

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MARK GREEN,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	No. 04-cv-43
	:	
FDC PHILADELPHIA, ET. AL,	:	
	:	
Defendants.	:	

**MEMORANDUM**

**Green, S.J**

**December , 2005**

Presently before the Court is Defendants', including Federal Detention Center ("FDC") Philadelphia, Motion to Dismiss or, in the alternative, Motion for Summary Judgment and Plaintiff's Response thereto. For the following reasons, Defendants' Motion to Dismiss will be denied in its entirety. Defendants' Motion for Summary Judgment will be dismissed without prejudice.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff, a pretrial inmate confined at Federal Detention Center ("FDC") Philadelphia at the filing of this lawsuit, brought the instant action, pursuant to 42 U.S.C. § 1983, against FDC Philadelphia and FDC Philadelphia's employees alleging that Defendants<sup>1</sup> failed to follow proper Bureau of Prisons ("BOP") procedures regarding the processing of his special mail and the monitoring of phone calls he placed to his attorney. BOP special mail procedure requires that FDC Philadelphia's staff

open incoming special mail only in the presence of the inmate for inspection for physical contraband and the qualification of any enclosures as special mail. The correspondence may not be read or copied if the sender is adequately identified on the envelope, and the front of the envelope is marked 'Special Mail-Open only in the presence of the inmate.' In the absence of either adequate identification or the

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<sup>1</sup>Defendants are all Bureau of Prisons employees assigned to Federal Detention Center Philadelphia: Edward B. Motley, Warden; Lieutenant Keith Fields, Special Housing Unit Lieutenant; and FDC Philadelphia's mail room staff.

'special mail' marking ... staff may treat the mail as general correspondence and may open, inspect, and read the mail.

28 C.F.R. § 540.18(a)-(b). FDC Philadelphia's unmonitored phone call policy provides that

[p]retrial inmates may request unmonitored calls to his/her attorney by submitting a written request to a member of their unit team. These calls can only be granted to the extent that staff resources allow.

FDC Philadelphia's Institutional Supplement 7331.04, Pretrial Inmates.

In his Complaint, Plaintiff sets forth alleged instances of Defendants' misconduct regarding special mail procedures and unmonitored phone calls dating from March 2003 to January 2004. Plaintiff claims that he "followed every step in the administrative procedure process" and has exhausted his administrative remedies regarding the issues raised in his Complaint. Pl.'s Compl. at p. 3.<sup>2</sup> Defendants claim that Plaintiff has not properly exhausted his administrative remedies regarding all of the issues raised in his Complaint. The BOP administrative procedural process requires that inmates formally submit a Request for Administrative Remedy to the institution where the inmate is being incarcerated, submit an appeal to the BOP Regional Office and then submit an appeal to the BOP Central Office before bringing a cause of action in federal court. An accounting of the parties' claims regarding Plaintiff's exhaustion of administrative remedies follows.

Plaintiff's Complaint consists of the standardized form used by prisoners to bring 42 U.S.C. § 1983 actions and three handwritten pages listing five separately numbered Statement of Claims. On page four of the standardized form, Plaintiff, a detainee, asserts that, while being housed in the Special Housing Unit ("SHU"), his attorney-client privilege was violated when Defendants forced him to make phone calls to his attorney using a speaker phone making it

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<sup>2</sup>Because Plaintiff claims that he properly exhausted all of his available administrative remedies, it is appropriate for this Court to consider Plaintiff's administrative remedy record on Defendants' Motion to Dismiss.

possible for prison officials to overhear Plaintiff's attorney-client phone conversations.<sup>3</sup> Plaintiff filed a December 29, 2003 Request for Administrative Remedy (No. 320487) and in its response, FDC Philadelphia granted Plaintiff's Request directing its staff to provide SHU inmates with the opportunity to place unmonitored telephone calls to their attorneys.

Defendants claim that the administrative remedy record does not show that Plaintiff appealed FDC Philadelphia's response to either the BOP Regional or Central Offices. In his "Response To Motion For Summary Judgment," Plaintiff asserts "he appealed thru all avenues of appeal [regarding his attorney-client phone call Request] and the Defendants' assertions to the contrary must fail." Pl.'s Resp. To Mot. For Summ. J. at p. 1. In support of his assertions, Plaintiff submits what he claims to be his appeals to the BOP Regional and Central Offices regarding the monitoring of his attorney-client phone calls dated March 12, 2004 and May 28, 2004 respectively.

Looking to the handwritten pages of Plaintiff's Complaint, Plaintiff's first Statement of Claim asserts that on March 4, 2003, FDC Philadelphia's mail room staff violated Plaintiff's attorney-client confidentiality privilege by opening up his legal mail outside of his presence and not processing his legal mail according to special mail procedure. A review of the administrative remedy record reveals that Plaintiff submitted a March 21, 2003 Request for Administrative Remedy (No. 293785) and FDC Philadelphia denied Plaintiff's request finding that Plaintiff's mail did not meet special mail requirements. The administrative remedy record also shows that Plaintiff appealed FDC Philadelphia's response to the BOP Regional and Central Offices and both appeals were denied.

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<sup>3</sup>Plaintiff also alleges that Defendants deprived other inmates of unmonitored calls to their attorneys. 28 C.F.R. § 542.10(a) states "[a]n inmate may not submit a Request or Appeal on behalf of another inmate." Furthermore, Plaintiff has not been certified as a class representative. Therefore, Plaintiff may neither seek relief, nor bring claims based on alleged violations of other inmates' rights by FDC Philadelphia Warden Edward Motley, Lieutenant Fields and Unit Manager Harold Mills.

Plaintiff's second Statement of Claim asserts that on May 8, 2003, he received mail that FDC Philadelphia's mail room staff failed to process using proper special mail procedures. Additionally, Plaintiff alleges FDC Philadelphia's mail room staff delayed delivery of his mail from the court for more than a month. Plaintiff filed a May 15, 2003 Request for Administrative Remedy (No. 299155) and FDC Philadelphia denied Plaintiff's Request regarding the alleged one month delay. FDC Philadelphia did not address Plaintiff's claim regarding inappropriate handling of special mail because it found that Plaintiff failed to seek informal resolution of the issue before submitting a Request for Administrative Remedy. The administrative remedy record as submitted by Defendants shows that Plaintiff only appealed FDC Philadelphia's response regarding the alleged one month delay to the BOP Regional Office and not to the BOP Central Office. However, in his "Response To Motion For Summary Judgment," Plaintiff attaches what he claims to be his August 3, 2003 appeal to the BOP Central Office regarding his Request for Administrative Remedy No. 299155.

Plaintiff's third Statement of Claim asserts that on April 23, 2003, and May 5, 2003, he received mail that FDC Philadelphia's mail room staff failed to process appropriately according to special mail procedures. Plaintiff also alleges that FDC Philadelphia's mail room staff read and copied portions of his mail and forwarded it to the prosecutor's office. Plaintiff submitted a May 15, 2003 Request for Administrative Remedy (No. 299151). Although FDC Philadelphia partially granted Plaintiff's Request, an investigation of Plaintiff's claims is said to have produced no evidence of intentional misconduct by mail room staff. Nevertheless, FDC Philadelphia responded by reinforcing proper special mail procedures with appropriate staff. A review of the administrative remedy record shows that Plaintiff appealed to the BOP Regional and Central Offices and both appeals were denied.

Plaintiff's fourth Statement of Claim asserts that on July 23, 2003, FDC Philadelphia's mail room unit officer illegally opened Plaintiff's outgoing legal mail, kept it in his possession for

four days, and then returned it to Plaintiff causing him to miss an important court deadline. Plaintiff submitted two July 30, 2005 Requests for Administrative Remedy with FDC Philadelphia (No.'s 306406 and 306407). FDC Philadelphia denied both of Plaintiff's Requests. A review of the administrative remedy record as submitted by Defendants does not show any record of Plaintiff appealing FDC Philadelphia's response to either the BOP Regional or Central Offices. However, in his "Response To Motion For Summary Judgment," Plaintiff claims that he exhausted all of his administrative remedies and provides evidence of his exhaustion by submitting what he claims to be his appeals to the BOP Regional and Central Offices regarding FDC Philadelphia's Response to Plaintiff's Request for Administrative Remedy No. 306406.

Plaintiff's fifth Statement of Claim asserts that on or about November 15, 2003, FDC Philadelphia's mail room staff opened Plaintiff's special mail and processed it as regular mail causing delay in its delivery to Plaintiff. Plaintiff also alleges that FDC Philadelphia's mail room staff removed contents of the mail and either kept the contents or sent them to the government. A review of Plaintiff's administrative remedy record as submitted by Defendants does not show that Plaintiff filed a Request for Administrative Remedy regarding this November 15, 2003 incident. However, in his "Response to Motion For Summary Judgment," Plaintiff claims that Defendants' "contention [regarding the November 15, 2003 incident] is without merit as Plaintiff has exhausted on all of his claims" and that he appealed "all the way to the central office." Pl.'s Resp. To Mot. For Summ. J. at p. 2-3.

Because of Defendants' alleged misconduct, Plaintiff claims he was prejudiced in his court proceedings. Plaintiff seeks \$175,000 in damages for the alleged telephone violations, \$100,000 in damages for the alleged mail room violations, appointment of counsel and a trial date.

Defendants move to dismiss Plaintiff's Complaint, pursuant to Fed. R. Civ. P. 12(b)(6), or, in the alternative, move for summary judgment, pursuant to Fed. R. Civ. P. 56. In their

Motion, Defendants claim 1) Plaintiff failed to exhaust all of his administrative remedies regarding the alleged opening of his legal mail and alleged monitoring of his attorney-client telephone calls, 2) Plaintiff's allegations are insufficient to rise to the level of a Sixth Amendment violation, 3) Plaintiff's allegations that Defendants opened his legal mail does not rise to the level of intentional conduct required to set forth an equal protection violation, 4) Defendants are immune from suit under the doctrine of sovereign immunity; and 5) Defendants are immune from suit because they have qualified immunity.

## **II. LEGAL STANDARD**

A court should grant a motion to dismiss for failure to state a cause of action only if it appears to a certainty that no relief could be granted under any set of facts which could be proved. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). The "notice pleading" approach governs the standard of specificity regarding motions to dismiss civil rights claims pursuant to 42 U.S.C. § 1983. In Swierkiewicz v. Sorema, 122 S. Ct. 992 (2002), a unanimous Supreme Court stated,

[g]iven the Federal Rules' simplified standard for pleading, a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. If the pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus on the merits of a claim.

Id. at 998-99 (internal citations omitted).

A court must accept as true all well pleaded allegations of the complaint in evaluating a motion to dismiss. See Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). Furthermore, because granting a motion to dismiss results in a determination on the merits at an early stage of the plaintiff's case, the district court must "construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of

the pleadings, the plaintiff may be entitled to relief.” Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989) (citations omitted). “A *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285 (1976) (internal citations omitted).

### **III. DISCUSSION**

In the instant case, Defendant asserts this Court should dismiss Plaintiff’s Complaint to the extent that Plaintiff has failed to exhaust his available administrative remedies pursuant to 28 C.F.R. § 542.10, et seq. In his Complaint, Plaintiff asserts he “followed every step in the administrative procedure process.” Pl.’s Compl. at p. 3. The Prison Litigation Reform Act of 1995 (“PLRA”), amended 42 U.S.C. § 1997e(a)(1994 ed., Supp. V), provides that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” Booth v. Churner, 532 U.S. 731, 736, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001). The Third Circuit Court of Appeals has found that “proper” exhaustion, under the PLRA, requires the inmate to follow the procedural requirements of the prison grievance system. Spruill v. Gillis, 372 F.3d 218, 231 (3d Cir. 2004). Therefore, if the prisoner fails to follow the procedural requirements, then his claims are procedurally defaulted and he is barred from bringing his claims in federal court. Id.

All inmates in institutions operated by the BOP may challenge any aspect of his or her confinement using BOP procedures for filing a Request for an Administrative Remedy. 28 C.F.R. § 542.10(a) and (b). These BOP procedures, codified at 28 C.F.R. § 542.10, et seq., provide three levels of appeal (institutional, regional and national/central) to an inmate who has

not been able to informally resolve his complaint. 28 C.F.R. § 542.13(a) and 542.15(b)(3). BOP procedures specify time frames in which an inmate may file an initial request and subsequent appeals. 28 C.F.R. § 542.14(b) and 15(a). Specifically, an inmate has twenty (20) calendar days following the date on which the basis for the Request occurred to submit a formal written Request for an Administrative Remedy unless the inmate demonstrates a valid reason for any delay. 28 C.F.R. § 542.14(a)-(b).

In response to Defendants' alleged misconduct regarding the monitoring of Plaintiff's attorney-client phone conversations, Plaintiff filed a December 29, 2003 Request for Administrative Remedy (No. 320487). A review of the administrative remedy record as submitted by Defendants does not show that Plaintiff filed any appeal regarding FDC Philadelphia's response in accordance with BOP policy. However, Plaintiff submitted to this Court what he claims to be his appeals to the BOP Regional and Central Offices. The information provided by both parties puts the issue of Plaintiff's appeals regarding the monitoring of his attorney-client phone conversations into question before this Court. Accordingly, this issue is inappropriate to determine on a motion to dismiss.

Looking to the handwritten portion of Plaintiff's Complaint, Plaintiff's first Statement of Claim alleges that on March 4, 2003, FDC Philadelphia's mail room staff opened up his legal mail outside of his presence, failed to process it as special mail and delayed delivery of his mail. Both parties agree that a review of the administrative remedy record demonstrates Plaintiff has properly exhausted all of his available administrative remedies concerning this claim. Therefore, construing Plaintiff's Complaint in the light most favorable to him as a *pro se* litigant, a reasonable reading of Plaintiff's Complaint demonstrates that Plaintiff's allegations in his first Statement of Claim are sufficient to allege a violation of his Constitutional rights pursuant to 42 U.S.C. § 1983. Therefore, Plaintiff's allegations in his first Statement of Claim will not be dismissed.

Regarding his second Statement of Claim, Plaintiff submitted a Request for Administrative Remedy with FDC Philadelphia on May 15, 2003 (No. 299155) regarding a delay in the delivery of his legal mail and failure to follow special mail procedure by Defendants. Defendants assert Plaintiff failed to exhaust his administrative remedies regarding this Request because there is no appeal to the BOP Central Office in the administrative remedy record and because Plaintiff failed to seek informal resolution under BOP administrative remedy procedure regarding his claim of inappropriate handling of special mail. In response, Plaintiff has submitted to this Court what he claims to be his appeal to the BOP Central Office dated August 3, 2003. Therefore, the information submitted by both parties puts the issue of whether Plaintiff fully exhausted his administrative remedies for Request No. 299155 into question. Therefore, the issue is inappropriate for this Court to determine on a motion to dismiss.

Plaintiff's third Statement of Claim alleges that on April 23, 2003, and May 5, 2003, Plaintiff received mail that had been opened by FDC Philadelphia's mail room staff in violation of special mail procedures and that contents of the mail were taken out and sent to the prosecutor's office. Plaintiff further asserts that the Warden admitted to "this tampering with the mail" but did not take appropriate actions to prevent it from happening again. Pl.'s Compl. at p. 2. Both parties agree that a review of the administrative remedy record demonstrates Plaintiff properly exhausted all of his available administrative remedies concerning this claim. Therefore, accepting all of Plaintiff's allegations in his Complaint as true as a *pro se* litigant, this Court finds that Plaintiff has set forth sufficient facts to allege a violation of his Constitutional rights pursuant to 42 U.S.C. § 1983 and the claim will not be dismissed.

In response to Defendants' alleged misconduct as described by Plaintiff in his fourth Statement of Claim, Plaintiff filed two Requests for Administrative Remedy with FDC Philadelphia on July 30, 2003 (No.'s 306406 and 306407). A review of the administrative remedy record as submitted by Defendants does not show that Plaintiff appealed either of FDC

Philadelphia's responses to the BOP Regional and Central Offices. To the contrary, Plaintiff claims he exhausted all of his administrative remedies regarding the July 30, 2003 incidents and submits to this Court what he claims to be his appeals to the BOP Regional and Central Offices regarding Request No. 306406. The information submitted to this Court by both parties puts the issue of whether Plaintiff properly exhausted his administrative remedies regarding his Requests filed on July 30, 2003 into question. Therefore, it is inappropriate for this Court to determine the issue on a motion to dismiss.

Plaintiff's fifth Statement of Claim asserts that on or about November 15, 2003, FDC Philadelphia's mail room staff opened Plaintiff's special mail outside of his presence, processed it as regular mail, removed some of the mail's contents, and either kept the contents or sent them to the government. A review of Plaintiff's administrative remedy record, as submitted by Defendants, fails to demonstrate that Plaintiff submitted any Requests regarding this alleged incident. However, Plaintiff claims he followed every step in the BOP administrative remedy process including an appeal to the BOP Central Office and that Defendants' assertions are without merit. Therefore, the issue of whether Plaintiff utilized any BOP procedural requirements regarding the incident that allegedly took place on November 15, 2003 is an issue that is inappropriate for this Court to consider on a motion to dismiss.

#### **IV. CONCLUSION**

For the above reasons, Defendants' Motion to Dismiss is denied in its entirety. Defendants' Motion for Summary Judgment will be dismissed without prejudice to reinstatement after discovery. An appropriate Order follows.

**BY THE COURT:**

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MARK GREEN,	:	
	:	
Plaintiff,	:	No. 04-cv-43
v.	:	
	:	
FDC PHILADELPHIA, ET. AL.,	:	
	:	
Defendants.	:	

**ORDER**

Presently pending is Defendants’ Motion to Dismiss, or in the alternative, Motion for Summary Judgment, and Plaintiff’s response thereto. **AND NOW**, this            day of December 2005, **IT IS HEREBY ORDERED** that Defendants’ Motion to Dismiss is **DENIED**, in its entirety.

**IT IS FURTHER ORDERED** that Defendants’ Motion for Summary Judgment is **DISMISSED** without prejudice to being reinstated by letter request, with a copy to Plaintiff, after the close of discovery and that discovery is to be completed by December 31, 2005. The parties have until January 16, 2006 to further supplement the record, and, if appropriate, to file or request to reinstate Motions for Summary Judgment.

**BY THE COURT:**

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**CLIFFORD SCOTT GREEN**