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United States Court of Appeals
Tenth Circuit

October 4, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GREGORIO FERNANDEZ-PEREZ,

Petitioner - Appellant,

v.

B. GREILICK, Warden,

Respondent - Appellee.

No. 21-1116
(D.C. No. 1:20-CV-03129-LTB-GPG)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MORITZ**, **BALDOCK**, and **EID**, Circuit Judges.**

Petitioner Gregorio Fernandez-Perez is a federal inmate at FCI-Englewood. He filed a pro se petition for habeas corpus under 28 U.S.C. § 2241, challenging Respondent Warden B. Greilick's decision to remove him from the Residential Drug Abuse Program ("RDAP"). Because we agree with the district court that Fernandez-Perez failed to exhaust administrative remedies, we affirm the district court's dismissal of his petition without prejudice.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

I.

Inmates who successfully complete RDAP may be eligible for early release from confinement. *See* 18 U.S.C. § 3621(e)(2)(B). Fernandez-Perez participated in the program for seven months before being removed in April 2019. According to Warden Greilick, Fernandez-Perez was wrongly enrolled in RDAP because he did not have a verifiable substance use disorder, which is a prerequisite for participating in the program.

Fernandez-Perez began challenging his removal through the Bureau of Prisons ("BOP") administrative remedy process. The process involves four steps. First, the inmate raises an informal complaint to BOP staff, who "shall attempt to informally resolve the issue." 28 C.F.R. § 542.13(a). Second, the inmate files an Administrative Remedy Request, or BP-9 form, with the warden. § 542.14(a). Third, the inmate appeals to the regional director through a BP-10 form, which must be accompanied by "one complete copy or duplicate original" of the BP-9 and the warden's response. § 542.15(a), (b)(1). Fourth, the inmate appeals to the general counsel at the central office with a BP-11 form that must also be accompanied by "one complete copy or duplicate original of the institution and regional filings"—i.e., the BP-9 and BP-10 forms—"and their responses." § 542.15(a), (b)(1).

Fernandez-Perez completed the first three steps of the process and was denied reinstatement to RDAP. When he attempted to complete the fourth step—appealing to the central office with a BP-11—he failed to include copies of the BP-9 and Warden Greilick's response. The office gave him fifteen days to cure the deficiency,

but he did not do so. Instead, Fernandez-Perez filed a subsequent BP-11, in which he raised similar claims and explained that he did not include the BP-9 because he could not access a copier. His appeal was rejected, and he was again given fifteen days to cure.

Fernandez-Perez then initiated the underlying action, asking the district court to order Warden Greilick to reinstate him to RDAP. In his petition, Fernandez-Perez maintained that he "diligently pursued exhaustion of remedies to the best of his abilities." R. at 8. The magistrate judge directed the parties to submit briefing about whether Fernandez-Perez had exhausted his administrative remedies and whether prison staff prevented him from "utilizing the administrative remedy process." *Id.* at 135–36.

Fernandez-Perez urged that administrative remedies were unavailable to him because a BOP-wide COVID-19 lockdown prevented him from accessing a copier, and a counselor ignored his request to make a copy for him. Warden Greilick filed a declaration by Fernandez-Perez's correctional counselor, S. Combs, in which Counselor Combs attested that he records inmates' verbal requests and Fernandez-Perez never requested a copy of the BP-9. Warden Greilick also filed a declaration by Paula Trujillo, a BOP employee who attested that prison staff members were instructed to "make rounds in their housing units to determine if any of the inmates on their caseload need[ed] assistance with anything," and that Fernandez-Perez "had, and continues to have the ability to request a member of Unit Team to assist him with obtaining copies." *Id.* at 46. Warden Greilick also argued that Fernandez-Perez's

allegations of a single instance where his counselor failed to respond to a request would not be enough to show that Fernandez-Perez was denied access to necessary services. Warden Greilick further noted that Fernandez-Perez could have requested additional time to submit his appeals, but his allegations do not show that he made such a request.

The magistrate judge found Fernandez-Perez failed to exhaust his administrative remedies because exhaustion requires completing all levels of review and Fernandez-Perez did not complete the final level. The magistrate agreed with Warden Greilick that Fernandez-Perez's "conclusory allegation that his counselor ignored his single request for a copy of his BP-9 does not demonstrate that BOP staff prevented him from completing the administrative remedy process." *Id.* at 140. Accordingly, the magistrate found Fernandez-Perez could not prove that the administrative remedies were unavailable to him, futile, or foreclosed. The magistrate recommended his habeas petition be denied and dismissed without prejudice. The district court adopted the magistrate's recommendations. This appeal followed.

II.

Fernandez-Perez appeals the district court's finding that he failed to exhaust administrative remedies. He again argues that he could not complete the final step of the four-step process because copies of the BP-9 were not returned to him and he could not access a copier while in lockdown.

"In habeas proceedings under § 2241, we review legal questions de novo and factual findings for clear error." *Standifer v. Ledezma*, 653 F.3d 1276, 1278 (10th Cir. 2011). A district court's finding of a failure to exhaust administrative remedies is reviewed de novo. *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002). "A finding of fact is not clearly erroneous unless it is without factual support in the record, or unless the court after reviewing all the evidence, is left with a definite and firm conviction that the district court erred." *United States v. Chavez*, 734 F.3d 1247, 1250 (10th Cir. 2013) (quoting *United States v. Jarvison*, 409 F.3d 1221, 1224 (10th Cir. 2005)). Because Fernandez-Perez is proceeding pro se, we construe his filings liberally. *Licon v. Ledezma*, 638 F.3d 1303, 1306 (10th Cir. 2011).

Here, the record amply supports the district court's factual finding that Fernandez-Perez was not prevented from pursuing his administrative remedies, which triggered its legal finding that he failed to exhaust them. The central office gave Fernandez-Perez an additional 30 days to provide the BP-9 and Warden Greilick's response—15 days after his first BP-11, and 15 days after his second BP-11. In that time, Fernandez-Perez could have asked his counselor or other unit staff members to copy the documents. Counselor Combs declared that he keeps records of inmate requests and Fernandez-Perez never asked him for copying help. Trujillo attested that, throughout the lockdown, Fernandez-Perez could have asked a member of the Unit Team to assist him with obtaining copies. Further, Fernandez-Perez declined to ask for more time to comply with the procedural requirements of the final step of the administrative process.

The record shows that Fernandez-Perez had several remaining avenues by which he could have obtained copies of the BP-9 and Warden Greilick's response to submit to the central office. Thus, even construing his filings liberally, we cannot conclude that the district court clearly erred by finding that Fernandez-Perez failed to "carry his burden of showing that administrative remedies [were] unavailable to him, futile, or effectively foreclosed," so that his failure to exhaust administrative remedies would be excused. R. at 141. With that finding intact, we conclude that Fernandez-Perez failed to exhaust his administrative remedies because he did not complete the BOP's administrative review process.

We also deny Fernandez-Perez's motion to proceed *in forma pauperis*. To proceed *in forma pauperis*, litigants must show a "reasoned, nonfrivolous argument on the law and facts in support of the issues raised in the action." *Lister v. Dep't of the Treasury*, 408 F.3d 1309, 1312 (10th Cir. 2005). Fernandez-Perez has not presented a nonfrivolous argument in this case.

III.

For the foregoing reasons, we AFFIRM the district court's dismissal of Fernandez-Perez's habeas petition without prejudice and DENY his motion to proceed *in forma pauperis*.

Entered for the Court

Allison H. Eid
Circuit Judge