

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2020 CA 0480

DERRICK BRIAN PIERRE

VERSUS

LOUISIANA DEPARTMENT OF PUBLIC SAFETY &
CORRECTIONS

DATE OF JUDGMENT: **DEC 30 2020**

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 690145, SECTION 27, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE TRUDY M. WHITE, JUDGE

* * * * *

Derrick Pierre
Angie, Louisiana

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Pro Se

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Counsel for Defendant-Appellee
Louisiana Department of Public Safety
& Corrections

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BEFORE: WHIPPLE, C.J., WELCH, AND CHUTZ, JJ.

Disposition: AFFIRMED.

StW
Welch Jr. concurs without reasons

CHUTZ, J.

Derrick Pierre, an inmate in the custody of the Department of Public Safety and Corrections (the Department) currently incarcerated at Rayburn Correctional Center, appeals a district court judgment dismissing his petition for judicial review, with prejudice, for failing to exhaust administrative remedies and for failing to state a cause of action. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

On August 5, 2019, the Department accepted Administrative Remedy Procedure (ARP) RCC-2019-439, in which Pierre complained the Warden had improperly seized a \$125.00 deposit Pierre's son made into the J-pay account of a fellow inmate. Pierre admitted the deposit violated departmental policy forbidding the family of an offender from sending funds to another offender without the Warden's prior approval. Nevertheless, Pierre asserted the Warden had no legal authority to seize the funds because they did not legally constitute contraband and, therefore, he should return the funds to his son.

Shortly thereafter, on August 12, 2019, the Department retracted its prior acceptance of Pierre's ARP by giving him notice that his ARP was rejected. The stated basis for the rejection was that the confiscation of funds did not "directly affect [Pierre] or his accounts and [was], therefore, not appealable through the Administrative Remedy Procedure."¹

Pierre claims he requested a second-step response to the rejection of his ARP, but received no response from the Department. On November 4, 2019, Pierre filed a petition for judicial review in the 19th Judicial District Court (JDC) requesting the \$125.00 in seized funds be returned to his son. Following service of the petition, the Department responded by filing a peremptory exception of no cause of action. The

¹ One of the enumerated grounds for rejection of an ARP is that the offender has requested a remedy for another offender. See LAC 22.I.325(I)(1)(c)(i)(e).

Department argued Pierre's petition failed to state a cause of action because none of his substantial rights were affected by the seizure of funds sent to another inmate's account.

In accordance with La. R.S. 15:1178 and La. R.S. 15:1188, a 19th JDC Commissioner screened plaintiff's petition. The Commissioner recommended the petition be dismissed pursuant to La. R.S. 15:1172 for failure to exhaust administrative procedures, resulting in a lack of subject matter jurisdiction, and that the Department's exception of no cause of action be sustained. In a traversal of the Commissioner's recommendation, Pierre claimed he was affected by the seizure because his son sent the funds to the other inmate for Pierre's benefit and because, as an inmate, Pierre also was subject to the Warden's practice of seizing funds not legally classified as contraband. On February 26, 2020, the district court signed a judgment adopting the Commissioner's recommendation, sustaining the Department's exception of no cause of action, and dismissing Pierre's petition, with prejudice, for failing to exhaust administrative remedies. Pierre now appeals.

DISCUSSION

Pierre argues the district court erred in dismissing his petition on the basis of failure to exhaust administrative remedies. He asserts no mechanism existed for him to proceed with the administrative remedy procedure after his ARP was rejected and, therefore, there were no available remedies left to exhaust. This contention has merit.

This court has previously recognized that, while further administrative procedures are provided when a grievance has been accepted into the administrative remedy procedure, if a request is rejected, "no further action [i]s necessary for it to be a final agency action" since the grievance was not accepted into the grievance procedure. *Johnson v. Cain*, 13-0323 (La. App. 1st Cir. 6/30/14), 2014 WL 2959297, at *3 (unpublished), writ denied, 14-1750 (La. 6/1/15), 171 So.3d 931.

Because no further administrative procedures are available once a prisoner's ARP is rejected, his administrative remedies are exhausted at that point. Accordingly, the district court erred in dismissing Pierre's petition for failing to exhaust administrative remedies.

Nevertheless, the dismissal of the petition was correct. The district court dismissed Pierre's petition on the alternate basis that the petition failed to state a cause of action. We note, however, that the Department's exception of no cause of action properly should have been filed as an exception of no right of action. While the two exceptions are often confused, the peremptory exceptions of no right of action and no cause of action are separate and distinct. La. C.C.P. art. 927(A)(5) and (6); *Derbonne v. State Police Commission*, 19-1455 (La. App. 1st Cir. 10/14/20), ___ So.3d ___, 2020 WL 6058126, at *5; *State, by and through Caldwell v. Astra Zeneca AB*, 16-1073 (La. App. 1st Cir. 4/11/18), 249 So.3d 38, 42, writs denied, 18-00766, 18-0758 (La. 9/21/18), 252 So.3d 899, 904.

The Louisiana Supreme Court has indicated a primary difference between the two exceptions "lies in the fact that the focus in an exception of no right of action is on whether the particular plaintiff has a right to bring the suit, while the focus in an exception of no cause of action is on whether the law provides a remedy against the particular defendant." *Badeaux v. Southwest Computer Bureau, Inc.*, 05-0612 (La. 3/17/06), 929 So.2d 1211, 1216-17. The function of an exception of no cause of action is to test the legal sufficiency of the petition by determining whether the law affords a remedy on the facts alleged in the pleading. The function of the exception of no right of action is to determine whether plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the petition. *Derbonne*, ___ So.3d ___, 2020 WL 6058126, at *5; *Caldwell*, 249 So.3d at 42.

In support of its exception, the Department argued none of Pierre's substantial rights were affected or prejudiced by the seizure of the funds his son sent to the J-

pay account of another inmate. Specifically, the Department asserted “[p]laintiff ha[d] no right to file an Administrative Remedy Procedure on another offender’s cause.” In effect, the Department argued Pierre did not belong to the class of persons to whom the law grants the cause of action he asserted. See *Derbonne*, ____ So.3d at ____, 2020 WL 6058126, at *5; *Caldwell*, 249 So.3d at 42. Accordingly, the Department’s argument should have been asserted in an exception of no right of action. Regardless, because the objection of no right of action may be noticed by an appellate court on its own motion, the merits of that exception are properly before us. See La. C.C.P. arts. 927(B); *State ex rel. Caldwell v. Molina Healthcare, Inc.*, 18-1768 (La. 5/18/19), 283 So.3d 472, 477.

Further, the Department’s contention that Pierre had no right to file an ARP on behalf of another inmate whose substantial rights were affected by the seizure is correct. See LAC 22.I.325(I)(1)(c)(i)(e). Any claim arising from the seizure of funds belonged to the inmate who owned the account from which the funds were seized. Because the funds were not seized from an account owed by Pierre, he did not have a right to bring a claim regarding the seizure. Thus, his petition is subject to dismissal based upon his lack of a right of action.²

Finally, we observe that under La. R.S. 15:1177(A), a prisoner is required to file a petition seeking review of a final agency decision within thirty days after receiving notice of the decision. If the petition for judicial review is not timely filed, the jurisdiction of the reviewing court does not attach. *Jones v. LeBlanc*, 14-1005 (La. App. 1st Cir. 12/23/14) (unpublished), 2014 WL 7332301, at *1. Pierre’s ARP was rejected on August 12, 2019, and he received notice of the rejection no later

² Since there is no manner in which Pierre can amend his petition to state a right of action in himself for the seizure of funds belonging to another, it is unnecessary to allow an opportunity for him to amend his petition. See La. C.C.P. art. 934.

than August 15, 2019.³ In order to be timely, Pierre’s petition for judicial review had to be filed within thirty days of that date. See La. R.S. 15:1177(A). Pierre’s petition for judicial review was not filed until November 4, 2019, well over thirty days after he received notice of the rejection of his ARP.⁴ Accordingly, the petition was untimely and subject to dismissal on this additional basis. See *Johnson*, 2014 WL 2959297, at *3.

CONCLUSION

For the above reasons, the February 26, 2020 district court judgment dismissing the petition for judicial review filed by appellant, Derrick Pierre, is affirmed. All costs of this appeal are assessed against Mr. Pierre.⁵

AFFIRMED.

³ In his petition for judicial review, Pierre claims he mailed a second step request to the Department on August 15, 2019, but never received a response. Thus, it is clear Pierre must have received notice of the ARP’s rejection no later than that date.

⁴ We recognize that under the “mailbox rule” a petition for judicial review filed by an incarcerated inmate, who is unable to personally file his petition in court, is considered timely filed if placed in the hands of prison officials within the thirty-day period mandated by La. R.S. 15:1177(A). See *Bourque v. Louisiana Department of Public Safety & Corrections*, 16-1342 (La. App. 1st Cir. 4/12/17), 218 So.3d 1041, 1043; *Jones*, 2014 WL 7332301, at *2. In this case, the earliest date Pierre could have given prison officials his completed petition for mailing was October 31, 2019, the date on which he signed the petition. Since that date also is well over thirty days after August 15, 2019 (the latest date Pierre received notice of the ARP’s rejection), Pierre’s petition would still be untimely even assuming *arguendo* it had been placed in the hands of prison officials on that date. See *Jones*, 2014 WL 7332301, at *2.

⁵ Even though Pierre filed his petition for judicial review *in forma pauperis*, because he is unsuccessful in obtaining the relief sought, costs may be assessed against him. See *Rochon v. Young*, 08-1349 (La. App. 1st Cir. 2/13/09), 6 So.3d 890, 893 n.1, writ denied, 09-0745 (La. 1/29/10), 25 So.3d 824, cert. dismissed, 560 U.S. 921, 130 S.Ct. 3325, 176 L.Ed.2d 1216 (2010); *Gibson v. Barners*, 597 So.2d 176, 178 (La. App. 1st Cir. 1992).