No. 21-2796

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Phillip L. Miles,

Plaintiff–Appellant,

v.

Julie Anton,

Defendant–Appellee.

On Appeal from a Final Order of the
United States District Court for the Northern District of Indiana,
South Bend Division
Case No. 3:20-cv-246, Hon. Robert L. Miller

BRIEF FOR APPELLANT URGING REVERSAL AND ATTACHED APPENDIX

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Feb. 25, 2022

CORPORATE DISCLOSURE STATEMENT

Appellant Phillip Miles is an individual, and is not a corporation. He offers no stock; there are no parent corporations or publicly owned corporations that own 10 percent or more of stock.

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INTRODUCTION

Phillip Miles was fired from his prison commissary job by his supervisor, Julie Anton, because he prayed in accordance with his Islamic faith. Unlike with many prison civil rights complaints, the Court need not take solely Mr. Miles' word on this. When he filed his complaint, Mr. Miles attached the affidavit of another Indiana Department of Corrections ("IDOC") employee, who corroborated all of his allegations. Office Austin Nunn swore that he personally had given Mr. Miles "prior permission" to attend prayers, and that he had "warned Anton that she could not fire Mr. Miles for wanting to attend his religious service," 14A (Nunn Affidavit), but that despite that warning, Mr. Miles "was terminated from commissary seven days later" by Ms. Anton. 15A (Nunn Affidavit).

The District Court, however, did not adjudicate that claim on the merits. Instead, it granted the State summary judgment for purported lack of exhaustion. That decision was wrong. First, state policy and internal prison guidance made Mr. Miles' issue "non-grievable," and thus, the normal grievance process was unavailable. Second, Mr. Miles *did* engage in internal administrative processes specified by IDOC policy, as he alleged in his complaint. Because Ms. Anton attempted pretextual discipline to justify firing him, Mr. Miles successfully disputed that discipline through the appeals process that the prison made available to him, and tried to file an informal grievance to which he received no response. And third, despite a clear factual dispute over exhaustion, the District Court declined to hold the *Pavey* hearing that this Court requires to determine administrative exhaustion when facts conflict.

This Court should reverse and reinstate Mr. Miles' complaint. If it has any doubt, at the very least, it should remand for the District Court to hold a *Pavey* hearing.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331, as Mr. Miles' complaint alleged claims pursuant to 42 U.S.C. § 1983. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291, as Mr. Miles appeals from a final judgment of the United States District Court. The order from which Mr. Miles appeals granted summary judgment to Appellee Anton, *see* 1-3A. Mr. Miles timely filed his notice of appeal 29 days later, *see* Dist. Ct. Doc. 32. The appealed order was both final and adjudicated all of Mr. Miles' claims; no claims or parties remain for disposition in the District Court.

ISSUES PRESENTED

Whether the District Court erred in holding that Mr. Miles had failed to exhaust available remedies, when Indiana DOC policy explicitly listed his issue as "non-grievable" and he had previously engaged in separate administrative process in the prison.

Proposed answer: Yes

If the answer on the first issue presented is no, whether the District Court erred by failing to hold a *Pavey* hearing, as required when parties dispute facts related to exhaustion of administrative remedies.

Proposed answer: Yes

STATEMENT OF THE CASE

Statement of Facts

In July 2019, Julie Anton fired Phillip Miles from his prison commissary job because he attended the weekly Friday services—scheduled and held by facility staff—for his Islamic faith. 5A (Complaint). Mr. Miles had attended those services with permission of Officer Nunn, with whom he had discussed the scheduling while interviewing with Nunn for the commissary job. 5A (Complaint), 14A (Nunn Affidavit). Officer Nunn hired him knowing he attended those weekly prayers, with no indication that his attendance would be an issue. 14A (Nunn Affidavit). And because of internal IDOC security procedures regarding prisoner counts, Mr. Miles would actually have gotten in trouble if he had ever *not* attended his prayer services on Fridays. 6A (Complaint). Shortly after he started, however, Appellee Anton, his supervisor, told Mr. Miles that he could not attend services. 6A (Complaint), 11A (Miles Affidavit). When he went anyway, she fired him. *Id*. In doing so, she justified it with pretextual discipline—a bogus report that he had stolen from the kitchen, *id*., and a negative work evaluation after barely two weeks on the job.

There is no serious dispute about why Appellee Anton terminated him. Officer Nunn told Mr. Miles—and the District Court, in an affidavit submitted with Mr. Miles' complaint—that Appellee Anton fired Mr. Miles because of his faith. 14-15A (Nunn Affidavit). Officer Nunn attested that he had warned Appellee Anton that she could not fire Mr. Miles for attending services, and that she explicitly told him that she would give Mr. Miles pretextual discipline to justify it instead. 14A (Nunn

Affidavit). She fired Mr. Miles based on exactly such pretext within seven days of that conversation with Officer Nunn. 15A (Nunn Affidavit).

Mr. Miles subsequently engaged in every process available to him to try to address this clear violation of policy and law. Because of the pretextual basis for his firing, he disputed both the allegation of theft, and the negative work evaluation. 12A (Miles Affidavit), *see also* 15A (Nunn Affidavit). After engaging in the internal process set out by IDOC policy, he was exonerated of the theft allegation and had the negative work allegation reversed. 6A (Complaint). Numerous superior officers—Lieutenant Gillespi, Captain Tribble, and Major Noatzke—agreed that Appellee Anton had violated policies. 12A (Miles Affidavit). That reversal meant that he could apply for a new, different prison job immediately, instead of waiting three months. 6A (Complaint). But he was not allowed to return to the commissary job that he liked and wanted despite that reversal, because of Appellee Anton's actions. 6-7A (Complaint).

Subsequently, Mr. Miles "filed an informal grievance against Julie Anton" with the IDOC, but "received no response." 12A (Miles Affidavit).

Procedural History

Mr. Miles filed a *pro se* complaint on March 18, 2020. Although he sought appointed counsel, the Court did not grant his motion. *See* Dist. Ct. Doc. 7. The Court *sua sponte* dismissed some claims, but allowed Mr. Miles to proceed against Ms. Anton with First Amendment claims based on her prohibiting his exercise of religion and retaliating against him for attending services. *See* Dist. Ct. Doc. 8. After the State filed an answer on behalf of Ms. Anton in which it disputed Mr. Miles' exhaustion,

the Court directed summary judgment briefing on the question of exhaustion. *See* Dist. Ct. Doc. 15. Although exhaustion was clearly disputed between Mr. Miles' complaint and the State's answer, the Court declined to order or hold a *Pavey* hearing, and denied Mr. Miles' second motion for appointment of counsel. *See* Dist. Ct. Doc. 17.

In his opposition to the State's summary judgment briefing, Mr. Miles filed an opposition in response, a statement of facts, an additional sworn declaration, and a brief, all of which disputed the State's assertion that he had failed to exhaust. *See generally* 16-40A. He also attached a copy of the IDOC grievance policies. *See* 26A (Grievance Policy). First, he described the grievance policy and quoted several provisions at length, including §IV(B) that described "matters inappropriate to the offender grievance process," including but not limited to "classification actions or decisions, which include loss of a job." 18A (Summary Judgment Response); 26A (Grievance Policy). Second, he explained that because his issue was that Appellee Anton had fired him from his prison job in the commissary, he understood the policy to make no remedy available to him. 18A (Summary Judgment Response). Third, he attested that he had filed in federal court "because there was no administrative remedy . . . that Plaintiff Miles could exhaust" to remedy the violation of his rights. 21A (Statement of Facts Opposing Summary Judgment). In reference to that and other disputes, he argued that the "foregoing factual allegation[s] create a genuine issue of material fact on the exhaustion issue" that precluded summary judgment. 25A (Miles Declaration).

After briefing underscored several disputes of material fact, the District Court still did not hold a *Pavey* hearing, and granted summary judgment to Appellee Anton, on the purported basis that Mr. Miles had not exhausted his administrative remedies as required. 1A (Opinion and Order). In a short, two-and-a-half-page order, the District Court wrote that Mr. Miles "concedes he didn't submit any grievances," 2A (Opinion and Order), despite Mr. Miles attesting in the affidavit attached to his complaint that he had tried to, 12A (Miles Affidavit). The District Court also held as a matter of law that although IDOC policy made any complaint related to his job classification a "non-grievable issue," 2A (Opinion and Order), Mr. Miles should have known from the more general provision about "actions of individual staff" that he could file a grievance. 3A (Opinion and Order).

Mr. Miles timely filed his notice of appeal. *See* Dist. Ct. Doc. 32.

SUMMARY OF ARGUMENT

The District Court wrongfully granted summary judgment to the Government based upon lack of exhaustion. First, it erred as a matter of law. Incarcerated people like Mr. Miles need only exhaust remedies that are "available," and IDOC policy made impositions of discipline and job classification issues "non-grievable." This Court has repeatedly held that when prisons tell people they cannot raise an issue in a grievance process, that process does not provide an available remedy. And Mr. Miles followed the separate path laid out in the policy, successfully appealing the discipline imposed and the negative work evaluation that provided the pretext for his firing. Second, the

District Court erred as a matter of fact. Or, at least, it construed factual disputes against Mr. Miles. Regardless of how this Court assess availability of remedies as a matter of law, the existing record shows several clear disputes of material facts about exhaustion and availability of remedies that preclude summary judgment. Among other factual disputes, Mr. Miles attested that he filed an informal grievance and received no response, which would constitute exhaustion even if the IDOC policy offered an available remedy.

Separate from its substantive resolution of the exhaustion question, however, the District Court erred because it granted summary judgment on that basis without even holding a *Pavey* hearing. When a factual dispute about exhaustion emerges from the complaint and summary judgment briefing—including about whether a grievance had been filed, how a reasonable prisoner would interpret a policy, or what effect staff actions had on that prisoner—the District Court is required to hold such a hearing. This Court has not only held that such a hearing is required, but that failing to hold one is reversible error.

This Court should reinstate Mr. Miles' claim based upon the existing record, but if it has any doubts at all about exhaustion it should remand with instructions for the District Court to hold a *Pavey* hearing.

STANDARD OF REVIEW

This Court reviews grants of summary judgment *de novo*. *E.g.*, *FKFJ, Inc. v. Vill. of Worth*, 11 F.4th 574, 585 (7th Cir. 2021). In assessing the grant of summary judgment, the court views all facts in the light most favorable to the non-moving party—here, Mr. Miles—and may only grant summary judgment when there is no genuine dispute of material fact and the moving party deserves judgment as a matter of law. *E.g.*, *Dunn v. Menard, Inc.*, 880 F.3d 899, 905 (7th Cir. 2018).

When this Court reviews a "grant of summary judgment, it is important to remember that exhaustion is an affirmative defense, and consequently the burden of proof is on the prison officials." *Kaba v. Stepp*, 458 F.3d 678, 680 (7th Cir. 2006). Put another way, this Court reviews a grant of summary judgment based upon non-exhaustion with two aspects of the decision in mind: first, the Court construes all factual disputes in favor of the non-movant prisoner, and second, on that view of the record, the State "must show beyond dispute that remedies were available." *Hernandez v. Dart*, 814 F.3d 836, 840 (7th Cir. 2016).

If the District Court holds a *Pavey* hearing on exhaustion of available remedies, this Court reviews factual findings about availability for clear error and legal conclusions *de novo*. *E.g. Wilborn v. Ealey*, 881 F.3d 998, 1004 (7th Cir. 2018). But this Court reviews "the threshold question [of] whether a *Pavey* hearing is required at all *de novo*," *Wagoner v. Lemmon*, 778 F.3d 586, 590 (7th Cir. 2015), and where, as here, the District Court has failed to hold a *Pavey* hearing, it receives no deference on facts or law. *See Wilborn*, 881 F.3d at 1004.

ARGUMENT

I. The IDOC did not make a remedy available for Mr. Miles' issue, and the existing record demonstrates that he tried to exhaust anyway.

This Court should reverse the District Court's grant of summary judgment and reinstate Mr. Miles' complaint because the existing record demonstrates that there are no remedies available for his situation, and because he still tried to exhaust them anyway. First, IDOC policy explicitly made his situation "non-grievable," and as this Court has held in the past about that IDOC policy specifically, policies that make certain issues non-grievable do not offer an "available" remedy to incarcerated persons on those topics. Under such policies, exhaust is impossible before suit. Second, despite this, Mr. Miles attempted to exhaust anyway. He engaged in the appeals process set out in IDOC policy to dispute discipline and job classifications, and, as he attested in the affidavit attached to his complaint, he also tried to file an informal grievance but received no response. The District Court ignored that allegation entirely, to say nothing of construing it in favor of Mr. Miles as required in the summary judgment posture. When properly construing disputes in Mr. Miles' favor, the record shows that he exhausted all the administrative processes actually available to him, and none of them could or did provide him with relief. Even if the policy offered a remedy, Mr. Miles complied with it—and the District Court erred by granting summary judgment.

A. Mr. Miles need only have exhausted available remedies, and DOC policy explicitly declined to make any remedy available for his problem.

The District Court erred in granting summary judgment because it purported to require Mr. Miles to exhaust unavailable remedies. Incarcerated people "must exhaust available remedies, but need not exhaust unavailable ones." *Ross v. Blake*, 578 U.S. 632, 642 (2016). When "the relevant administrative procedure lacks authority to provide any relief, the inmate has nothing to exhaust." *Id.* at 643 (quoting *Booth v. Churner*, 532 U.S. 731, 737-38 (2001)). Cases from this Court, including those addressing the same IDOC policy at issue in this case, have held that incarcerated people like Mr. Miles do not have an available remedy when procedures make "the ordinary prisoner," *Ross*, 578 U.S. at 648, believe that the grievance process makes no remedy available to them. *E.g. Davis v. Mason*, 881 F.3d 982, 986 (7th Cir. 2018). And in cases discussing that policy, this Court has previously observed that several provisions work together to deprive prisoners like Mr. Miles of any available remedy for certain types of explicitly excluded issues.

Incarcerated people need "need not exhaust unavailable" remedies. *Ross*, 578 U.S. at 642. Among other bases for courts to find unavailability of remedies, prison procedures may lack authority to provide any relief. *Id.* at 643; *see also Booth*, 532 U.S. at 737-38. Courts make that assessment in reference to the specific "facts on the ground," looking to see if the potential for relief exists. *Ross*, 578 U.S. at 643. That factual inquiry—in this Circuit, conducted at and after a *Pavey* hearing, *see* Section II, *infra*—looks at, among other things, whether "standard grievance procedures potentially offer relief," and, "even if [so], were those procedures knowable by an

ordinary prisoner in [the grievant's] situation." *Ross*, 578 U.S. at 648. If they are not knowable, they provide no remedy, and "[i]n short, if one has no remedy, one has no duty to exhaust remedies." *White v. Bukowski*, 800 F.3d 392, 395 (7th Cir. 2015).

This Court has regularly reinstated the lawsuits of incarcerated people that district courts had erroneously dismissed for purported failure to exhaust, because prison policy rendered remedies unavailable to the ordinary prisoner. This Court has previously held that where "the handbook itself shows that [a grievant] did not have an administrative remedy available," the person need not exhaust that unavailable remedy. *Thomas v.* Reese, 787 F.3d 845, 848 (7th Cir. 2015). The handbook may do that by instructing, for example, that "grievances may *not* be filed for issues involving" a particular subject. *Id.* (emphasis in *Thomas*). An ordinary prisoner would understand such a rule to bar him or her from filing a grievance, and prison defendants insisting instead that incarcerated people "divine" a meaning contrary to the text of the policy amounts to "retroactively amending the handbook," and prison defendants "cannot defeat the suit" on exhaustion grounds as a result. *Id.* at 848 (quoting *King v. McCarty*, 781 F.3d, 889, 896 (7th Cir. 2015) (per curiam)); *see also Lanaghan v. Koch*, 902 F.3d 683, 689 (7th Cir. 2018) (rejecting district court dismissal for non-exhaustion because that dismissal "holds Lanaghan responsible for failing to follow a procedure of which he was not aware and which was not presented in the handbook which described the grievance process.").

This Court has even held that the specific IDOC policies at issue in this case render remedies unavailable for topics that the policy excludes as non-grievable. Not only does the policy exclude topics—like discipline and job classification—from the

grievance policy, the IDOC directs staff to "deny grievances that concern a non-grievable issue" without offering a response. *Davis*, 881 F.3d at 986 (citing §V(B) of IDOC policy); *see also* 28A, 36A (Grievance Policy). Under the circumstances, staff are not "empowered to consider the complaint" and cannot take any "action in response to it," which obviates the need to exhaust. *Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006) (citing and describing *Larkin v. Galloway*, 266 F.3d 718, 723 (7th Cir. 2001)). Although the IDOC argued in *Davis* that the plaintiff there should have known to file anyway, this Court rejected that argument. Especially "in the light most favorable to the [non-movant] incarcerated plaintiff," policies like IDOC's can amount to "mixed or improper instructions" that make remedies unavailable. *Davis*, 881 F.3d at 986. This remains true whether those instructions come from the policy itself or from officials who "erroneously inform an inmate that the remedy does not exist," because in either situation an ordinary prisoner would believe that he can obtain no relief. *Id*.

Other IDOC policies compound this problem and make grievances on "non-grievable" subjects particularly impossible to exhaust. *Davis* followed *Hill v. Snyder*, which observed that IDOC policy—in *Hill*, a prior but substantively similar version of the policy at issue in this case—also bars appeals from an initial "refusal to process" a grievance submitted on a non-grievable subject. *Hill v. Snyder*, 817 F.3d 1037, 1040 (7th Cir. 2016). This Court therefore held that ordinary prisoners need not attempt to exhaust those unavailable remedies. *Id*. To be clear, while that additional bar to consideration of a grievance underscores the unavailability, it is not necessary to demonstrate it. Even if an appeal of a non-response denial for a non-grievable subject

were allowed, it would still not make a remedy "available" if the ultimate result is still mandatory denial. *See, e.g.*, *Ross*, 578 U.S. at 642. "[W]here the relevant administrative procedure lacks authority to provide relief or take any action whatsoever in response to a complaint," the process fails to offer an "available remedy" required by the PLRA. *Booth*, 532 U.S. at 736.

Here, Mr. Miles faced the same circumstance as the plaintiffs in *Thomas*, *Hill*, and, especially, *Davis*. As in *Thomas* and *Davis*, Mr. Miles attested and explained in his exhaustion briefing that IDOC makes job classification issues "non-grievable" for prisoners. 18A (Summary Judgment Opposition), 21A (Statement of Facts), 24A (Miles Declaration). As in *Thomas* and *Davis*, Mr. Miles cited and attached the operative IDOC policy that confirms this, listing as "examples of non-grievable issues" both "classification actions or decisions, which include loss of a job" and "disciplinary actions or decisions." 28A (Grievance Policy). As in at least *Davis*, that same policy directs staff to return the grievance without a response. 29A (Grievance Policy). And as in *Hill*, the policy allows appeals only from grievance responses, which do not issue for non-grievable subjects. 28A, 36A (Grievance Policy). As *Thomas*, *Davis*, *Hill*, *Lanaghan*, and numerous other decisions of this Court have held, Mr. Miles need not have divined from text that made his issue non-grievable that he should do the opposite, effectively a "retroactive amendment" by IDOC. *Thomas*, 787 F.3d at 848. Simply put, Mr. Miles need not have exhausted an unavailable administrative process.

B. Despite lack of available remedies, Mr. Miles still engaged in administrative processes and put the DOC on notice of his issue.

Because IDOC policy made his issue non-grievable, Mr. Miles followed the alternative path set out in IDOC policy to the best of his ability. First, he followed the IDOC policy which directs incarcerated people that their remedy for disputing disciplinary action is the disciplinary appeals process. Despite Mr. Miles' substantial appeals processes at the prison, the prison could not and did not provide any relief for his issue. So, second, as he alleged in his complaint—and could have elaborated on at a *Pavey* hearing, *see* Section II, *infra*—he still tried to file an informal grievance on the topic of his job loss. The informal grievance received no response—which satisfies his exhaustion requirement. *Reid v. Balota*, 962 F.3d 325, 329 (7th Cir. 2020) (citing *Dole*, 438 F.3d at 809, and emphasizing that "An administrative scheme can be 'unavailable' to a prisoner when a prison fails to respond to a prisoner's grievance"); *see also Shifflett v. Korszniak*, 934 F.3d 356, 359 (3d Cir. 2019) (holding that "a prisoner exhausts his administrative remedies as soon as the prison fails to respond" to a grievance); *Whitington v. Ortiz*, 472 F.3d 804, 808 (10th Cir. 2007) (same); *Haight v. Thompson*, 763 F.3d 554, 561 (6th Cir. 2014) (same). Both of these steps would have served to put IDOC on notice of his issue, and more importantly, each amounts to exhaustion under this Court's precedent.

First, when a prison sets out its grievance policy, prisoners must follow "its specific procedures." *King*, 781 F.3d at 896. This includes prison procedures that direct a prisoner to use something other than the formal grievance process to exhaust. *See Swisher v. Porter Cnty. Sheriff's Dep't*, 768 F.3d 553, 555 (7th Cir. 2014) (describing

officials directing prisoner to informal resolution instead). When a prisoner is told that "his problem [i]s being resolved" through some other process, and officials "don't tell [him] how to invoke" other procedures—especially procedure not clear from the grievance policy—he need not file a formal grievance. *Id*. Here, Mr. Miles followed the separate appeals process laid out in the IDOC grievance policy for both prison discipline and issues related to job classification, disputing the allegation of theft and the negative work evaluation through the appeals process. 6A (Complaint); 12A (Miles Affidavit); 28A (Grievance Policy) ("a separate disciplinary appeals process is in place for this purpose"). Even while acknowledging that Mr. Miles had been correct, and that the discipline and negative evaluation had been pretextual, that process nevertheless did not provide a remedy. 12A (Miles Affidavit).

Second, courts excuse an incarcerated person's failure to exhaust when he files a grievance and receives no response. "A remedy becomes unavailable 'if prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting.'" *Pyles v. Nwaobasi*, 829 F.3d 860, 864 (7th Cir. 2016) (quoting *Dole*, 438 F.3d at 809). This Court has repeatedly applied that principle to prison cases where parties dispute exhaustion. *See, e.g.*, *Pyles*, 829 F.3d at 809; *Hernandez*, 814 F.3d at 842; *Turley v. Rednour*, 729 F.3d 645, 650 n.3 (7th Cir. 2013) (collecting cases). Lack of response that excuses failure to exhaust includes not only a failure to respond, but also, in situations where a prisoner engages in a process the prison regards as incorrect, officials who "don't tell you how to invoke [the correct] procedure" or otherwise fail to "explain the grievance procedure to" the prisoner. *Swisher*, 768 F.3d at 555. When there has been "a muddle created by the

people running the jail," a prisoner "can't be blamed for failing to invoke" some other procedure the prison asserts as proper in its affirmative defense later. *Id*.

Here, Mr. Miles swore in the affidavit attached to his complaint that, in addition to having "appealed [the] re-classification" according to policy, he had also "filed an informal grievance against Julie Anton to which I received no response." 12A (Miles Affidavit). That lack of response makes sense—IDOC makes his issue non-grievable. 28A (Grievance Policy). It would be confusing enough if Mr. Miles had *only* received no response to the informal grievance. But Mr. Miles also had numerous interactions with several officers during his appeals process and afterward, none of whom informed him that he was engaging in the wrong process. Lieutenant Gillespi, Captain Tribble, and Major Noatzke all agreed that he had been wrongfully fired, and helped reverse some of the effects of the pretextual discipline, but none of them informed him that he had engaged in the wrong process or needed to invoke a different additional one. 12A (Miles Affidavit). Officer Nunn not only supported Mr. Miles' version of events, but offered to—and did—provide an affidavit to file in the District Court, and offered to "testify under oath" in a lawsuit. 14-15A (Nunn Affidavit). At no point did Officer Nunn suggest to Mr. Miles that he had engaged in the wrong process required to benefit from his offered affidavit or testimony. Mr. Miles attempted to file a grievance and received no response; engaged in the process called for by IDOC policy to challenge disciplinary actions and work evaluations; and spoke to numerous officers, including superior officers familiar with the rules, without being informed by any official that he had invoked the wrong process. Under the circumstances, any possible failure to exhaust is excused.

II. Regardless, the District Court failed to hold the *Pavey* hearing required when the parties in a prison civil rights suit dispute exhaustion.

Although the existing record demonstrates that Mr. Miles' suit should proceed, the District Court committed reversible error even prior to resolving the exhaustion question against him. In this Circuit, when exhaustion is disputed, "an evidentiary hearing on the availability question [i]s required by *Pavey v. Conley*." *Ramirez v. Young*, 906 F.3d 530, 533 (7th Cir. 2018) (citing *Pavey v. Conley*, 544 F.3d 739 (7th Cir. 2008) ("*Pavey I*")); *see also Roberts v. Neal*, 745 F.3d 232, 236 (7th Cir. 2014) ("If the defendants want to contest the issue whether the grievance was filed, this will require such a hearing in the district court," referring to *Pavey*, reversing, and remanding to hold one); *see also McIntosh v. Wexford Health Sources*, 987 F.3d 662, 663 (7th Cir. 2021) (observing that when "a dispute arises over whether a prisoner satisfied [the] exhaustion requirement . . . resolving the question requires holding a hearing, finding facts, and making credibility determinations"). Here, the District Court declined to order or hold a *Pavey* hearing, despite a clear factual dispute about exhaustion in the papers. If this Court has any doubt about Mr. Miles' exhaustion, it should remand with orders for the District Court to hold a *Pavey* hearing. Such a hearing could elicit evidence about Mr. Miles' attempts to exhaust, about his interactions with prison officials throughout the discipline and job classification appeals processes, and about how a reasonable incarcerated plaintiff would understand the IDOC policy that made discipline and job classification issues "non-grievable."

This Court regularly reversed district courts that granted summary judgment despite factual disputes about exhaustion even prior to *Pavey* and its progeny. Before *Pavey*, this Court observed that affirmative exhaustion defenses often calls for "a more discriminating analysis" into availability of remedies, particularly where availability is "not an either-or proposition" and there "is a middle ground, where, for example a prisoner may only be able to file grievances on certain topics." *Kaba*, 458 F.3d at 685. The *Kaba* Court addressed circumstances similar to those here, in that the prison in question allowed grievances on some topics but not others, and allowed grievances at some times but not others. *Id.* at 685-86. But where a question exists as to the availability of remedies on a particular topic or at a particular time, a court "cannot say that the prison officials met their burden of proving the availability of administrative remedies." *Id.* at 686. So the *Kaba* Court reversed and reinstated the prisoner's litigation.

These reversals happened often enough that this Court established a process for district courts to hold pre-discovery evidentiary hearings where the parties dispute availability of remedies or other aspects of exhaustion. It is not optional; "the sequence to be followed in a case in which exhaustion is contested" starts with "a hearing on exhaustion" that "permits whatever discovery relating to exhaustion" the district court requires to resolve the question. *Pavey I*, 544 F.3d at 742. In helping resolve disputes about exhaustion, the *Pavey* hearing serves an "important role" in both ensuring jurisdiction and developing a record of a "prisoner's exhaustion evidence." *Wagoner*, 778 F.3d at 588, 590 (describing purposes of *Pavey* hearings). The record developed in such hearings is important because it gives this Court the

opportunity to conduct appropriate review. *See Pavey v. Conley*, 663 F.3d 899, 906 (7th Cir. 2011) ("*Pavey II*") (addressing exhaustion with the benefit of evidence developed after remand in *Pavey I*); *see also Lanaghan*, 902 F.3d at 690 (discussing exhaustion in the context of factual findings by the District Court).

In refining the *Pavey* precedent over time, the Court has repeatedly emphasized the importance of the hearings. For one thing, district courts get more deference when they hold one. When, as here, they decline to hold one, this Court reviews *de novo* instead of for clear error any District Court factual findings about exhaustion. *Wilborn*, 881 F.3d at 1004; *Hernandez*, 814 F.3d at 840. For another, this Court most recently clarified that a district court judge cannot reject a magistrate judge's recommended finding "without itself holding a new [*Pavey*] hearing upon which to base its own credibility finding" when exhaustion turns on credibility. *McIntosh*, 987 F.3d at 663. And, as noted, this Court's precedential decisions post-dating *Pavey I* have characterized it as "requiring" such hearings "where exhaustion is contested." *E.g.*, *McIntosh*, 987 F.3d at 664 (citing and describing the holding of *Pavey I*); *Roberts*, 745 F.3d at 236 (same); *Ramirez*, 906 F.3d at 533 (same).

Granting summary judgment without holding a *Pavey* hearing on disputed facts related to availability of remedies, including exhaustion, constitutes reversible error. *See, e.g.*, *Roberts*, 745 F.3d at 236 (reversing and remanding for a *Pavey* hearing in light of dispute about grievance). Such reversals are so unremarkable this Court often declines to publish them. *E.g.*, *Owens v. Funk*, 760 F. App'x 439, *3-4 (7th Cir. 2019) (reversing for a *Pavey* hearing where, because "the district judge did not properly

assess, through a live hearing" evidence as to availability of remedies, "the case must go back to district court on the issue of exhaustion").

The District Court's failure to hold a *Pavey* hearing before granting summary judgment matters particularly because of how strenuously Mr. Miles and the IDOC have disputed exhaustion. Mr. Miles should win as a matter of law based on the clear text of the policy. *See* Section I, *supra*. But if he does not, summary judgment is still precluded because of the factual disputes that prevent the State from carrying its burden on exhaustion as an affirmative defense. The complaint, Mr. Miles' affidavit, and his summary judgment opposition highlight "a substantial number of open questions that cannot be resolved on the record before [this Court]." *Kaba*, 458 F.3d at 686. First, does IDOC policy making "job classification" and "disciplinary" issues "non-grievable" lead an ordinary prisoner to understand that he should file a grievance nevertheless? Mr. Miles did not believe so. Second, why did none of the many prison officers who participated in his appeal process—Lieutenant Gillespi, Captain Tribble, and Major Noatzke—tell Mr. Miles he had engaged in the wrong process? Third, why did Officer Nunn offer an affidavit and testimony for a lawsuit, if he thought that Mr. Miles' existing actions did not amount to exhaustion that would allow such a suit? Fourth, what happened to Mr. Miles' informal grievance against Ms. Anton?

Despite the posture, the District Court construed all of those factual disputes against Mr. Miles on the way to granting summary judgment. Such construction is wrong on the posture, where the court draws all reasonable inferences in the light most favorable to the non-moving party. *See, e.g.*, *Jenkins v. Yager*, 444 F.3d 916, 921

(7th Cir. 2006). The District Court declined to make reasonable inferences in Mr. Miles' favor despite the nested burdens for the State to meet—first from the summary judgment standard, and second from the "burden of proof [being] on prison officials" to prove non-exhaustion as an affirmative defense.[1] *Kaba*, 458 F.3d at 681; *see also Hernandez*, 814 F.3d at 840. And the District Court considered whether the State had carried those burdens without the benefit of a *Pavey* hearing, which not only led the District Court to write a short opinion that did not address key facts, but deprived this Court of a full record from which it could itself review the issue. That failure alone constitutes reversible error, entirely separate from the explicit exclusion of Mr. Miles' issues as appropriate subjects for grievance by the IDOC policy.

[1] Not only should the District Court have construed such disputes in Mr. Miles' favor because of the summary judgment posture and the State's affirmative burden to prove non-exhaustion, but the District Court seemingly failed to account for Mr. Miles' status as a *pro se* litigant. "[A]s a *pro se* litigant, [the plaintiff] is entitled to have his complaint be liberally construed." *Kaba*, 458 F.3d at 681 (citing *Marshall v. Knight*, 445 F.3d 965, 969 (7th Cir. 2006)).

CONCLUSION

"The PLRA exhaustion requirement does not demand the impossible." *Lanaghan*, 902 F.3d at 688 (quoting *Pyles*, 829 F.3d at 864). Because there was no available remedy to Mr. Miles, the Court should reverse the judgment of the District Court and remand for further proceedings. If the Court has any doubt about exhaustion, however, it should reverse and remand for a *Pavey* hearing.

Respectfully submitted,

/s/ Jim Davy

Jim Davy
ALL RISE TRIAL & APPELLATE
P.O. Box 15216
Philadelphia, PA 19125
(215) 792-3579

Counsel for Appellant

Feb. 25, 2022

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g), I certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) and Circuit Rule 32(c) because it contains 5,748 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word version 16.58, set in Century Schoolbook font in 12-point type.

/s/ Jim Davy

Jim Davy

CERTIFICATE OF SERVICE

I certify that on Feb. 25, 2022, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ Jim Davy

Jim Davy

ATTACHED APPENDIX

CERTIFICATE OF COMPLAINCE WITH CIRCUIT RULE 30

In accordance with Circuit Rule 30(d), I certify that this appendix contains all of the materials required by Circuit Rule 30(a), and all of the materials required by Circuit Rule 30(b), and that this attached appendix includes both sets of materials because it contains fewer than 50 total pages.

APPENDIX TABLE OF CONTENTS

Attached Appendix

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

PHILLIP L. MILES,

Plaintiff,

v.

JULIE ANTON,

Defendant.

CAUSE NO. 3:20-CV-246-RLM-MGG

OPINION AND ORDER

Phillip L. Miles, a prisoner without a lawyer, sues "Julie Anton in her personal capacity for monetary damages for infringing on the free exercise of his religion and retaliating against him in violation of the First Amendment[.]" ECF 8 at 4. In his complaint, Mr. Miles alleged that Ms. Anton violated his constitutional rights by terminating him from his job in the commissary department because he attended a religious service. Ms. Anton moved for summary judgment, arguing that Mr. Miles didn't exhaust his administrative remedies before filing suit. ECF 24. The motion is ripe for ruling.

Summary judgment must be granted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Federal Rule of Civil Procedure 56(a). A genuine issue of material fact exists when "the evidence is such that a reasonable [factfinder] could [find] for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To determine whether a genuine issue of material fact exists, the court must construe all facts in the light

most favorable to the non-moving party and draw all reasonable inferences in that party's favor. Heft v. Moore, 351 F.3d 278, 282 (7th Cir. 2003).

Prisoners can't bring an action in federal court with respect to prison conditions "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). "[A] suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits, even if the prisoner exhausts intra-prison remedies before judgment." Perez v. Wisconsi0n Dep't of Corr., 182 F.3d 532, 535 (7th Cir. 1999) (emphasis added). "Failure to exhaust is an affirmative defense that a defendant has the burden of proving." King v. McCarty, 781 F.3d 889, 893 (7th Cir. 2015).

Courts take a "strict compliance approach to exhaustion." Dole v. Chandler, 438 F.3d 804, 809 (7th Cir. 2006). "To exhaust remedies, a prisoner 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). An inmate need only exhaust remedies that are available. Woodford v. Ngo, 548 U.S. 81, 102 (2006).

Ms. Anton argues that Mr. Miles didn't exhaust his administrative remedies because he didn't submit any grievances before filing his complaint. Mr. Miles concedes he didn't submit any grievances, explaining that he didn't have any available remedies because his claim alleges Ms. Anton fired him from his job, which is a "non-grievable issue" under the Offender Grievance Process. *See* ECF 27-3 at 3-4; ECF 25-2 at 3 (IDOC grievance policy listing as an example of a non-grievable issue "[c]lassification actions or decisions, which include loss of a job . . ."). Mr. Miles isn't

proceeding against Ms. Anton on a loss-of-job claim. Rather, he is proceeding against Ms. Anton for "infringing on the free exercise of his religion and retaliating against him in violation of the First Amendment." ECF 8 at 4. The grievance policy specifically lists as an appropriate issue to grieve "[a]ctions of individual staff," which encompasses Ms. Anton's alleged actions here. ECF 25-2 at 3. This claim alleges a grievable issue under the Offender Grievance Process. *See* ECF 25-1 at 5; ECF 25-2 at 3. That the alleged constitutional violation was related to Ms. Anton's act of terminating Mr. Miles from his job didn't make this claim non-grievable. Because Mr. Miles' claim alleges a grievable issue and it is undisputed that Mr. Miles didn't submit any grievances, Mr. Miles didn't exhaust his administrative remedies before filing suit. The motion for summary judgment must be granted.

For these reasons, the court GRANTS the motion for summary judgment (ECF 24). The clerk shall issue judgment accordingly.

SO ORDERED on September 1, 2021

/s/ Robert L. Miller, Jr.
JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHEN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Phillip L Miles

Plaintiff,

V.

Julie Anton

Defendant,

Cause No.: 3:20-cv-246

42 U.S.C. 1983 COMPLAINT

I. Jurisdiction and Venue

This Honorable Court has Jurisdiction over this matter in accordance with Title 42 U.S.C. § 1983, plaintiff has federal constitutional rights in question, and the defendant conduct does violate clearly established statutory and constitutional rights of which a reasonable person should have known. The defendant is liable as the defendant personally participated in the deprivation of plaintiffs constitutional rights, knew of the violations, failed to act to prevent them, promulgated or "implemented a policy so deficient that the policy 'itself was a repudiation of plaintiffs constitutional rights' and is 'the moving force of the constitutional violation, violating the first amendments free exercise clause. Defendant placed a substantial burden on plaintiffs' ability to practice his religion and also retaliated against plaintiff for continuing to exercise his religious beliefs.

II. Plaintiff.

Plaintiff Phillip L. Miles, pro se, has requested to move forward in forma pauperis. He is currently incarcerated at the Indiana State Prison located in Michigan City, Indiana.

III. Defendants.

Defendant Julie Anton

The defendant is sued in her individual capacity and is liable under § 1983 due to the defendant personally participating in the deprivation of plaintiffs constitutional rights. Defendant knew of these violations or should have known and failed to act to prevent them, promulgated or "implemented a policy so deficient that the policy 'itself was a repudiation of plaintiffs constitutional rights' and is 'the moving force of the constitutional violation, violating the first amendments free exercise clause. Defendant placed a substantial burden on the plaintiffs' ability to practice his religion, and also retaliated against plaintiff for continuing to exercise his first amendment constitutional right.

IV. Facts

1. Plaintiff, Phillip L. Miles is currently an inmate at the Indiana State Prison.
2. Defendant, Julie Anton at the time of the injury was an employee at the Indiana State Prison apart of Indiana's Department of Corrections.
3. On July 22, 2019 Plaintiff was hired in the commissary dept. in large part by Ofc. Nunn after being cleared by the prisons Internal Investigations dept. (see affidavit attached)
4. Plaintiff is Muslim and attends all religious services pertaining to plaintiff's creed and beliefs as a Muslim including the Jumuah religious ceremony held every Friday by Muslims across the world. (see affidavit attached)

5. Upon hiring Plaintiff, Ofc. Nunn was informed by plaintiff that he would not be available on Fridays during the hours of 12 pm to 2 pm as he has to attend his mandatory Jumuah services. Plaintiff even is a part of the prison count letter and must attend said service for security purposes regarding head count and could receive a bad conduct report of being out of place/ interfering with staff duties. (see affidavit attached)
6. On August 2, 2019 plaintiff informed his supervisor which was the defendant at the time that he would be leaving work early to attend his religious count letter Jumuah at which time Julie Anton proceeded to tell plaintiff that he could not attend Jumuah. (see affidavit attached)
7. There is no policy implemented by the Indiana State Prison which states plaintiff cannot attend religious ceremonies because of his work schedule. (see affidavit attached)
8. Plaintiff was told by defendant "go your done." At which point plaintiff left work to attend his religious ceremony Jumuah. (see affidavit attached)
9. Plaintiff was eventually told by staff that he could not go back to work at which point plaintiff inquired to the defendant why he was laid off, plaintiff was informed by the defendant he was under investigation for theft. (see affidavit attached)
10. Plaintiff later received a bad work evaluation and was terminated from his job assignment in the commissary department on August 5, 2019. (see affidavit attached)
11. On August 13, 2019 plaintiff was cleared by internal investigations of theft and was never given a conduct report for theft. (see affidavit attached)
12. On August 26, 2019 plaintiffs bad work evaluation was reversed by internal investigations as plaintiffs' job code changed and he was able to apply for another job

instead of having to wait 90 days per policy for any bad work evaluation. (see affidavit attached)

13. Ms. Anton clearly violated plaintiffs first amendment rights to practice his religious beliefs by stating plaintiff could not attend his religious service, and by giving plaintiff an ultimatum in the form of 'go your done'.
14. Ms. Anton clearly violated plaintiffs' first amendment rights retaliating against plaintiff by accusing plaintiff of theft, giving plaintiff a bad work evaluation, and firing plaintiff.
15. Plaintiff has since been exonerated of theft by prison officials, and has had his bad work evaluation overturned by prison officials.
16. Ms. Anton does not work at the Indiana State Prison any longer.

V. Legal Claims

1. Defendant violated plaintiffs well established constitutional right by depriving plaintiff of his first amendment rights to freedom of religion. This deprivation was caused by defendant acting under the color of state law.

2. Defendant violated plaintiffs well established constitutional right by retaliating against plaintiff for exercising his first amendment right to freedom of religion.

VI. Prayer for Relief

WHEREFORE, plaintiff respectfully pray this court enter judgement:

1. Granting plaintiff Miles a declaration that the acts or omissions described herein violated his rights under the Constitution and laws of the United States, and

2. Granting plaintiff compensatory damages in the amount of $10,000 against the defendant amounting to $5,000 for each violation, and

3. Plaintiff seeks punitive damages in the amount of $50,000 against the defendant amounting to $25,000 for each violation, and

4. Plaintiff seeks a jury trial on all issues triable by jury, and

5. Plaintiff also seeks recovery of the cost in this suit, and

6. Any additional relief this court deems just, proper, and equitable.

RESPECTFULLY SUBMITTED,

Phillip Miles
Doc.114544
Loc.F-E-6
1 Park Row
Michigan City, In 46360,

Plaintiff-*pro se*

VERIFICATION AND SIGNATURE

___✓___ I agree to promptly notify the clerk of any change of address.
___✓___ I have read all of the statements in this complaint.
___✓___ I declare under penalty of perjury that the foregoing is true and correct.

Signed this 18th day of March, 20 20.

A. Phillip Miles

Phillip Miles

Mail all of these paper to:

South Bend Division Clerks Office
102 Grant Federal Building
204 S. Main Street
South Bend, IN 46601

CERTIFICATE OF SERVICE

I, **Phillip Miles** pursuant to 28 U.S.C 1746, I hereby verify under penalty of perjury that I have, this 18th day of March, 2020, served a copy of the above and foregoing on the individual **LAST KNOWN ADDRESS** indicated below pursuant to Fed. Rule of Procedure 5(b)(2), by deposit in the E-filing program, addressed as indicated :

Indiana State Prison
One Park Row
Michigan City, IN 46360

By: Phillip Miles .

Phillip Miles
Doc.114544 Loc.F-E-6
1 Park Row
Michigan City, In 46360,
Plaintiff '*pro se*'

AFFIDAVIT OF TRUTH

I, PHILLIP MILES, who being first duly sworn upon my oath, swear under penalties for perjury that the following facts are true and correct and within my personal knowledge:

1. I am an American citizen, over the age of twenty-one, and I am not under any legal disability or infirmity which would render me incompetent to testify as to any matter set forth herein.

1. I am currently incarcerated at Indiana State Prison and may be contacted at this address for notice that my appearance is necessary to appear and/or testify at any hearing or trial at which any matter set forth herein my be material and/or relevant.

2. I provide this Affidavit freely and voluntarily, without coercion of any kind, as my affirmance to appear and testify at any hearing or trial.

3. On 8-2-2019 I approached Julie Anton to ask to attend my religious worship Jumuah count letter. I explained that Jumuah was like church is to Christians except that for us it is mandatory if being held. I told Julie Anton all the work for the week was complete. Julie Anton responded saying "I thought you went to Jumuah last week and I told you that you cannot attend Jumuah every week? Officer Nunn should've addressed this before he hired you". I responded by inquiring about Indiana code 11-11-4-1 rights of a confined person, D.O.C. policy and my right to attend my religious worship service. Julie Anton responded saying "well I don't care anything about that and officer Nunn had no right to hire you anyway, just go you're done". I was terminated that day. I was made aware of this on 8-5-2019 when I was informed by Sgt. Stratham of C-cell house to not go into

house to not go into work that day or for the rest of the week. I later that day went to inquire about why I was being laid off for the week from Julie Anton personally. To which she responded by saying "I had nothing to do with it. You are under administrative investigation for theft." I later that day received a bad work evaluation from my case worker Wilson. The bad work evaluation stated as follows Conduct: violates, Group Conformity: easily led, Initiative: minimal. She commented stating "Offender Miles is easily led by other offenders and staff. I was re-classed to IDLE-IS2. The classification hearing form stated "Terminate Employment Does Not Meet Standards". Officer Nunn was relocated from the commissary dept. on 8-1-2019. I never received a conduct report for theft. I was employed at commissary for approximately 11 days. I was terminated due to three primary reasons (1) Julie Anton's insensitivity, and blatant disregard of my religious practice. (2) Julie Anton's lack of understanding and ignorance of D.O.C. policy and U.S. Law. (3) Julie Anton's blatantly open dislike and disapproval of Officer Nunn's decision and choice of hiring me. I've since filed an informal grievance against Julie Anton to which I received no response, appealed my re-classification as well which was later overturned by internal investigations and spoke with Lt. Gillespi, Capt. Tibble, and Major Nowatzke to whom all verbally agreed her decision to fire me and how she did it was incorrect. I also was cleared by internal investigations for the alleged theft Ms. Anton stated I was under investigation for. Ofc. Nunn later informed me that Anton purposely discriminated against me because of my religious beliefs and fired me because I wished to attend my Muslim Jumuah service. When I asked Ofc. Nunn why did Anton fire me under the guise of a bad work evaluation he responded that she couldn't fire me for

"wanting to attend Jumuah" and the he would be willing to write , sign, and date an affidavit of truth affirming these events. Ofc. Nunn also informed me that he would be willing to testify under oath in regards to these injuries Anton has caused me. Since these events Anton has either been terminated or has quit working at the Indiana State Prison for reasons unknown.

I, PHILLIP MILES the undersigned, swear under penalties for perjury that all of the foregoing statement are true and correct.

FURTHER, THIS AFFIANT SAYETH NAUGHT.

PHILLIP MILES

Affiant P. Phillip Miles

Before me, the undersigned Notary Public in and for said State and County, this 10th day of March, 2020, personally appeared P. Phillip Miles, the Affiant named above, and who being first duly sworn upon his oath did then and there acknowledge the execution of this Affidavit to be the voluntary act and deed of said Affiant for the uses and purposes therein stated.

Subscribed and sworn to before me on this 10TH day of March, 2020

JEROME MARTIN TAYLOR, SR.
Lake County
My Commission Expires
February 24, 2024

AFFIDAVIT OF TRUTH

I, Austin Nunn, who being first duly sworn upon my oath, swear under penalties for perjury that the following facts are true and correct and within my personal knowledge:

1. I am an American citizen, over the age of twenty-one, and I am not under any legal disability or infirmity which would render me incompetent to testify as to any matter set forth herein.

4. I am currently employed at the Indiana State Prison and may be contacted at this address for notice that my appearance is necessary to appear and/or testify at any hearing or trial at which any matter set forth herein may be material and/or relevant.

5. I provide this Affidavit freely and voluntarily, without coercion of any kind, as my affirmance to appear and testify at any hearing or trial.

6. On 7-26-2019, I Ofc. Nunn Witnessed offender Miles whom which I've just hired recently, request to attend his religious service Jumuah. I had no problem with offender Miles attending this service as he had already informed me before I hired him that he was Muslim and that the only time he would not be available would be on Fridays in the afternoon for Jumuah. Offender Miles approached me and Julie Anton requesting to attend his religious service at which time Ms. Anton stated 'He cannot go every week to Jumuah'. Mr. Miles stated he had prior permission to attend his religious worship count letter from me. I was later informed that Mr. Miles would be terminated by Ms. Anton. I warned Anton that she could not fire Mr. Miles for wanting to attend his religious services at which time she told me that she would write it up as a "3380" which is known to offenders as a work evaluation. Offenders who receive a bad work evaluation lose their

job and job eligibility for 90 days and cannot appeal the decision as it isn't a conduct report. I would later be informed by offender Miles that he was terminated from commissary seven days later with a bad work evaluation alleging that he was under investigation for theft. I told offender Miles that I would attest to him not being accused of any stealing for the week that he worked with me as his supervisor and that this altercation arose out of offender Miles attempting to attend his religious service. Ms. Aton is not employed at the Indiana State Prison any longer.

I, Austin Nunn, the undersigned, swear under penalties for perjury that all of the foregoing statement are true and correct.

FURTHER, THIS AFFIANT SAYETH NAUGHT.

Austin Nunn

Affiant

Before me, the undersigned Notary Public in and for said State and County, this 6th day of March, 20 20, personally appeared _____, the Affiant named above, and who being first duly sworn upon his oath did then and there acknowledge the execution of this Affidavit to be the voluntary act and deed of said Affiant for the uses and purposes therein stated.

Subscribed and sworn to before me on this 10th day of March, 20 20.

JEROME MARTIN TAYLOR, SR.
Lake County
My Commission Expires
February 24, 2024

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

PHILLIP L. MILES
Plaintiff,

v.

JULIE ANTON
Defendant.

CAUSE NO: 3:20-cv-246-RLM-MGG

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

NOW COMES THE PLAINTIFF PHILLIP L. MILES, PRO-SE, AND IN HIS RESPONSE IN OPPSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, PURSUANT TO FEDERAL RULES OF CRIMINAL PROCEDURE 56, STATES AS FOLLOWS:

1. ON DECEMBER 22, 2020, ROBERT L. MILLER JR. OF THE UNITED STATES DISTRICT COURT SCREENED AND GRANTED PLAINTIFF PHILLIP L. MILES LEAVE TO PROCEED AGAINST JULIE ANTON IN HER PERSONAL CAPACITY FOR MONETARY DAMAGES FOR INFRINGING ON THE FREE EXERCISE OF HIS RELIGION AND RETALIATING AGAINST HIM IN VIOLATION OF THE FIRST AMENDMENT BY:

a. PLACING A SUBSTANTIAL BURDEN ON HIS PRACTICE OF

RELIGIOUS; AND

6. FOR RETALIATING AGAINST HIM FOR ATTENDING RELIGIOUS SERVICES.

2. ON FEBRUARY 22, 2021 DEFENDANT JUSTICE ANTON BY COUNSEL SAMANTHA M. SUMCAD FILED AN ANSWER TO PLAINTIFF'S COMPLAINT AND AFFIRMATIVE DEFENSES AND DEMANDED A JURY TRIAL.

3. DEFENDANT'S STATEMENT OF AFFIRMATIVE DEFENSES PARAGRAPH NUMBER ONE(1) STATES: "THE PLAINTIFF IS BARRED FROM RECOVERY BECAUSE HE FAILED TO EXHAUST AVAILABLE ADMINISTRATIVE REMEDIES FOR THE PROPER GRIEVANCE PROCESS."

4. ON APRIL 15, 2021, DEFENDANT FILED A MOTION FOR SUMMARY JUDGMENT AND REQUESTED THIS HONORABLE COURT TO GRANT SUMMARY JUDGMENT IN DEFENDANT'S FAVOR PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56 AND LOCAL RULE 56-1 ON THE BASIS THAT PLAINTIFF FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES PRIOR TO FILING THIS LAWSUIT AND THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT AS TO PLAINTIFF'S FAILURE TO EXHAUST AND THE DEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

5. HOWEVER, PLAINTIFF DID IN FACT FOLLOW ALL PROPER GUIDELINES SET FORTH IN POLICY AND PROCEDURE 00-02-301 OFFENDER GRIEVANCE PROCESS; WHICH IS

INCORPORATED HEREIN AS EXHIBIT A AND STATES UNDER IV, B, 1, 5, AND 13 THE FOLLOWING:

"IV. USE OF THE OFFENDER GRIEVANCE PROCESS:

THE DEPARTMENT RECOGNIZES ONLY ONE GRIEVANCE PROCESS. THE GRIEVANCE PROCESS DESCRIBED IN THIS POLICY AND ADMINISTRATIVE PROCEDURE IS THE ONLY ADMINISTRATIVE REMEDY OFFICIALLY RECOGNIZED BY THE DEPARTMENT FOR THE RESOLUTION OF OFFENDERS' GRIEVABLE ISSUES. THE COMPLETE OFFENDER GRIEVANCE PROCESS CONSIST OF THE FOLLOWING STEPS:

B. MATTERS INAPPROPRIATE TO THE OFFENDER GRIEVANCE PROCESS:

EXAMPLE OF NON-GRIEVABLE ISSUES, BUT NOT LIMITED TO:

1. FEDERAL, STATE, AND LOCAL LAW;

5. CLASSIFICATION ACTIONS OR DECISIONS, WHICH INCLUDE LOSS OF A JOB, CHANGE IN SECURITY LEVEL, FACILITY TRANSFERS, AND BED MOVES (A SEPARATE CLASSIFICATION APPEAL PROCESS IS IN PLACE FOR THIS PURPOSE); AND

13. STAFF DISCIPLINE, STAFF ASSIGNMENT, STAFF DUTIES, AND OR STAFF TRAINING."

THUS, PURSUANT TO POLICY AND PROCEDURE 00-02-301 IV, B, 1, 5, AND 13 THERE WAS NO ADMINISTRATIVE REMEDY AVAILABLE TO PLAINTIFF BEFORE INITIATING

THIS LAWSUIT. (See EXHIBIT A ATTACHED HERETO)

6. THERE IS A GENUINE ISSUE OF MATERIAL FACT AND PLAINTIFF IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFF'S FIRST AMENDMENT CLAIM BY DEFENDANT JULIE ANTON PLACING A SUBSTANTIAL BURDEN ON PLAINTIFF'S ABILITY TO PRACTICE HIS RELIGION, AND ALSO RETALIATING AGAINST PLAINTIFF FOR CONTINUING TO EXERCISE HIS FIRST AMENDMENT CONSTITUTIONAL RIGHT.

7. PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT JULIE ANTON'S MOTION FOR SUMMARY JUDGMENT ON THIS ISSUE TO EXHAUST ADMINISTRATIVE REMEDIES IS SUPPORTED BY THE ARGUMENT(S) SET FORTH IN THE ACCOMPANYING MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S OPPOSITION MOTION, WHICH IS INCORPORATED HEREIN BY REFERENCE AND PLAINTIFF'S ISSUES ARE IDENTIFIED IN THE ACCOMPANYING STATEMENT OF DISPUTED FACTUAL ISSUES FILED BY THE PLAINTIFF PURSUANT TO FEDERAL RULES OF PROCEDURE 56, THUS, INCLUDING PLAINTIFF PHILLIP L. MILES' DECLARATION IN SUPPORT OF HIS MOTION IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

WHEREFORE, PLAINTIFF RESPECTFULLY REQUESTS THAT THE COURT GRANT SUMMARY JUDGMENT IN HIS FAVOR AS TO THE DEFENDANT'S CLAIMS; DISMISS DEFENDANT JULIE ANTON'S CLAIMS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES IN THEIR ENTIRETY, AND GRANT ALL OTHER RELIEF DEEMED JUST AND PROPER.

PURSUANT TO 28 U.S.C. 1746, I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

EXECUTED ON THIS 22 DAY OF APRIL, 2021.

PHILLIP L. MILES #114544
PLAINTIFF, PRO-SE
1 PARK ROW
MICHIGAN CITY, IN. 46360

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON APRIL 22, 2021, I HANDED THE FOREGOING TO THE CASE WORKER IN E-CELLHOUSE WHERE I AM LOCKED-DOWN FOR E-FILING WITH THE LAW LIBRARY. I FURTHER CERTIFY THAT BECAUSE OF THIS LOCK-DOWN I AM UNABLE TO SERVE A COPY OF THE FOREGOING ON OPPOSING COUNSEL MENTIONED BELOW.

SAMANTHA M. JUMPAD
DEPUTY ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
INDIANA GOVERNMENT CENTER SOUTH - 5TH FL.
302 W. WASHINGTON STREET
INDIANAPOLIS, INDIANA 46204-2770

PHILLIP L. MILES #114544
PLAINTIFF, PRO-SE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

PHILIP L. MILES
Plaintiff,

v.

JULIE ANTONI
Defendant.

CAUSE NO.: 3:20-cv-246-RLM-MGG

STATEMENT OF UNDISPUTED FACTS

PURSUANT TO RULE 56(c)(2) OF THIS COURTS CIVIL RULES, THE PLAINTIFF SUBMITS THE FOLLOWING LIST OF UNDISPUTED FACTS THAT ENTITLE HIM TO SUMMARY JUDGMENT ON DEFENDANT JULIE ANTONI'S CLAIM FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

1. ON AUGUST 2, 2019, AT THE INDIANA STATE PRISON, DEFENDANT JULIE ANTONI VIOLATED PLAINTIFF PHILIP L. MILES' RIGHTS UNDER THE FIRST AMENDMENT TO THE U.S. CONSTITUTION.

2. THERE WAS NO ADMINISTRATIVE REMEDY OR ANY OTHER PROCEDURE AT THE INDIANA STATE PRISON OR IN IDOC POLICY 00-02-301 THAT PLAINTIFF MILES COULD EXHAUST BECAUSE OF THE VIOLATION OF HIS FIRST AMENDMENT RIGHT.

3. BECAUSE THERE WAS NO ADMINISTRATIVE REMEDY FOR PLAINTIFF TO EXHAUST IN IDOC POLICY HE

INITIATED A CIVIL RIGHTS COMPLAINT UNDER 42 U.S.C. 1983 AGAINST DEFENDANT JUDGE ANTON. (SEE EXHIBIT A TO PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT)

EXECUTED ON THIS 22 DAY OF APRIL 2021

PHILLIP L. MILES #114544
PLAINTIFF, PRO-SE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

PHILLIP L. MILES
Plaintiff,

v.

JULIE ANTON
Defendant.

CAUSE NO: 3:20-cv-246-RLM-MGG

DECLARATION IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

PLAINTIFF PHILLIP L. MILES PURSUANT TO U.S.C. 1746 DECLARES UNDER THE PENALTY FOR PERJURY.

1. I AM THE PLAINTIFF IN THE ABOVE ENTITLED CAUSE. I MAKE THIS DECLARATION IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES.

2. THE DEFENDANTS' MOTION CLAIMS IN SUMMARY, THAT I, PLAINTIFF MILES, DID NOT EXHAUST MY AVAILABLE ADMINISTRATIVE REMEDIES PRIOR TO FILING SUIT AND DEFENDANT JULIE ANTON BELIEVES SHE IS ENTITLED TO JUDGMENT. IN FACT, DEFENDANT JULIE ANTON IS NOT ENTITLED TO JUDGMENT BECAUSE I, THE PLAINTIFF, DID IN FACT SHOW THIS COURT THAT THERE WAS NO ADMINISTRATIVE REMEDY AVAILABLE UNDER IDOC POLICY 00-02-301 TO EXHAUST.

3. DEFENDANT JUDE ANTON IS NOT ENTITLED TO SUMMARY JUDGMENT AS TO THE ISSUE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT TO BE RESOLVED. THESE ISSUES ARE IDENTIFIED IN THE ACCOMPANYING STATEMENT OF UNDISPUTED FACT AND MY MEMORANDUM OF LAW FILED PURSUANT TO FEDERAL RULES OF PROCEDURE 56. THE FACTS ARE SET OUT IN THIS DECLARATION.

4. IDOC POLICY 00-02-301 SPECIFICALLY STATES UNDER IV., B., 1., 5., AND 13.:

IV. USE OF THE OFFENDER GRIEVANCE PROCESS:

THE DEPARTMENT RECOGNIZES ONLY ONE GRIEVANCE PROCESS. THE GRIEVANCE PROCESS DESCRIBED IN THIS POLICY AND ADMINISTRATIVE PROCEDURE IS THE ONLY ADMINISTRATIVE REMEDY OFFICIALLY RECOGNIZED BY THE DEPARTMENT FOR THE RESOLUTION OF OFFENDERS' GRIEVABLE ISSUES. THE COMPLETE OFFENDER GRIEVANCE PROCESS CONSIST OF THE FOLLOWING STEPS:

B. MATTERS INAPPROPRIATE TO THE OFFENDER GRIEVANCE PROCESS:

EXAMPLES OF NON-GRIEVABLE ISSUES, BUT NOT LIMITED TO:

1. FEDERAL, STATE, AND LOCAL LAWS;

5. CLASSIFICATION ACTIONS OR DECISIONS, WHICH INCLUDE LOSS OF A JOB, CHANGE IN SECURITY

LEVEL, FACILITY TRANSFERS, AND BED MOVES (A SEPARATE CLASSIFICATION APPEAL PROCESS IS IN PLACE FOR THIS PURPOSE);

13. STAFF DISCIPLINE, STAFF ASSIGNMENT, STAFF DUTIES, AND/OR STAFF TRAINING.

THERE WAS NO ADMINISTRATIVE REMEDY AVAILABLE TO PLAINTIFF PHILLIP L. MILES BEFORE INITIATING THIS LAWSUIT.

5. DEFENDANT JULIE ANTON DID IN FACT VIOLATE PLAINTIFF'S FIRST AMENDMENT RIGHTS TO FREEDOM OF RELIGION BY PLACING A SUBSTANTIAL BURDEN ON PLAINTIFF MILES ABILITY TO PRACTICE HIS RELIGION, AND ALSO RETALIATING AGAINST PLAINTIFF MILES FOR CONTINUING TO EXERCISE HIS FIRST AMENDMENT CONSTITUTIONAL RIGHT.

6. CONTRARY TO DEFENDANT JULIE ANTON MOTION FOR SUMMARY JUDGMENT AS TO THE ISSUE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES THIS COURT RESPECTFULLY SHOULD GRANT JUDGMENT IN THE FAVOR OF PLAINTIFF PHILLIP L. MILES.

7. THE FOREGOING FACTUAL ALLEGATION CREATE A GENUINE ISSUE OF MATERIAL FACT ON THE EXHAUSTION ISSUE AND THIS ENTITLES PLAINTIFF PHILLIP L. MILES TO JUDGMENT AS EXPLAINED IN HIS MEMORANDUM OF LAW SUBMITTED WITH THIS DECLARATION.

EXECUTED ON THIS _____ DAY OF APRIL 2021.

PHILLIP L. MILES #114544
PLAINTIFF, PRO-SE

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POLICY AND ADMINISTRATIVE PROCEDURE
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EXHIBIT A

Title
OFFENDER GRIEVANCE PROCESS

Legal References (includes but is not limited to)	Related Policies/Procedures (includes but is not limited to)	ACA:
IC 11-11-1-1	02-04-101 02-01-101 01-04-101	CO: 2-CO-3C-01 ACI: 4-4284

I. PURPOSE:

The purpose of this policy and administrative procedure is to provide a process where offenders committed to the Indiana Department of Correction may resolve concerns and complaints relating to their conditions of confinement.

II. POLICY STATEMENT:

The offender grievance process is to provide a mechanism for every offender to express complaints and topics of concern for the efficient and fair resolution of legitimate offender concerns and for facility and Department management to be better informed and better able to fulfill the Department's mission and goals. The offender grievance process is not intended to interfere with or replace existing channels of communication. It is expected that offender complaints will be resolved informally by staff attempting to meet and discuss the complaints prior to the offender filing a written grievance.

III. DEFINITIONS:

For the purpose of this policy and administrative procedure, the following definitions are presented:

A. APPEAL: A request for review of a facility-level response to a grievance by the Warden/designee (first level) or the Department Offender Grievance Manager (second level).

B. BUSINESS DAY: Monday through Friday, excluding weekends and State holidays.

C. DEPARTMENT: The Indiana Department of Correction.

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D. DEPARTMENT OFFENDER GRIEVANCE MANAGER: The staff person in the Department's Central Office designated by the Commissioner as overseeing the offender grievance process and who is responsible for ensuring that second-level appeals are investigated and a response is made in the designated time frame.

E. DIRECT INVOLVEMENT: Being the subject of the complaint or grievance at issue, being personally involved in the alleged conduct or incident at issue, or being a witness to the conduct or incident.

F. EMERGENCY GRIEVANCE: The resolution of a grievance that if subjected to the normal time limits could cause the grievant substantial risk of personal injury or irreparable harm.

G. FRIVOLOUS / ABUSE / OR MULTIPLE GRIEVANCES: The use of the offender grievance process in a manner other than in good faith, such as the filing of frivolous, repetitive, or retaliatory grievances. Repetitive grievances or multiple grievances occur when the same issue has been addressed and where sufficient time for a response has not elapsed or where a response has been provided.

H. GRIEVANCE: A formal written complaint or concern submitted on a State Form 45471 in compliance with this policy and administrative procedure and logged by the Offender Grievance Specialist.

I. OFFENDER GRIEVANCE SPECIALIST: The staff person(s) who are designated by, and report directly to, the Warden/designee. The Offender Grievance Specialist oversees the operation of the offender grievance process at the facility and is responsible for receiving, reviewing, logging, assigning a case number, ensuring an investigation is conducted, and a proper response and resolution is made to each grievance.

J. PRISON RAPE ELIMINATION ACT (PREA): The federal law establishing a standard of zero tolerance for incidents related to sexual abuse of offenders.

K. REMEDY: Any action taken in response to a complaint or concern, or to a grievance.

L. REPRISAL: Any act or threat of action against anyone for the use of, or participation in, the offender grievance process.

IV. USE OF THE OFFENDER GRIEVANCE PROCESS:

The Department recognizes only one grievance process. The grievance process described in this policy and administrative procedure is the only administrative remedy officially recognized by the

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Department for the resolution of offenders' grievable issues. The complete offender grievance process consists of the following steps:

1. A formal attempt to solve a problem or concern following unsuccessful attempts at informal resolutions;
2. A written appeal to the Warden/designee; and,
3. A written appeal to the Department Grievance Manager.

A. Matters Appropriate to the Offender Grievance Process:

Examples of issues about which an offender may initiate the grievance process include, but are not limited to:

1. The substance and requirements of policies, procedures, and rules of the Department or facility (including, but not limited to, correspondence, staff treatment, medical or mental health, some visitation, and food service);
2. The manner in which staff members interpret and apply the policies, procedures, or rules of the Department or of the facility.
3. Actions of individual staff, contractors, or volunteers;
4. Acts of reprisal for using the Offender Grievance Process;
5. Any other concerns relating to conditions of care or supervision within the Department or its contractors, except as noted in this policy and administrative procedure; and,
6. PREA.

B. Matters Inappropriate to the Offender Grievance Process:

Examples of non-grievable issues, but not limited to:

1. Federal, State, and local law;
2. Court actions and decisions, including pre-sentence investigation reports, pending charges, and jail time credit;
3. Indiana Parole Board Actions or Decisions;
4. Parole Agent recommendations to the Indiana Parole Board;
5. Classification actions or decisions, which include loss of a job, change in security level, facility transfers, and bed moves (a separate classification appeals process is in place for this purpose);
6. Disciplinary actions or decisions (a separate disciplinary appeal process is in place for this purpose);
7. Contents of grievance or appeal responses from the Warden / designee, or the Department Offender Grievance Manager;

8. Complaints on behalf of other offenders, class action complaints, or third party individuals;
9. The denial of a sex offender's visits with minors based upon the results of the Department's case review (Review of this type of visiting restriction is found in Policy and Procedure 02-01-102, "Offender Visitation");
10. Any matter over which the Department has no control, such as the actions of persons outside the Department who are not operating under contract with the Department;
11. Decisions by Wardens to designate an offender as an abuser of the offender grievance process and, thereby, restrict the offender's access to the offender grievance process;
12. Tort Claims seeking monetary compensation; and,
13. Staff discipline, staff assignment, staff duties, and/or staff training.

When an offender submits a grievance concerning a non-grievable issue, such as listed above, staff shall complete State Form 45475, "Return of Offender Grievance," retain copies on file according to record retention guidelines, and return both (the documented grievance and return of offender grievance form) to the offender within two (2) business days.

C. Emergency Grievances:

The Offender Grievance Specialist shall immediately bring emergency grievances to the attention of the Warden / designee for review and response within one (1) business day of the offender filing the grievance. The action on any emergency grievance may be appealed by the offender within one (1) business day of receiving the response. Upon the receipt of the appeal, the Offender Grievance Specialist shall notify, via email, the Department Offender Grievance Manager that the appeal has been submitted. The Department Offender Grievance Manager shall issue a final Department decision within five (5) business days of the offender filing the grievance. The initial response and final Department decision shall document the Department's determination whether the offender is in substantial risk of imminent danger and the action taken in response to the emergency grievance. The facility may discipline an offender for filing an emergency grievance in bad faith. The determination that a grievance is not an emergency may be appealed through the normal grievance procedures as directed in this policy and administrative procedure.

D. PREA Grievances:

When receiving an emergency grievance alleging an offender is subject to a substantial risk of imminent sexual abuse, the receiving staff member shall immediately forward the

grievance, or any portion of the grievance that alleges the substantial risk of imminent sexual abuse, to the Warden. The Warden shall take immediate corrective action. The Warden shall forward the emergency grievance to the Offender Grievance Specialist, who shall provide an initial response within forty-eight (48) hours of the offender filing the emergency grievance. The Warden shall also forward the emergency grievance to the Department's Offender Grievance Manager, who shall issue a final Department decision within five (5) calendar days to the offender who filed the grievance. The initial response and final Department decision shall document the Department's determination whether the offender is in substantial risk of imminent sexual abuse and the action taken in response to the emergency grievance. The facility may discipline an offender for filing a grievance related to alleged sexual abuse only where the facility demonstrates that the offender filed the grievance in bad faith. The determination that a grievance is not an emergency may be appealed through the normal grievance procedures as directed in this policy and administrative procedure.

This subsection presents guidelines for the filing of grievances alleging that an offender is subject to a substantial risk of imminent sexual abuse, and removing the standard time limits on submission for a grievance regarding an allegation of sexual abuse. Standard time limits may apply to any portion of a grievance that does not allege an incident of sexual abuse. The Department shall not require an offender to use any informal grievance process, or to otherwise attempt to resolve with staff, an alleged incident of sexual abuse. Nothing in this subsection shall restrict the Department's ability to defend against an offender lawsuit on the grounds that the applicable statute of limitations has expired.

An offender who alleges sexual abuse may submit a grievance without submitting it to a staff member who is the subject of the complaint at any time after the alleged incident. Sexual abuse as defined in Policy and Administrative Procedure 02-01-115, "Sexual Abuse Prevention," consists of non-consensual sex acts, abusive sexual contact, and staff sexual misconduct. Such a grievance shall not be referred to a staff member who is the subject of the complaint. The Department shall issue a final decision on the merits of any portion of a grievance alleging sexual abuse within ninety (90) days of the initial filing of the grievance. Determination of the ninety (90) day time period shall not include time consumed by the offender in preparing any administrative appeal. The Department may claim an extension of time to respond, of up to seventy (70) days, if the normal time period for response is insufficient to make an appropriate decision. The Department shall notify the offender in writing of any such extension and provide a date by which a decision shall be made.

At any level of the administrative process, including the final level, if the offender does not receive a response within the time allotted for response, including any proper extension, the offender may consider the absence of a response to be a denial at that level. Third

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parties, including other offenders, staff members, family members, attorneys, and outside advocates, shall be permitted to assist offenders in filing requests for administrative remedies relating to allegations of sexual abuse, and shall also be permitted to file such requests on behalf of offenders. If a third party files such a request on behalf of an offender, the facility may require, as a condition of processing the request, that the alleged victim agree to have the request filed on his/her behalf, and may also require the alleged victim to personally pursue any subsequent steps in the administrative remedy process. If the offender declines to have the request processed on his/her behalf, the Department shall document the offender's decision.

V. USE OF OFFENDER GRIEVANCE PROCESS WITHOUT FEAR OF REPRISAL:

Reprisal against an offender for filing an informal complaint or formal grievance is strictly prohibited. The prohibited reprisal includes, but is not limited to, disciplinary action against the offender for filing a grievance.

Any offender who believes that he or she has been the subject of reprisal/retaliation for using the offender grievance process may file a grievance explaining what action or threat of action has been taken against him or her as a direct result of using the offender grievance process. The Offender Grievance Specialist shall ensure that grievances related to reprisal/retaliation shall be thoroughly investigated and, if found to be accurate, appropriate action shall be taken against staff or offenders involved in the reprisal/retaliation.

An offender's restriction in the use of the offender grievance process for misuse or abuse of the process shall not be considered a reprisal for use of the offender grievance process and no grievance may be filed regarding this action.

VI. REMEDIES:

If a grievance is decided in favor of an offender, the Offender Grievance Specialist shall ensure that the appropriate remedy or resolution to the grievance is provided in a timely manner. The remedy may not directly benefit the offender and may not be the remedy the offender seeks. No grievance shall be rejected because an offender seeks an improper or unavailable remedy, except that a grievance shall be rejected if the offender seeks a remedy to a matter that is inappropriate to the offender grievance process.

The Department may, at its discretion, provide one or more of the following remedies:

A. Provide or replace State-issued items that have been lost, stolen, or damaged through the negligence of staff;

B. Review and/or revise Department or facility procedures or practices, if necessary;
C. Correct Department records; or,
D. Provide other remedies as deemed appropriate by the Warden.

VII. COMMUNICATION OF THE OFFENDER GRIEVANCE PROCESS:

Intake/receiving facilities shall include the offender grievance process in the Offender Admission and Orientation (A & O).

Upon an offender's entry into the Department and when transferred to receiving facilities during incarceration, each offender shall be advised of the offender grievance process during the offender admission and orientation (A & O). Staff shall ensure that each offender is made aware of the offender grievance process and how he or she may obtain access to a copy of this policy and administrative procedure. Each offender shall be provided with a copy, or provided access to a copy, of the Department's Offender Handbook which includes a section on the offender grievance process.

The Warden/designee shall ensure that the offender grievance process is explained to offenders whose primary language is other than English, or has a visual, hearing, or mental impairment. There shall be mechanisms in place to ensure that the offender grievance process is understood by all offenders.

VIII. INVOLVEMENT OF STAFF IN THE OFFENDER GRIEVANCE PROCESS:

A. Participation of Person Involved in the Matter

Any staff person directly involved in the situation giving rise to an offender's complaint or grievance shall not participate in the investigation or resolution of the complaint or grievance other than to provide necessary information during the investigation. Direct involvement does not include routine administrative actions. If the Warden is directly involved in the current issue, the Warden shall appoint a designee to resolve the issue.

B. Assistance with Preparation of Grievance

In restrictive status housing units or other units where an offender does not have access to other offenders, the complaining offender may request that a staff person in the unit assist in the preparation of a grievance or an appeal. The complaining offender must sign the grievance or appeal and submit it personally. An offender cannot submit an offender grievance or appeal on behalf of another offender.

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C. Warden/designee:

If the Warden has designated an individual to fulfill the duties listed in this policy and administrative procedure as Warden/designee duties, the designee and the Warden shall meet monthly to discuss issues relevant to the grievance process.

IX. OFFENDER ABUSE OF GRIEVANCE PROCESS:

Offenders shall not be allowed to abuse or misuse the offender grievance process by attempting to flood the process with excessive numbers of grievances or frivolous grievances. The determination as to whether an offender is attempting to abuse the process shall not be based solely on the quantity of grievances, but shall also include the types of grievances and the subject matter of the grievances. The grievances submitted to satisfy the order of a court shall not be included in documentation alleging abuse of the offender grievance process.

An offender who appears to be abusing the offender grievance process shall not be automatically referred to the Warden as an alleged abuser, but shall first be interviewed by the Offender Grievance Specialist to determine the rationale and need of the offender to file the amount and type of grievances currently under consideration. The ramifications of abuse of the process shall be explained to the offender. Offenders shall be informed of what is considered abuse of the offender grievance process. The Offender Grievance Specialist shall be the one interviewing the offender and shall document in a recommendation to the Warden that the offender has been interviewed and if he/she refuses to comply with the offender grievance process.

The Warden or designee shall determine whether the offender is an abuser of the offender grievance process and may place the following restrictions on the offender:

A.	First instance:	No additional grievances filed for thirty (30) days.
B.	Second instance:	No additional grievances filed for sixty (60) days.
C.	Third instance:	No additional grievances filed for ninety (90) days.

Emergency, PREA, and court-remanded grievances shall not be restricted.

X. INFORMAL RESOLUTION OF COMPLAINT:

It is the intent of the Department to resolve all offender complaints and concerns as quickly and informally as possible. Both staff and offenders are to attempt to resolve matters through open and courteous discussion before turning to the grievance process.

Before filing a grievance, an offender is required to attempt to resolve a complaint informally and provide evidence (e.g., "To/From" correspondence, State Form 36935, "Request for Interview")

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of the attempt. The offender may do this by discussing the complaint with the staff member responsible for the situation or, if there is no such single person, with the person who is in charge of the area where the situation occurs. If the offender is uncomfortable discussing the issue with that staff member, he/she may discuss with the staff person's immediate supervisor.

Staff members shall be advised that they cannot impede or hinder the offender's ability to resolve the complaint informally or hinder the offender from submitting a formal grievance regarding issue(s) surrounding his/her situation provided the offender is compliant with this policy and administrative procedure.

XI. OFFENDER FILING A GRIEVANCE:

An offender wanting to submit a grievance on an issue that he/she has been unable to resolve informally as outlined in Section X shall submit a completed State Form 45471, "Offender Grievance," no later than ten (10) business days from the date of the incident giving rise to the complaint or concern to the Offender Grievance Specialist.

The Offender Grievance Specialist must either return an unacceptable form or provide a receipt for an accepted form. If an offender does not receive either a receipt or a rejected form from the Offender Grievance Specialist within five (5) business days of submitting it, the offender shall notify the Offender Grievance Specialist of that fact (retaining a copy of the notice) and the Offender Grievance Specialist shall investigate the matter and respond to the offender's notification within five (5) business days.

A. Each completed State Form 45471, "Offender Grievance," must meet the following standards:

1. Each part of the form shall be completed;
2. It shall be written legibly;
3. It shall avoid the use of legal terminology;
4. It shall raise the same issue that the offender raised in trying to get the informal resolution and document the attempts at informal resolution;
5. It shall relate to only one event or issue;
6. It shall be signed, dated, and submitted by an offender on his or her own behalf, although it can be written by another offender or staff member if the offender is unable to do so due to a physical, language, or other problem;
7. It shall explain how the situation or incident affects the offender; and,
8. The offender shall suggest appropriate relief or remedy.

B. Screening the Grievance:

The Offender Grievance Specialist shall review the grievance form within five (5) business days of receiving it and shall either accept it and log it, or reject it.

The Offender Grievance Specialist may reject the grievance form and return it to the offender unfiled if any of the standards listed in subsection A are not met. In addition, the form may be returned to the offender if it was not submitted within the ten (10) business day time limit or is grieving a matter inappropriate to the offender grievance process (Section IV, B).

An offender may not grieve the procedure used in disciplinary proceedings or grieve a finding of guilt. However, the offender is not barred from filing a grievance about an event that is merely related to an event that is the subject of disciplinary proceedings. For example, an offender who has been found guilty of battery on staff would not necessarily be barred from filing a grievance that the staff member had treated him or his property improperly in the same course of events.

The Offender Grievance Specialist has the discretion to consider a grievance that does not conform to the rules if there is good cause for the violation. An example of good cause is an inability to comply for reasons outside of the offender's control.

If the Offender Grievance Specialist determines from a review of the grievance form that it does not meet the requirements of this policy and administrative procedure and there is no good cause shown, the Offender Grievance Specialist shall return the grievance form within one (1) business day to the offender with an explanation as to why the form was returned and how it may be corrected. State Form 45475, "Return of Grievance," shall be used for this purpose. It shall be the responsibility of the offender to make the necessary revisions to the grievance form and to return the revised form to the Offender Grievance Specialist within five (5) business days from the date that it is returned to the offender.

C. Response to Grievance:

If the matter is not an emergency grievance or a PREA grievance, the Offender Grievance Specialist has fifteen (15) business days from the date that the grievance is received to complete an investigation and provide a response to the offender, unless the time has been extended.

Within one (1) business day of accepting and logging (subsection B) a completed State Form 45471, "Offender Grievance," the Offender Grievance Specialist shall submit SF

45471 to the appropriate facility staff / supervisor for response. Within ten (10) business days of receipt of the offender's grievance, the facility staff / supervisor shall:

1. Investigate the grievance;
2. Prepare a written response to the offender's grievance. The written response shall include a summary of the findings, the decision, and its supporting rationale; and,
3. Forward the written response to the Offender Grievance Specialist.

If there is a delay in returning the response due to the need to further investigate the offender's concerns, (such as to make contact with the offender, discuss concerns with Health Services, awaiting information from local hospital, etc.), the facility staff / supervisor must notify the Offender Grievance Specialist with a reason for the delay. The Offender Grievance Specialist must document the reason for the delay and, if requested by the staff / supervisor, an addition of (5) business days can be given to complete the investigation. The Offender Grievance Specialist shall ensure the offender is notified within one (1) business day of being notified of the delay due to further investigation of the concerns in his/her grievance.

If the offender receives no grievance response within twenty (20) business days of being investigated by the facility Offender Grievance Specialist, the offender may appeal as though the grievance had been denied. If there is a delay in investigating the offender's grievance issues, the Offender Grievance Specialist may seek approval for a time extension with the request submitted to the Warden/designee, and with a responding email for file noting the approval/disapproval for the extension. The Offender Grievance Specialist shall notify the offender in writing of the number of days of the extension. In this event, the time to appeal begins on the twenty-first (21st) business day after the grievance was submitted or at the end of extension approved by the Warden/designee This time frame may be waived and documented by the Offender Grievance Specialist if it is determined that there are valid reasons to do so.

XII. OFFENDER GRIEVANCE APPEALS:

Upon receipt of the grievance response from the Offender Grievance Specialist, the offender shall be responsible for reviewing the response and determining whether the response adequately addresses the matter in the grievance. The offender shall be permitted to appeal the response to the Warden/designee if the offender disagrees with the formal response at the institution level.

The right to appeal is absolute and the offender shall not be informed otherwise or asked to waive this right.

If the offender is dissatisfied with the grievance response, he/she may appeal the response by completing the appropriate sections of State Form 45473, "Grievance Appeal." The completed State Form 45473, and any additional information, shall be submitted to the Offender Grievance Specialist within five (5) business days after receiving the grievance response. The submission of State Form 45473 shall serve as notice that the offender wants to appeal to the Warden/designee's office. Within one (1) business day of receipt of the appeal, the Offender Grievance Specialist shall forward all pertinent documentation to the Warden/designee, complete State Form 56285, "Receipt of Facility Level 1 Grievance Appeal," and forward a copy of State Form 56285 to the offender.

Appeals must address the basic matter of the grievance. The appeal may contain additional facts or information regarding the original issue and may raise concerns regarding the response from the previous level, but it shall not raise new or unrelated issues. The offender must state why the previous response was unacceptable, thereby establishing a rationale for the appeal and the basis for a reinvestigation. The appeal must be legible, signed, and dated by the offender, unless the offender cannot sign the appeal and a staff member has indicated why the offender was not able to sign.

Warden/designee responses to offender appeals shall be completed within five (5) business days of receipt of the appeal. The Offender Grievance Specialist shall log the date he / she received the appeal, forwarded the appeal to the office of the Warden, and generate a receipt for the appeal. The receipt shall be given to the offender within one (1) business day from the date the appeal is logged. Once the appeal response is received from the office of the Warden, the Offender Grievance Specialist shall provide the offender a copy of the appeal response within one (1) business day.

If, after receipt of the appeal response, the offender is still dissatisfied, or no response is received within the time frame, he/she may appeal to the Department Offender Grievance Manager.

XIII. DEPARTMENT OFFENDER GRIEVANCE MANAGER APPEALS:

If the offender wishes to appeal the Warden's/designee's appeal response, the offender shall check the "Disagree" box, sign, and submit the completed State Form 45473, "Offender Grievance Appeal," and any additional, pertinent documentation to the Offender Grievance Specialist within five (5) business days of receipt of the Warden's/designee's appeal response.

The Offender Grievance Specialist shall scan and enter the completed State Form 45473 and any additional pertinent information received from the offender into the grievance database, within two (2) business days of receipt for the Department Offender Grievance Manager's review.

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The Department Offender Grievance Manager shall complete his/her investigation and submit a response to the appeal within ten (10) business days from the date of receipt, unless the Department Offender Grievance Manager notifies the offender and the facility housing the offender in writing within that ten (10) business day period that the appeal response will take additional time to complete. The Department Offender Grievance Manager may take one (1) extension of ten (10) additional business days to respond to the appeal. If no appeal response is received after the ten (10) business days, the appeal shall be considered as denied.

The decision of the Department Offender Grievance Manager shall be final. Once the response is completed, it shall be returned to the Offender Grievance Specialist electronically. It shall be the responsibility of the Offender Grievance Specialist to review the response, print a copy of the response, and ensure that the offender receives the response within two (2) business days from the date that the Offender Grievance Specialist receives the response from the Department Offender Grievance Manager.

XIV. TIME LIMIT EXTENSIONS:

A. For an offender:

An offender who does not follow the established time limits in this procedure may have his/her grievance or appeal denied for failure to comply to the time frames unless he or she is able to show good cause. If there are extenuating circumstances which caused the offender a delay in submitting the grievance form within the time frames, the offender must document and submit the reason for the delay on a separate piece of paper with signature and date, and include with the appropriate appeal form or make a request for the specific form to the Offender Grievance Specialist for review. The Warden/designee shall approve or deny such offender delay requests.

B. Extensions That Can Be Considered by the Warden/designee or the Department Offender Grievance Manager:

The Warden/designee or Department Offender Grievance Manager may extend the deadline once, for ten (10) business days in the case of the Warden/designee and for ten (10) business days in the case of the Department Offender Grievance Manager. This shall be done by notifying the offender of the extension. If there is a need to delay beyond the ten (10) business days due to additional information before making a decision on the offender's grievance at the institution level or the Department Offender Grievance Manager, the offender shall be notified of the second delay that may go beyond ten (10) business days.

When there has been delay in responding to a request for grievance, or an appeal that goes beyond the second ten (10) business days, the result shall be that the complaint, the grievance, or the appeal is deemed to have been denied and the offender is permitted to proceed to the next step of the grievance process, if any step remains. If no step remains, the offender has exhausted all remedies at the Department level.

C. Emergency extensions:

When the Warden declares a facility emergency in accordance with Policy and Administrative Procedure 02-03-102, "Emergency Response Operations," all time limits shall be suspended. During facility lockdowns that last for an extended period of time, the Warden may elect to allow offenders to submit grievances. In such cases, the time limits shall apply unless the Warden designates in writing an extension for a fixed period. PREA and emergency grievances must be processed immediately and with a suspension of time limits. Grievances that concern life threatening situations shall not be subject to a suspension of the time frames.

XV. TRANSFER OR RELEASE FROM SUPERVISION:

An offender may pursue or originate a grievance at a facility from which he/she has been transferred or released from supervision only under the following conditions:

A. If a grievance was initiated prior to the offender's transfer or release, the offender may exhaust the administrative remedies available through the grievance process at the former facility.

B. A new complaint against a former facility regarding transfer of property or funds may be initiated within twenty (20) business days from the date of transfer or release. The offender shall work cooperatively with the receiving facility's Offender Grievance Specialist to forward all necessary documentation to the sending facility's Offender Grievance Specialist.

XVI. STAFF TRAINING:

Each facility shall ensure that the offender grievance process is included in the orientation given to new staff. Each new employee shall receive training on the Offender Grievance Process during the New Employee Training Process.

All staff shall be provided annual refresher training on the offender grievance process via on-line eLearning Model Training, which may include updates on the Department's offender information system, how to address specific issues, proper methods of communication, and dispute resolution.

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All Grievance Specialists and staff assigned to oversee the Offender Grievance Process shall complete On-the-Job Training in the process, which will include training on the offender information system and grievance database.

XVII. APPLICABILITY:

This policy and administrative procedure is applicable to all adult offenders, staff, and facilities housing adult offenders.

signature on file
Robert E. Carter,
Commissioner

Date