

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NUMBER 2015 CA 0676**

**EDWARD SIMMONS**

**VERSUS**

**LOUISIANA DEPARTMENT OF PUBLIC SAFETY  
AND CORRECTIONS**

**Judgment Rendered: NOV 06 2015**

**Appealed from the  
Nineteenth Judicial District Court  
In and for the Parish of East Baton Rouge, Louisiana  
Docket Number C635278**

**Honorable Michael R. Caldwell, Judge Presiding**

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**Edward Simmons  
Angola, LA**

**Plaintiff/Appellant, *pro se***

**William L. Kline  
Baton Rouge, LA**

**Counsel for Defendant/Appellee,  
Louisiana Department of Public  
Safety and Corrections**

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**BEFORE: WHIPPLE, C. J., WELCH AND DRAKE, JJ.**

*Welch J. concurs with reasons.*

**WHIPPLE, C. J.**

This appeal challenges whether the district court properly dismissed a petition for judicial review of an inmate disciplinary action. For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY**

Edward Simmons, an inmate in the custody of the Louisiana Department of Public Safety and Corrections (DPSC) and housed at the Louisiana State Penitentiary, filed a petition for judicial review, seeking review of a June 2014 disciplinary proceeding. In his petition, Simmons averred that as a result of a June 19, 2014 incident with another inmate, Simmons was charged with a Rule 11 violation (aggravated fighting).<sup>1</sup> Simmons further alleged that following a hearing before the Disciplinary Board, he was found guilty as charged and was sentenced to extended lockdown and to make restitution in the amount of \$52.00.

According to the petition, Simmons then timely appealed the Disciplinary Board's decision to the warden. Attached to Simmons's petition is a July 28, 2014 Acknowledgement of Receipt of Disciplinary Appeal, which informed Simmons that his appeal had been received and assigned appeal number LSP-2014-0226-W. In the acknowledgement, Simmons was also informed that his appeal would be reviewed and that he would be notified once a decision had been rendered.

However, according to the allegations of his petition for judicial review, Simmons was never notified of a decision by the warden with regard to his disciplinary appeal. In his petition, Simmons further alleged

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<sup>1</sup>As set forth in Title 22 of the Louisiana Administrative Code, Part I, in Section 341(I), Rule 11 provides, in part, that “[o]ffenders shall not fight with each other using any object as a weapon (including any liquid or solid substances thrown or otherwise projected on or at another person).”

the following events with regard to his disciplinary appeal. After the passage of forty days of the receipt of his appeal with no notice of a decision, Simmons made written inquiry as to the status of his appeal on September 6, 2014. When he again received no response, Simmons, by letter dated September 10, 2014, requested commencement of an appeal to the Secretary of the DPSC. Thereafter, on September 18, 2014, Simmons forwarded his appeal to the Secretary of the DPSC, but he never received notification of a decision.<sup>2</sup>

According to Simmons, both the warden and the Secretary of the DPSC had failed to render a decision in the time limits set forth in the disciplinary appeal rules drafted by the DPSC. Accordingly, Simmons requested that the district court review this disciplinary action and reverse the guilty verdict and sentence imposed.

Because Simmons did not attach to his petition a copy of the DPSC's final decision in his disciplinary appeal, the commissioner for the district court ordered Simmons to comply with required district court rules in order to show proof of exhaustion of administrative remedies. Simmons filed a response to the order, again detailing his efforts at the agency level to assert his appeal and asserting that the DPSC's failure to comply with its own rules and regulations regarding disciplinary appeals should not be manipulated to accrue to its benefit. Thus, Simmons argued that he should not now be punished for failing to exhaust available administrative remedies.

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<sup>2</sup>Simmons attached to his petition for judicial review a copy of an "Offender Funds Withdrawal Request" form, dated September 15, 2014, indicating his request to withdraw \$1.17 from his drawing account with the notation "James LeBlanc Secretary Appeal No. L.S.P. 2014-0226-W."

On January 7, 2015, the commissioner for the district court issued a screening report to the district court judge, recommending that Simmons's petition be dismissed without prejudice or service, for lack of subject matter jurisdiction based on a failure to exhaust administrative remedies as required by LSA-R.S. 15:1172(C) and LSA-R.S. 15:1176.<sup>3</sup> By judgment dated January 28, 2015, the district court dismissed Simmons's petition for judicial review without prejudice, in accordance with the commissioner's recommendation.

From this judgment, Simmons appeals, arguing that the district court erred in dismissing his petition for failure to exhaust administrative remedies where he made multiple attempts to pursue his disciplinary appeal, but the DPSC failed to decide his appeal within the time limits set forth in its rules, thereby denying him a "viable opportunity to seek available remedies."

## DISCUSSION

The "Disciplinary Rules and Procedures for Adult Offenders" in the custody of the DPSC are published in Title 22 , Part I, Section 341 of the Louisiana Administrative Code. With regard to inmate appeals in disciplinary matters, Section 341(H)(1)(b) provides as follows:

- i. An offender may appeal a case heard by the disciplinary board (high court). All appeal requests on high court cases shall be to the warden.
- ii. The offender may appeal himself or through counsel or counsel substitute. In any case, the appeal must be received within 15 calendar days of the hearing.
- iii. The appeal should be clearly written or typed on the appeal from the disciplinary board form. This form is available

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<sup>3</sup>Louisiana Revised Statutes 15:1176 provides, in part: "Before any cause of action may be heard in any state or federal court, administrative remedies must be exhausted under the procedure authorized by this Part." Additionally, LSA-R.S. 15:1172(C) states, in part: "If at the time the petition is filed the administrative remedy process is ongoing but has not yet been completed, the suit **shall** be dismissed without prejudice." (Emphasis added.) The office of commissioner of the Nineteenth Judicial District Court was created to hear and recommend disposition of criminal and civil proceedings arising out of the incarceration of state prisoners. See LSA-R.S. 13:713(A).

from the offender's classification officer. If the form is not available, the appeal may be on plain paper but should contain the information called for on the form.

- iv. The warden will decide all appeals within 30 calendar days of the date of receipt of the appeal and the offender will be promptly notified in writing of the results (unless circumstances warrant an extension of that time period and the offender is notified accordingly).

An inmate who is dissatisfied with the warden's appeal decision may further appeal in accordance with Section 341(H)(1)(c), which provides in pertinent part:

- i. An offender may appeal the decision of the warden to the secretary and must indicate that he is "not satisfied" in the appropriate box on the appeal decision form. The document should be submitted to the disciplinary office or designated depository.
- ii. The offender must submit the form within five calendar days of the receipt of the warden's decision. No supplement to the appeal will be considered.
- iii. It is only necessary that the inmate check the box indicating, "I am not satisfied," date, sign and forward the form to the appropriate person.

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- v. The offender will receive an acknowledgment of receipt and date forwarded to the secretary's office.

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- ix. The secretary will decide all appeals within 85 days of the date of receipt of the appeal and the offender will be promptly notified in writing of the results (unless circumstances warrant an extension of that time period and the offender is notified accordingly). Absent unusual circumstances, the secretary will only consider review of the sanction(s) imposed of an offender who pled guilty.

On appeal, Simmons argues that because the DPSC has failed to follow its own procedures for review of disciplinary actions, it would be unconscionable to demand that he continue to pursue them, and he should be allowed to proceed to judicial review in the district court. In Moreau v.

Louisiana Department of Public Safety and Corrections, 2007-1430, pp. 4-5 (La. App. 1<sup>st</sup> Cir. 2/8/08), 2008 WL 426477, \*2 (unpublished), this court recognized that the Louisiana Administrative Code provides in the Administrative Remedy Procedure (ARP) rules that “[a]bsent ... an extension, expiration of response time limits shall entitle the offender to move on to the next step in the process.”<sup>4</sup> See LAC 22:I.325(J)(1)(c). However, as this court noted in Moreau, this provision is found in the ARP rules, which provide a grievance process that is instituted by the inmate, whereas a disciplinary action is instituted by prison officials under the Disciplinary Rules and Procedures for Adult Offenders, currently found in Title 22 of the Louisiana Administrative Code, Part I, Section 341, which has no similar provision.<sup>5</sup> See Moreau, 2007-1430 at p. 5, 2008 WL 426477 at \*2.

Thus, in Moreau, we recognized and noted that the facts therein (which involved review of a disciplinary action) were distinguishable from those contemplated by Title 22 of the Louisiana Administrative Code, Part I,

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<sup>4</sup>With regard to this ARP rule, in a situation where the DPSC has failed to follow its own guidelines in rendering a timely decision at the second step in the ARP procedure, this court has remanded the matter to the district court with instructions to remand to the DPSC to finalize the ARP second-step process. Harper v. Louisiana Department of Public Safety and Corrections, 2014-1320 (La. App. 1<sup>st</sup> Cir. 3/12/15), 166 So. 3d 1078, 1081-1082. Alternatively, this court has held that when the DPSC has effectively precluded an offender from proceeding to a review by the district court by failing to issue its decision as directed by the ARP provisions, the administrative remedies will be considered to have been pursued by the offender to the fullest extent possible under the circumstances, and the inmate will be allowed to seek a legal remedy in the district court. See Sims v. Wackenhut Health Services, Inc., 97-1147 (La. App. 1<sup>st</sup> Cir. 2/20/98), 708 So. 2d 1140, 1143, writ denied, 98-0747 (La. 5/1/98), 718 So. 2d 417.

<sup>5</sup>We note that in Moreau, this court further observed that in the case before it, the inmate was informed that additional time for the warden’s appeal was needed and was thus aware that the 30-day period had been extended. Moreover, the inmate eventually was sent a copy of the warden’s decision denying his appeal, and the inmate did not seek to appeal that decision to the DPSC Secretary within 5 days, as required under the rules.

To the extent that the court in Moreau may have relied upon the fact that the inmate did not timely seek an appeal to the DPSC Secretary, we do not have the same factual scenario here. Under the facts herein (as alleged by Simmons), Simmons purportedly has never received the warden’s decision, but has attempted to appeal to the Secretary and to the district court. Nonetheless, the rules governing disciplinary appeals simply do not provide that the failure of the department to issue a decision in the time delays provided allows the inmate to advance to the next step.

Section 325 and Sims v. Wackenhut Health Services, Inc., 97-1147 (La. App. 1<sup>st</sup> Cir. 2/20/98), 708 So. 2d 1140 (discussed in footnote 4, supra). Moreover, as further noted by this court in Moreau and as indicated in the district court commissioner's written recommendation, an action for mandamus is available to compel official completion of a disciplinary appeal should the official fail to do so. Moreau, 2007-1430 at p. 5, 2008 WL 426477 at \*2.

Further, with regard to Sims (which Simmons relies on herein), the facts therein involved a diabetic inmate complaining about inadequate medical care. Thus, Sims involved an ARP complaint (and ultimately an action for damages), not a disciplinary action. Accordingly, this court's holding therein, that where the DPSC failed to issue its decision as directed by the ARP provisions, the administrative remedies would be considered to have been pursued by the inmate, is inapplicable herein. For the same reasons, the cases of Edwards v. Bunch, 2007-1421 (La. App. 1<sup>st</sup> Cir. 3/26/08), 985 So. 2d 149, and Wallace v. GEO Group, Inc., 11-863 (La. App. 3<sup>rd</sup> Cir. 2/1/12), 84 So. 3d 750, also relied upon by Simmons, are also inapposite, in that they involved ARP complaints (where such a rule allowing the inmate to move on to the next step in the process is provided), rather than disciplinary appeals (which have no comparable rule).<sup>6</sup>

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<sup>6</sup>We likewise find no support in the other case relied on by Simmons, Webb v. Whitley, 623 So. 2d 165 (La. App. 1<sup>st</sup> Cir.), writ granted and amended, 629 So. 2d 377 (La. 1993). In Webb, the opinion indicates that the prison disciplinary board had found the inmate guilty of violating a prison rule and that the inmate appealed to the warden. The court's opinion then states, "[T]he warden ... failed to decide plaintiff's appeal within 120 days. Plaintiff's appeal was then deemed granted, effectively reversing his conviction." Webb, 623 So. 2d at 166. However, there is no explanation as to how or why this happened or of the legal support for the granting of his appeal and reversal of the conviction due to failure of the warden to decide the appeal within 120 days. Moreover, the current Disciplinary Rules and Procedures for Adult Offenders promulgated by the DPSC and published in the Louisiana Administrative Code, which would have superseded any prior rules, simply contain no such provision. Thus, Webb cannot be considered as controlling herein, in light of the current Disciplinary Rules and Procedures for Adult Offenders promulgated by the DPSC.

In sum, the Louisiana Legislature has clearly decreed that “[i]f at the time the petition [for judicial review] is filed the administrative remedy process is ongoing but has not yet been completed, the suit shall be dismissed without prejudice.” LSA-R.S. 15:1172(C). Here, Simmons failed to complete the appeal process provided to him within the correctional administrative system; therefore, the district court correctly dismissed his petition for judicial review. See Moreau, 2007-1430 at p. 6, 2008 WL 426477 at \*3.

### **CONCLUSION**

For the above and foregoing reasons, the district court’s January 28, 2015 judgment is hereby affirmed. Costs of this appeal are assessed against appellant, Edward Simmons.

**AFFIRMED.**

EDWARD SIMMONS

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PUBLIC SAFETY AND  
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STATE OF LOUISIANA

*JW* Welch, J., concurring.

While I concur because I am constrained to follow **Moreau v. Louisiana Dep't of Pub. Safety & Corr.**, 2007-1430 (La. App. 1<sup>st</sup> Cir. 2/8/08), 2008 WL 426477, I write separately to respectfully disagree with that portion of the opinion requiring an individual to file a mandamus action in the district court to compel official action mandated under the Disciplinary Rules and Procedures for Adult Offenders. The stated purpose of the Disciplinary Rules and Procedures for Adult Offenders is "...to help provide a structure and organization for the prisons and a framework within which the offender can expect the disciplinary system to function." 22 La. Admin. Code Pt. I, 341(C). When an individual in the disciplinary system refuses to participate in or comply with the administrative process, the other party dependent on the administrative process for relief is effectively rendered a hostage. To be functional, the administrative process requires the cooperation of all participants. When an individual is forced to go outside of the administrative process, as here, to seek a writ of mandamus to compel an administrator to follow the administrator's procedure, then the administrative process has been exhausted. Therefore, I believe that a party can be deemed to have exhausted his administrative remedies when the failure of the Department of Public Safety and Corrections to follow its own explicit procedures requires judicial intervention. The administrative relief needed should not have to be compelled by the court. For these reasons, I respectfully concur with the majority.