IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ARCHIE BEAR, WILLIAM STRINGER, and MICHAEL McBRIDE,	:	
Plaintiffs,	:	CIVIL NO. 4:01-CV-40456-JEG-CFB
vs.	:	
WALTER KAUTZKY, and JOHN MATHES,	:	REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT
Defendants.	:	

The Court has before it Defendants Walter Kautzky's and John Mathes' Motion for Partial Summary Judgment, (Clerk's No. 42), filed August 18, 2004, seeking dismissal of Plaintiffs William Stringer's and Michael McBride's claims under 42 U.S.C. § 1983.[1] In their Complaint, Stringer and McBride seek injunctive and declaratory relief from a prison policy that ends the exchange of legal assistance and correspondence among inmates at Iowa State Penitentiary (ISP), Fort Madison, Iowa, where Plaintiffs are incarcerated. Plaintiffs claim that ISP's policy violates their rights under the First and Sixth Amendments by preventing them from pursuing challenges to their criminal convictions. Defendants are the Director of the Iowa Department of Corrections (IDOC) and the Warden of ISP.

Defendants assert they are entitled to summary judgment, because Stringer and McBride allegedly did not exhaust their administrative remedies before seeking judicial relief, as required

[1] The Motion was originally filed on August 18, 2004, as a supplement, (Clerk's No. 34), to the Motion for Partial Summary Judgment filed April 13, 2004, (Clerk's No. 21), which challenged the claims of Plaintiff Archie Bear. The Clerk's Office redocketed Clerk's No. 34 as a motion for partial summary judgment on March 21, 2005 (Clerk's No. 42).

under 42 U.S.C. § 1997e(a), as amended by the Prison Litigation Reform Act of 1996 (PLRA). Plaintiffs filed a Response to the Motion on October 6, 2004.

This case was referred to the undersigned on March 21, 2005, for a Report and Recommendation under 28 U.S.C. § 636(b)(1)(B). This matter is fully submitted. After carefully considering the summary judgment record, the Court finds and recommends as follows on the issues presented.

MATERIAL FACTS NOT IN DISPUTE

The following facts are either undisputed or viewed in the light most favorable to Stringer and McBride, the nonmoving parties.

I. Background

Before July 1, 2001, IDOC allowed inmates to provide legal services to each other. To facilitate legal correspondence between inmates, ISP officials developed a system, called the Red Star system, for screening and delivering legal mail that inmates sent to other inmates in the same housing unit.

On July 1, 2001, Defendant John Mathes, ISP's warden, announced that IDOC, directed by Defendant Walter Kautzky, had adopted a new policy prohibiting inmates from providing legal services to each other, allowing them instead to obtain legal assistance from a private attorney under contract with the prison. After IDOC adopted the new policy, Mathes eliminated the Red Star system at ISP.

To complain about IDOC's new policy and ISP's elimination of the Red Star system, at least one of the plaintiffs "Filed a grievance with John Mathes by inmate memo." (Compl. at 2.) Plaintiffs assert, and Defendants do not deny, that the memorandum to Mathes was titled "grievance." (Pls.' Statement Disputed Material Facts at 1.[2]) Plaintiffs stated in their Complaint that in response to their grievance memorandum, Mathes advised them that they "must go through contract attorney even though the contract attorney does not provide help on actually

[2] Due to a scrivener's error, the Statement of Disputed Material Facts filed by Plaintiffs was captioned "Defendants' Statement of Disputed Material Facts." (Clerk's No. 40.) To avoid confusion, the Court will refer to the Statement as Plaintiffs' Statement of Disputed Material Facts.

litigating criminal cases." (Compl. at 2.) The record contains no copy of either the memorandum to Mathes or his response.

ISP's written grievance policy states inmates may grieve "policies and conditions, within the institution or Department of Corrections that affect them personally, as well as actions by employees and offenders." (Defs.' Supp. App. at 13.) Under the policy, a grievance is "A formal, written complaint, utilizing the established procedures, filed by an offender." (*Id.* at 12.) The policy defines standard grievances as, "Complaints which are not an emergency." (*Id.* at 13.)

Inmates may file emergency grievances when there appears "to be a substantial risk of physical injury or other serious and irreparable harm if regular time limits are followed." (*Id.*) When an inmate alleges an emergency, the grievance officer reviews the grievance and determines whether an emergency in fact exists. If the officer determines that an emergency exists, "the grievance will be investigated immediately and corrective action" initiated. (*Id.* at 14.) If in his judgment an emergency does not exist, the grievance officer will explain the denial in writing.

Nongrievable complaints are, "Policies which have formal appeal mechanisms. (Parole Board, disciplinary process, classification decisions, work release decisions, publications review, visiting decisions, etc.)" (*Id.* at 13.)

ISP's grievance officer, Dave DeGrange, stated in his affidavit that the grievance process' first step requires the inmate to try to resolve the dispute informally with the appropriate staff member. If the inmate's complaint remains unresolved, he next files a grievance, which a prison official records in a log and assigns a number. DeGrange investigates the issue raised in the grievance, and he responds to the grievant. The inmate may appeal DeGrange's decision to the warden first, and then to IDOC. "The maximum period between receipt of a grievance and the final appeal response will not exceed 90 days unless extensions have been given." (*Id.* at 15.)

The written policy states that inmates must use the designated "Offender Grievance Complaint" form to submit a grievance and the "Grievant Appeal" form for appeals, and provides that, "Incomplete forms will be returned to be completed properly and resubmitted." (*Id.* at 14.) The grievance complaint form provides a line for the inmate to indicate whether the

grievance is standard or emergency.

DeGrange stated in his affidavit that, "using the designated forms is not always required," although following the grievance process is required to complete the administrative remedy. (DeGrange Aff. at 2.) The record does not indicate under what circumstances the designated forms are not required, or what forms, other than those designated, an inmate may use to submit a grievance. DeGrange stated that inmates often complain to ISP staff about issues either verbally or through inmate memoranda, or kites, but he believed such complaints do "not mean that [the inmates] have initiated or even completed the grievance process." (*Id.*)

McBride and Stringer have been at ISP since at least 1999, DeGrange stated. According to ISP's records, neither McBride nor Stringer has filed any grievance at the prison.

II. Procedural History

Plaintiffs filed their Complaint in this Court on July 27, 2001, challenging the prison policy banning prisoners' communications with jailhouse lawyers and use of the Red Star system. The day Plaintiffs filed their Complaint, they also filed a Motion for Temporary Restraining Order and/or Preliminary Injunction.

In its Initial Review Order filed July 27, 2001, the Court directed Stringer and McBride to submit a signed copy of the Complaint's signature page within 30 days if they wanted to be plaintiffs in the lawsuit. The Court also denied the motion for a temporary restraining order and ordered service of process to be issued by mail to Defendants and the Attorney General of the State of Iowa. The Court directed Defendants to respond to the motion for preliminary injunctive relief no later than August 13, 2001, and to report to the Court whether the case should be consolidated with *Overton v. Galloway*, No. 4-01-CV-80225, another § 1983 case in which ISP inmates were challenging the new prison policy. Finally, the Court ordered Defendants to reply to the Complaint within 60 days. (Clerk's No. 4.)

The Clerk's Office issued service of process by mail on July 30, 2001, to Defendants Mathes and Kautzky and to the Attorney General of the State of Iowa. On August 27, 2001, the Attorney General entered his appearance for Mathes and Kautzky and filed a Request for Extension of Time to Respond to Complaint and Motion for Injunctive Relief, stating, "The response to the request for injunctive relief and to the complaint will be filled contemporaneously." (Clerk's No. 9.) On the same day, Defendants filed their Resistance to

Plaintiffs' Motion for Injunctive Relief, Resistance to Consolidate With *Overton et al. v. Galloway et al.*, No. 4:01-CV-80225, and supporting memoranda. Defendants did not raise the exhaustion issue in their Resistances. They did not file a response to the Complaint that day.

In its Order filed September 14, 2001, the Court scheduled a hearing on the motion for preliminary injunctive relief and on the consolidation issue. The docket, but not the Order, stated the hearing was also on the motion to extend time to respond to the Complaint. The docket entry for the minutes of the hearing held September 19 indicate the Court considered the motion to extend time, but the minutes themselves do not mention the motion. (*See* Clerk's No. 15.)

On September 26, 2001, the Court ordered consolidation of *Overton v. Galloway*, No. 4-01-CV-80225, and the present case; granted a preliminary injunction in favor of Plaintiffs Stringer, McBride, Archie Bear and Romeo Hardin, enjoining enforcement of the new policy *pendente lite* and preserving the four plaintiffs' access to the Red Star system; granted appointment of counsel for Stringer, McBride and Bear; and scheduled a final pretrial conference for December 14 and a trial for December 28, 2001. In its Order, the Court did not address Defendants' pending motion to extend time to respond to the Complaint.

On October 2, 2001, Plaintiff Thomas Overton filed a Motion for Summary Judgment. On October 5, Defendants filed a Motion to Dismiss based on Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. This motion did not raise the issue of any Plaintiffs' failure to satisfy the PLRA's exhaustion requirement. On October 19, Defendants filed a Notice of Appeal from the Court's September 26 Order granting a preliminary injunction. On October 30, the Court denied Overton's Motion for Summary Judgment and Defendants' Motion to Dismiss. The Court did not directly address Defendants' pending motion to extend time to respond to the Complaint, but once the Motion to Dismiss was ruled upon, the Defendants were authorized to file an Answer pursuant to Federal Rule of Civil Procedure 12(a)(4). Plaintiffs did not file a motion for default judgment within 10 days.

The Court held a status conference on November 2, 2001, to discuss whether the case would be ready for the trial set in December. In its Order on November 5, the Court continued without date the trial and final pretrial conference pending issuance of the Eighth Circuit Court of Appeal's opinion on the appeal. On November 15, Defendants filed their Answer, asserting

the affirmative defense of failure to comply with the PLRA's exhaustion requirement.

On October 4, 2002, the Eighth Circuit Court of Appeals affirmed the district's court grant of preliminary injunction.

On April 18, 2003, the Court rescinded its order consolidating this case with *Overton v. Galloway*, No. 4-01-CV-80225.

STANDARD FOR SUMMARY JUDGMENT

A court shall grant a motion for summary judgment only if the record shows that no genuine issues of material fact exists, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The court in ruling on a motion for summary judgment must draw all justifiable inferences in the nonmoving party's favor. *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999).

The moving party bears the initial burden of proving that the case lacks a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The nonmoving party must then show sufficient evidence to establish every essential element of the party's case, and on which the party will bear the burden of proof at trial. Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 322-23.

DISCUSSION

Defendants assert that Plaintiffs failed to satisfy the PLRA's exhaustion requirement. Plaintiffs deny this assertion. Plaintiffs further state that because Defendants did not raise the defense in a timely manner, Defendants have waived the affirmative defense of non-exhaustion or are equitably estopped from raising the defense.

The PLRA's exhaustion provision states, "No 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." 42 U.S.C. § 1997e(a).

In prisoner cases covered by § 1997e(a), exhaustion is mandatory. *Id.* A lack of exhaustion, however, does not deprive federal courts of subject matter jurisdiction. *Nerness v. Johnson*, No. 04-2679, 2005 WL 627150, *1 (8th Cir. Mar. 18, 2005). The defendant has the burden to plead and prove the PLRA's exhaustion requirement, which is an affirmative defense.

Id.

I. Waiver of Section 1997e(a)'s Exhaustion Requirement

Plaintiffs first argue that because Defendants did not assert the affirmative defense of exhaustion until after they lost the appeal of the district's court grant of preliminary injunction, they waived the defense.

Reliance on the PLRA's exhaustion requirement as an affirmative defense can be waived. *Foulk v. Charrier*, 262 F.3d 687, 697 (8th Cir. 2001) (citing *Randolph v. Rogers*, 253 F.3d 342, 347 n.11 (8th Cir. 2001)); *accord Johnson v. Testman*, 380 F.3d 691, 695 (2d Cir. 2004) (following *Foulk*, 262 F.3d at 697); *Gibson v. West*, 201 F.3d 990, 993 (7th Cir. 2000); *Perez v. Wisconsin Dep't of Corr.*, 182 F.3d 532, 536 (7th Cir. 1999); *see Lyon v. Vande Krol*, 305 F.3d 806, 808 (8th Cir. 2002) (holding ISP officials did not waive their right to raise non-exhaustion issue, because ISP officials raised the non-exhaustion issue at the first opportunity when, although district court ordered service of process on ISP officials prior to first appeal, the court entered a stay, pending appeal, of all proceedings in the district court before the ISP defendants were required to respond to the complaint).

On July 30, 2001, three days after Plaintiffs filed their Complaint and Motion for Temporary Restraining Order and/or Preliminary Injunction, service of process was issued on Defendants and the Attorney General of the State of Iowa. On August 27, Defendants requested an extension of time to respond to the Complaint and the request for a temporary restraining order. Although the Court did not directly rule on this request, it did address the Motion to Dismiss. This in effect extended Defendants' time to answer pursuant to Federal Rule of Civil Procedure 12(a)(4). After the Court ruled on the Motion to Dismiss, Defendants filed their Answer on November 15, 2001, specifically raising the affirmative defense of Plaintiffs' alleged failure to satisfy the PLRA's exhaustion requirement, and Plaintiffs did not object until October 6, 2004, when they filed their Response to the Motion for Summary Judgment.

No material facts are in dispute. Under the circumstances of this case, the Court finds that Defendants did not waive the affirmative defense of failure to exhaust the PLRA's exhaustion requirement. The Court respectfully recommends that Defendants' Motion for Summary Judgment be considered. It should not be denied on the ground of waiver, as Plaintiffs argue.

II. Equitable Bar by Lapse of Time

Plaintiffs next submit that Defendants are equitably estopped from asserting the affirmative defense of the PLRA's exhaustion requirement, because Defendants did not assert the defense until after appealing the district court's grant of the preliminary injunction, and in the intervening time, Plaintiffs and their counsel expended significant time and resources in this case, particularly in relation to the appeal, and Plaintiffs continued to "develop and deepen their relationship with their jailhouse lawyers." (Pls.' Brf. Res. Defs.' Supp. Mot. Summ. J. at 1.)

Some courts have held that the PLRA's exhaustion requirement is subject to the defense of equitable estoppel. *Ziemba v. Wezner*, 366 F.3d 161, 163 (2d Cir. 2004) (following *Wright v. Hollingsworth*, 260 F.3d 357, 358 n.2 (5th Cir. 2001)). The doctrine of equitable estoppel "comes into play when a defendant takes active steps to prevent a plaintiff from suing on time." *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1329 (8th Cir. 1995) (internal quotation and citations omitted); *see Teamsters & Employers Welfare Trust of Illinois v. Gorman Bros. Ready Mix*, 283 F.3d 877, 881 (7th Cir. 2002) (stating doctrine of equitable estoppel allows plaintiff to extend statute of limitations if defendant did something that made plaintiff reasonably believe he had more time to sue); *Marvin Lumber v. PPG Indus., Inc.*, Nos. 02-2833, 02-2869, 2005 WL 659125, *11 (8th Cir. Mar. 23, 2005).

Plaintiffs' estoppel argument, in contrast, asserts an equitable bar based on the lapse of time before Defendants' assertion of the PLRA's exhaustion requirement. The Court construes Plaintiffs' challenge to Defendants' exhaustion defense as more akin to the equitable doctrine of laches than to equitable estoppel.[3] *See City of Sherrill, New York v. Oneida Indian Nation of New York*, No. 03-855, 2005 WL 701058, *12 (U.S. Mar. 29, 2005) ("It is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief"; stating the "'doctrine of an equitable bar by lapse of time . . . should now be regarded as settled law in this court'") (quoting *Bowman v. Wathen*, 1

[3] Laches is a form of equitable estoppel. *Teamsters & Employers Welfare Trust of Illinois*, 283 F.3d at 882 (citing *Central Improvement Co. v. Cambria Steel Co.*, 210 Fed. 696, 713 (8th Cir. 1913) (per curiam) ("Laches is equitable estoppel under another name"; stating court would consider together two claims of equitable estoppel and laches)).

How. 234, 258 (1849)). Laches is not merely a matter of the passage of time, but is "principally a question of the inequity of permitting the claim [for equitable relief] to be enforced – an inequity founded upon some change in the condition or relations of the property or the parties." *Id.* [3]

Plaintiffs' assertion of an equitable bar based on lapse of time fails for two reasons. First, some courts do not recognize a plaintiff's defensive use of the laches doctrine against a general defense asserted by the defendant. *See Northern Pacific R.R. v. United States*, 277 F.2d 615, 624 (10th Cir. 1960) (stating, "laches is available only as a bar to affirmative relief. It cannot be invoked by Plaintiff to bar rights asserted by defendant merely by way of defense) (cited in 30A C.J.S. *Equity* § 128 (2004)); *cf. Teamsters & Employers Welfare Trust of Illinois*, 283 F.3d at 882 (stating only difference, although not material, between laches and equitable estoppel is which party asserts it: Laches is asserted defensively by defendant to bar a suit; and equitable estoppel is used offensively by plaintiff to obtain extra benefits).

Second, Plaintiffs' claim of inequity, whether styled as laches or equitable estoppel – that Defendants' delay in asserting the defense of the PLRA's exhaustion requirement until after appealing the district court's grant of the preliminary injunction caused Plaintiffs and their counsel to spend significant time and resources, particularly in relation to the appeal, and caused Plaintiffs to "develop and deepen their relationship with their jailhouse lawyers," (Pls.' Brf. Res. Defs.' Supp. Mot. Summ. J. at 1) – relies on mere speculation. The same events about which Plaintiffs complain could reasonably have occurred even if Defendants had asserted the affirmative defense before appealing the district court's decision. Furthermore, Plaintiffs have waited approximately three years to object to the affirmative defense raised by Defendants in their Answer filed November 15, 2001. The Court finds that the circumstances of this case do not rise to the level of evoking the doctrine of laches to render inequitable Defendants' assertion of the affirmative defense of the PLRA's exhaustion requirement.

The Court respectfully recommends that Defendants' Motion for Summary Judgment be considered. It should not be denied on the ground of laches or estoppel.

III. Defendants' Motion for Summary Judgment Based on Failure to Exhaust

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[3]

Defendants argue that Plaintiffs failed to exhaust their available administrative remedies as required under the PLRA, because they did not comply with ISP's grievance procedure. Plaintiffs counter that administrative remedies were not available for them to exhaust, and even if such remedies were available, Plaintiffs complied with the prison's grievance procedure.

A. Available Administrative Remedies

Plaintiffs dispute that the PLRA's exhaustion requirement should bar their claims, arguing that ISP's grievance system was not an available remedy within the meaning of the PLRA. Defendants maintain that the prison's grievance system was an available remedy.

An inmate satisfies section 1997e(a)'s exhaustion requirement by exhausting available remedies within the correctional facility. *See Williams v. Norris*, 176 F.3d 1089, 1089 (8th Cir. 1999) (per curiam). Section 1997e(a) does not require exhaustion of all remedies, but rather "exhaustion of 'such administrative remedies as are available.'" *Foulk*, 262 F.3d at 698 (holding that remedies were not "available" to prisoner, when prison officials failed to respond to his grievance during time period required by regulations).

Plaintiffs offer three theories for their contention that ISP's grievance system was not an available remedy. First, Plaintiffs argue that because "no reasonable inmate would labor under the false assumption that the filing of a grievance against such a significant policy change would result in the policy being overturned and the Red Star Envelope system reinstated," the grievance system was not an available remedy. (Pls.' Brf. Res. Defs.' Supp. Mot. Summ. J. at 1.)

This argument fails, because for purposes of the PLRA's exhaustion requirement, it does not matter whether an inmate subjectively believes that there is no point in pursuing administrative remedies. *See Lyon*, 305 F.3d at 809 (stating that § 1997e(a) "does not permit the court to consider an inmate's merely subjective beliefs, logical or otherwise, in determining whether administrative procedures are 'available'") (citing *Chelette v. Harris*, 229 F.3d 684, 688 (8th Cir. 2000)).

Second, Plaintiffs maintain the prison's administrative remedies were unavailable for their claims, in that Plaintiffs required immediate injunctive relief from the Court to enable them to pursue their pending claims related to their convictions and prison conditions, and pursuing administrative relief would have been time consuming and fruitless.

The Court finds this argument unpersuasive. ISP's grievance system provided a

procedure for inmates to file emergency grievances, and Plaintiffs have provided no evidence the procedure was inadequate. Furthermore, the Court may not consider Plaintiffs' subjective belief that the grievance system would have been time-consuming and fruitless. *See id.*

Third, Plaintiffs assert that in Mathes' response to their memorandum complaining about IDOC's new policy prohibiting inmate-to-inmate legal services and ISP's elimination of the Red Star system, the warden "did not direct the Plaintiffs to file a grievance, but rather he affirmatively directed them to proceed through the ISP contact attorney," thus leading Plaintiffs reasonably to believe their complaint was nongrievable and the grievance system was therefore unavailable to them. (Compl. at 2.)

Although the PLRA does not define when an administrative remedy is available, the term's plain meaning: "capable of use for the accomplishment of a purpose: immediately utilizable . . . accessible." *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001). A remedy that prison officials prevent an inmate from using does not qualify as an available administrative remedy under §1997e(a). *Id.* (finding allegations that prison officials failed to respond to his written requests for grievance forms were sufficient to raise an inference that the prisoner had exhausted his "available" administrative remedies); *see Booth v. Churner*, 532 U.S. 731, 736, 736 n.4, 738 (2001) n.4 ("Without the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust"; stating parties did not dispute that state grievance system at issue had authority to take some responsive action with respect to type of allegations that inmate raised; "modifier 'available' requires the possibility of some relief for the action complained of").

In support of their contention, Plaintiffs point to their Complaint, in which they allege Mathes "advised that we must go through contract attorney even though the contract attorney does not provide help on actually litigating criminal cases." (Compl. at 2.) The Court finds that Mathes' alleged comment is insufficient to raise a reasonable inference that Mathes was telling Plaintiffs' that their complaints were nongrievable, thus preventing them from using the administrative remedy. *See Lyon*, 305 F.3d at 809 ("Mr. Lyon was never told that there was not a procedure, moreover, so there is no basis for the application of an estoppel principle here, even if one might otherwise be available.").

Viewing all reasonable inferences in the light most favorable to Plaintiffs, the Court finds

they have not generated a genuine issue of material fact concerning whether the grievance system was not an available remedy within the meaning of the PLRA. The Court therefore turns to the issue of whether Defendants have shown no genuine issue of material fact exists and they are entitled to judgment as a matter of law, in that Plaintiffs failed to meet the PLRA's exhaustion requirement.

B. Exhaustion of ISP's Administrative Remedies

In their pro se Complaint, Plaintiffs alleged they "Filed a grievance with John Mathes by inmate memo." (Compl. at 2.) Defendants challenge this allegation on the grounds that "sending an inmate memo to a staff member does not constitute exhaustion of the grievance process." (Mem. Supp. Defs.' Supp. Mot. Summ. J. at 9.) Plaintiffs counter that a genuine issue of material fact exists concerning whether their memorandum to Mathes constituted a grievance under ISP's grievance policy, in that the memo was titled as a grievance.[4]

Defendants also contend that Plaintiffs failed to appeal the denial of their grievance, as required under ISP's grievance policy.

The undisputed facts show the prison's written grievance policy requires inmates to use designated form to submit a grievance. The policy also provides that inmates appeal the denial of a grievance by filling out and submitting the designated grievance appeal form to the warden. Here, Plaintiffs submitted their memorandum directly to Mathes, and he responded.

DeGrange, however, stated in his affidavit that in practice inmates do not always have to use the designated forms to exhaust. No evidence indicates when the designated forms are not required. Similarly, no evidence shows how, other than using the designated forms, an inmate may submit a grievance or appeal. Mathes did not return the memorandum to Plaintiffs for them to resubmit their grievance in proper form.

When prison officials do not establish the administrative rules applicable to the inmate at the time and place, and under the circumstances of his incarceration, the district court may lack a sufficient factual basis on which to find that the inmate failed to exhaust his administrative

[4] The record does not contain the memorandum to Mathes and his response. Defendants do not dispute Plaintiffs' allegations concerning the existence of the memorandum, its title, or Mathes' response.

remedies. *Foulk*, 262 F.3d at 698.

Viewing all reasonable inferences in the light most favorable to Plaintiffs, the Court finds they have generated a genuine issue of material fact concerning whether, at the time and place, and under the circumstances of their incarceration, they met ISP's requirements for filing and appealing a grievance.

Material facts remain in dispute, and Defendants have not established their affirmative defense of failure to exhaust as a matter of law. Accordingly, the Court respectfully recommends that Defendants' Motion for Summary Judgment be denied.

RECOMMENDATION AND ORDER

IT IS RESPECTFULLY RECOMMENDED, under 28 U.S.C. § 636(b)(1)(B), that Defendants' Motion for Summary Judgment (Clerk's No. 42) against Plaintiffs Stringer and McBride be denied for the reasons discussed above.

IT IS ORDERED that the parties have until April 22, 2005, to file written objections to this Report and Recommendation, under 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. *Thompson v. Nix*, 897 F.2d 356, 357 (8th Cir. 1990) (per curiam); *Halpin v. Shalala*, 999 F.2d 342, 345 & n.1, 346 (8th Cir. 1993). The Court will freely grant such extensions. *Martin v. Ellandson*, 122 F. Supp. 2d 1017, 1025 (S.D. Iowa 2000). Any objections filed must identify the specific portions of the Report and Recommendation and relevant portions of the record to which the objections are made and set forth the basis for such objections. *See* Fed.R.Civ.P. 72; *Thompson*, 897 F.2d at 357; *Martin*, 122 F. Supp. 2d at 1025. Failure to timely file objections may constitute a waiver of a party's right to appeal questions of fact. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *United States v. Newton*, 259 F.3d 964, 966 (8th Cir. 2001) (citing *Griffini v. Mitchell*, 31 F.3d 690, 692 (8th Cir. 1994)).

IT IS SO ORDERED.

Dated this 31st day of March, 2005.

CELESTE F. BREMER
UNITED STATES MAGISTRATE JUDGE