administrative Code relating to corrections (Wis. Admin. Code § 310).

The first step of the process requires prisoners to "talk to appropriate staff in an effort to informally resolve the issue." Generally this means seeking an intervention from a prison supervisor with, more often than not, negligible results.

The next step is to file, within 14 days, a formal Offender Complaint addressing the incident or issue being complained about. The complaint can be filed individually or as a group.

After the complaint is filed the Inmate Complaint Examiner (ICE) can choose to investigate or reject the complaint. Grievances filed in Wisconsin are supposed to be confidential, investigated in an unbiased manner, and conducted in a way that allows for a timely and orderly review.

In the case of complaints addressing disciplinary proceedings, this process is often anything but unbiased or timely and is choreographed to be a process that abrogates a timely judicial review of a disciplinary hearing, often requiring the prisoner to complete a disciplinary sanction in its entirety even if the court eventually finds fault in the hearing process.

If the complaint is accepted and investigated, the ICE makes a decision and recommendation to the warden as to whether the complaint should be dismissed or acted upon. With few exceptions, the warden (or warden designee) usually rubber stamps the ICE's recommendation.

If the recommendation is for dismissal of the complaint the prisoner can,

within 10 days, file an appeal to the Corrections Complaint Examiner (CCE) located at the main office of the Department of Corrections in Madison, Wisconsin.

Like the ICE at the institutional level, the CCE reviews the complaint and makes a recommendation to the Secretary of the DOC. Once again, it is rare that the Secretary reverses the recommendation of the CCE or the decisions made by an ICE at a Wisconsin facility.

When this process is complete a prisoner is determined to have exhausted their administrative remedies and can now proceed with a judicial review of their issues.

Scope of the Wisconsin ICRS

The formal complaint system of the WDOC is not all encompassing. For instance, if the ICE at a facility feels that the complaint does not fit within the scope of the department's grievance system they can opt to reject the complaint. If the complaint is rejected prisoners can submit a request to review the rejection back to the ICE which rejected the complaint in the first place. A further review is then conducted by the warden. As with dismissed complaints, rejected complaints are usually rubber-stamped.

One of the ironies of the WDOC complaint process is that a rejection of a complaint offers the most timely response from a WDOC official which in turn, allows a more propitious route to filing a court action.

Inmate complaints in Wisconsin cannot address parole issues, program review issues dealing with custody or program changes, challenges to prison records or denials of open records requests.

Additionally, prisoners can only challenge procedural issues where prison discipline is concerned and only after they have exhausted all remedies that exist in the convoluted institution appeals process that is governed by the WDOC's disciplinary procedures.

An ineffective process: PLRA and the abrogation of justice

Prior to 1996 and the passage of the PLRA, prisoners had rather liberal access to both State and Federal courts. Though highly publicized cases regarding chunky versus creamy peanut butter became the Congressional versions of "urban legends," those types of frivolous lawsuits were rare.

The most notable thing about pre-PLRA access was that both prison complaint and appeals processes and judicial processes in states like Wisconsin were more timely, efficient and less abusive of equitable access to the courts in order to redress legitimate grievances.

The problem with PLRA is that it did curb utterly frivolous lawsuits, but it also placed a much higher burden on prisoner complainants when it come to filing legitimate legal actions. It also enabled more abusive practices on the part of Correctional Departments around the country with regard to finding ways to limit timely access to the courts, or try to find ways to restrict it altogether.

The best way to see PLRA and the Wisconsin's use of the ICRS is to look at examples of both in practice.

Example 1 *

In February of 2003 a disciplinary action was conducted against a prisoner for an alleged disciplinary violation in a private contract prison located in another state. Wisconsin prison authorities chose to discipline the prisoner even though he did not commit a disciplinary offense within the borders of the State of Wisconsin.

The prisoner was found guilty of two counts and disciplined with a sanction of 360 days of segregation time to be served at Wisconsin's "supermax" prison at Boscobel.

The prisoner immediately appealed the discipline to the warden as the first step in exhausting his state remedies under Wisconsin's PLRA doctrine.

This process in Wisconsin is so convoluted that it took the warden nearly two months to respond.

The sanctioned prisoner was required to go through the whole appeals and complaint process twice, the first time to address the original conduct report and sanction--and when one of the two charges was dismissed--he was required to restart the whole appeals and complaint process again in order to properly exhaust his PLRA-required administrative remedies. In all it took seven months before the prisoner was finally able to get the issues into court.

Two years after the process began and over a year after the disciplinary sanction had been served in its entirety, a Wisconsin Appeals Court remanded the prisoner's case to a lower court for a hearing.

Almost three years after the process began a Wisconsin Circuit Court judge asked the prisoner what the court should do now that the sanction was served, and the prisoner noted that not much could be done under Wisconsin law but that the problem was in the appeal criteria per the WDOC, ICRS and PLRA and how long each step took to run its course.

Because of the PLRA and the structuring of Wisconsin's ICRS/PLRA appeals processes, the legislature effectively tied the hands of the courts in performing their functions in a timely and equitably fair manner.

Example 2

In October 2008 the WDOC, taking advantage of new guidelines for release passed by Wisconsin's legislature, created an emergency rule that raised a release fund amount from an achievable $500.00 to $5000.00. Ironically, the WDOC--when trying to justify the raise--noted that under the old policy it would take an average prisoner about 7 years to save less than $300.00 unless they were lifers or long-timers. The WDOC went on to note that, under the new policy, it would take the average prisoner about 75 years (the actual timeframe is 151 years) to save the new release account amount of $5000.00. (**Note: The balance is adjusted every 5 years per the CPI and is currently $5500.00**).

In Wisconsin, an emergency rule is an agency's way of getting a controversial rule to pass if they wish to do an end run around the legislature.

A prisoner challenged the policy by filing a complaint under the ICRS. The dismissal of the complaint came back in record time (one day) indicating that the WDOC had prepared for similar challenges by creating blanket repsonses for the ICE departments to use. This negated the whole idea that the ICRS should fairly and unbiasly address legitimate complaints.

Once the complaint was appealed to the WDOC level, the response was not so timely. After a number of time extensions without proper notification and an over-exaggerated process, the complaint was finally dismissed four months after it was initially filed and nearly two months after it was supposed to have been acted upon by State law.

The resultant court challenge was dismissed at a status hearing due to a technicality. It turns out that, due to the deliberate delays that the WDOC used to extend the exhaustion process, the emergency rule--by law--became a permanent rule, thus requiring a judicial attack under a different subsection of the same state statute.

When the prisoner finally was able to file his lawsuit and submit proof that he had exhausted his administrative remedies, over 20 documents--including 16 official forms necessary to perfect the complaint--were filed.

The whole process eventually took nearly 5 months to complete.

Example 3

The final example relates to a 2012 conduct report that was written when a prison artist was sanctioned for the anticipated sale of some of his artwork in the community. As required, the prisoner appealed the conduct report (CR) and filed a complaint under Wisconsin's ICRS.

In this particular case, the complaint was rejected as being beyond the scope of the ICRS process. The prisoner requested a review of the rejection noting that the reasons for the rejected complaint were mis-stated. The rejection was reviewed by the warden of the facility and the rejection held.

In this particular instance, the rejection worked in favor of the prisoner and an immediate court action was filed in State Court.

The prisoner was assigned a judge that had previously ruled against the State in a recent action and the WDOC through the Attorney General's Office, had the case removed to Federal Court where the PLRA standards are more rigorous for a prisoner to meet. The result was that the suit was dismissed based on those standards.

The three examples listed above are extreme cases. The effectiveness of the ICRS/PLRA process in Wisconsin varies from facility to facility and issue to issue. In Wisconsin, medium custody facilities--especially those that conduct so-called rehabilitative programming--are the worst offenders when it comes to timely and fair processes of inmate complaints on certain issues.

Generally, as long as complaints are about non-policy or non-disciplinary issues, they were decided in favor of the prisoner complainant, but as soon as a complaint addressed questionable policy or disciplinary processes, every single complaint was either dismissed or rejected.

Additionally, any complaint that was subject to judicial review was nearly always delayed by the processes required to exhaust administrative remedies per the PLRA.

Spell my name right: Staff responses to Inmate Complaints

Except when addressing the most obviously egregious actions by a staff member, most line staff do not take inmate complaints seriously. This is especially so after the 1996 PLRA reforms which effectively gutted what little respect the ICRS processes in Wisconsin and other states commanded.

Very few Wisconsin prisoners have confidence in the ICRS system or that they will get a fair and impartial hearing by utilizing the ICRS process. Staff are aware of this fact and it often emboldens them to promulgate actions that, prior to 1996, would not have occurred.

Additionally, many prisoners are not aware of the procedural traps that extend beyond the exhaustion doctrine at the prison level and they often fail to conform to the "letter of the law" as it relates to ICRS/PLRA requirements which often result in failed complaints or legal actions.

Though Federal and State laws prohibit retaliation towards prisoners who make use of the ICRS or who attempt to perfect a judicial review by exhausting all of their administrative remedies, though subtle, retaliation does occur: a notation in a unit file; a subtle word to other staff during shift change; a little extra energy being exerted during a cell search.

With blanket dismissals of the majority of complaints filed in Wisconsin prisons--especially when pertaining to discipline or policy issues--it is not uncommon to hear more arrogant staff members comment, "I hope they spell my name right!"

Conclusion

Prior to 1996 and the creation of the PLRA judicial reviews, and inmate complaints, were more equitable and effective. Though there were some abuses of the system, prisoners who actually attempted to change bad policies or address improper staff actions had **some** confidence in the processes they were required to follow.

With post-PLRA policies and subsequent changes to the WDOC ICRS policies and procedures, little confidence exists that WI prisoners will get a fair and impartial hearing by staff ICRS members.

There is a cultural nepotism that exists in this nation's prisons that supports the "us versus them" mentality on both sides of the correctional fence. The PLRA and ICRS system in states like Wisconsin help to further support that mentality.

PLRA has allowed the system to de-evolve from the small advances that had been made prior to 1996.

Solutions

One solution to mitigate the growing distrust of the ICRS process by prisoners in Wisconsin--and perhaps other states--is to create an Ombudsman of Corrections office and remove the ICRS process from the supervision of the WDOC.

To require a agency to properly and equitably investigate itself on all levels is a questionable and obtuse practice.

Finally, require more accountability. There needs to be a process in place that provides for consistency and continuity. Additionally, PLRA needs to be re-visited and redefined. If the wheel is to be reinvented, then it should be created in such a way that it actually provides a viable and fair solution to the problem.

Notes

Due to the confidential nature of complaints, grievances referenced in this essay are those that have been filed by the author of this essay during the period of confinement from 1983 to the present.

Cases referenced in the examples referenced by the essay are also cases that were litigated by the author.

*** Case References**

Example 1: Taliaferro v. Franks, et. al. 03 CV 2704; 2004 AP 2482.

Example 2: Taliaferro v. Wisconsin Department of Corrections 10 CV 2951.

Example 3: Taliaferro v. Hepp 12 IP 46.