WEST VIRGINIA CODE CHAPTER 25 ARTICLE 1A

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§25-1A-1. Definitions.

As used in this article,

(a) "Civil action" means any action or appeal from an action filed by any current or former inmate or his or her personal representative with respect to conditions of confinement, including, but not limited to, petitions for extraordinary writs, civil actions under 42 U.S.C. §1983 and other federal and state laws and negligence actions. Actions that exclusively concern an inmate's sentence or conviction are not subject to the requirements of this article.

(b) "Correctional facility" means any county jail, regional jail or any facility operated by the Division of Corrections, the West Virginia Regional Jail and Correctional Facility Authority or Division of Juvenile Services for the confinement of inmates.

(c) "Inmate" means any person confined in a correctional facility who is accused of, convicted of, sentenced for or adjudicated delinquent for violations of criminal law or the terms and conditions of parole, probation, pretrial release or a diversionary program.

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§25-1A-2. Exhaustion of ordinary administrative remedies.

(a) As used in this section, an "ordinary administrative remedy" is a formal administrative process by which an inmate submits a grievance seeking redress or presenting concerns regarding any general or particular aspect of prison life which does not involve violence, sexual assault or sexual abuse against an inmate. An ordinary administrative remedy includes, but is not limited to, complaints concerning food quality, health care, appeals of prison discipline, physical plant, classification, staff treatment or some other alleged wrong.

(b) The Commissioner of the Division of Corrections and the Executive Director of the Regional Jail Authority are authorized to establish procedures for ordinary administrative remedies according to their respective authority for issuance of policies governing the conduct of inmates.

(c) An inmate may not bring a civil action regarding an ordinary administrative remedy until the procedures promulgated by the agency have been exhausted.

(d) An ordinary administrative remedy is considered exhausted when the inmate's grievance complies with duly promulgated rules and regulations regarding inmate grievance procedures, has been accepted, fully appealed and has received a final decision from the Commissioner of Corrections or the Commissioner's designee, or the Executive Director of the Regional Jail Authority, or the director's designee.

(e) The agency shall issue a final decision regarding an ordinary administrative remedy no later than sixty days from the date the inmate filed his or her initial grievance. Computation of the sixty-day time period shall not include time consumed by inmates in preparing any administrative appeal. The agency may claim an extension of time to issue a final decision regarding an ordinary administrative remedy of up to thirty days if the sixty day final decision time frame is insufficient to make an appropriate decision, except in cases involving a threat to health, life or safety of the prisoner. The agency shall notify the inmate in writing of any such extension and provide a date by which the final decision regarding an ordinary administrative remedy will be made.

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§25-1A-2a. Exhaustion of administrative remedies which address sexual assault and sexual abuse.

(a) The agency shall not require an inmate to use any informal grievance process, or to otherwise attempt to resolve with staff, an alleged incident involving sexual assault or sexual abuse against an inmate. For purposes of this article, "sexual assault" or "sexual abuse" means any offense which would constitute a violation of article eight-b, chapter sixty-one of this code. The agency shall ensure that:

(1) An inmate who alleges an incident involving sexual assault or sexual abuse may submit a grievance without submitting it to a staff member who is the subject of the complaint; and,

(2) Such grievance may not be referred to a staff member who is the subject of the complaint.

(b) The agency shall issue a final agency decision on the merits of any portion of a grievance within sixty days of the initial filing of the grievance. Computation of the sixty-day time period shall not include time consumed by inmates in preparing any administrative appeal. The agency may claim an extension of time to respond, of up to thirty days, if the normal time period for response is insufficient to make an appropriate decision, except in cases involving threat to health, life or safety of the prisoner. The agency shall notify the inmate in writing of any such extension and provide a date by which a decision will be made.

(c) At any level of the administrative process, including the final level, if the inmate does not receive a response within the time allotted for reply, including any properly noticed extension, the inmate may consider the absence of a response to be a denial at that level.

(d) Third parties, including fellow inmates, staff members, family members, attorneys and outside advocates, shall be permitted to assist inmates in filing requests for administrative remedies relating to incidents involving sexual assault or sexual abuse, and shall also be permitted to file such requests on behalf of inmates. If a third party files such a request on behalf of an inmate, the facility may require as a condition of processing the request that the alleged victim agree to have the request filed on his or her behalf, and may also require the alleged victim to personally pursue any subsequent steps in the administrative remedy process. If the inmate declines to have the request processed on his or her behalf, the agency shall document the inmate's decision.

(e) After receiving an emergency grievance alleging an inmate is subject to a substantial risk of sexual assault or sexual abuse, the agency shall immediately forward the grievance, or any portion thereof that alleges the substantial risk of sexual assault or sexual abuse, to a level of review at which immediate corrective action may be taken, shall provide an initial response within forty-eight hours, and shall issue a final agency decision within five calendar days. The initial response and final agency decision shall document the agency's determination whether the inmate is in substantial risk of sexual assault or sexual abuse and the action taken in response to the emergency grievance.

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(f) The agency shall establish procedures for processing an inmate grievance which alleges imminent violence. The commissioner and the executive director shall, by December 31, 2013, propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code to meet the requirements of this subsection.

(g) An administrative remedy for an allegation of violence, sexual assault or sexual abuse against an inmate is considered exhausted when the inmate's grievance has complied with duly promulgated rules and regulations regarding inmate grievance procedures for imminent violence, sexual assault or sexual abuse, has been accepted, fully appealed and has received a final decision from the Commissioner of Corrections or the Commissioner's designee, or the Executive Director of the Regional Jail Authority, or the director's designee.

(h) The agency may discipline an inmate for filing a grievance related to sexual assault or sexual abuse only where the agency demonstrates that the inmate filed the grievance in bad faith.

(i) Notwithstanding any other provision of this code, no inmate shall be prevented from filing an appeal of his or her conviction or from bringing a civil or criminal action alleging violence, sexual assault or sexual abuse, after exhaustion of administrative remedies. If such a civil or criminal action is ultimately dismissed by a judge as frivolous, then the inmate shall pay the filing costs associated with the civil or criminal action as provided for in this article.

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§25-1A-3. Payment of filing fees and court costs.

(a) Notwithstanding any other provision of this code, an inmate may not file with any court of this state a civil action without the payment of filing fees as set forth in this section: Provided, That the collection of the full filing fee is not required before the inmate's claim may be filed and served.

(b) When an inmate seeks to file a civil action as an indigent and requests that customary filing fees and court costs be waived, the clerk of the court in which the inmate has filed his or her complaint shall notify the warden or designated representative of the facility in which the inmate resides of the inmate's request and the amount of filing costs. Once the facility receives notification, the custodian of the inmate's trust account shall immediately compute the average monthly balance of the inmate's trust account over the preceding three-month period and deduct from the inmate's trust account thirty percent of the average balance as a partial filing fee. The custodian shall deduct that same amount or up to thirty percent of the balance of the inmate's trust account, whichever is greater, on a monthly basis until the filing fee is paid in full.

(c) The custodian of the inmate's trust account shall place all funds deducted from the inmate's trust into a special account designated as the "filing fees account," to be established for each correctional facility and to be administered by the custodian and warden or chief administrator of each facility. Biannually the custodian and warden or chief administrator of the filing fees account shall distribute the balance of the account, minus any expense in maintaining that account, to the circuit clerk of the county in which the state correctional facility resides as a filing fee for all suits filed by indigent inmates of that facility.

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§25-1A-4. Judicial review of initial pleading; dismissal.

(a) The court shall, prior to issuance of process, review the complaint, petition or other initial pleading to determine whether a civil action is frivolous or malicious as defined in subsection (b) of this section and fails to state a claim for which relief can be granted or seeks monetary relief from a party who is immune from such relief. If the complaint, petition or other initial pleading is frivolous or malicious, fails to state a claim for which relief can be granted or seeks monetary relief from a party who is immune from such relief, the court shall not issue process and shall dismiss the case.

(b) A civil action is frivolous or malicious if it:

(1) Has no arguable basis in fact or law; or

(2) Is substantially similar to a previous civil action in which the inmate did not substantially prevail, either in that it is brought against the same parties or in that the civil action arises from the same operative facts of a previous civil action; or

(3) Has been brought with the intent to harass an opposing party.

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§25-1A-5. Hearings.

(a) To the extent practicable, a court shall conduct pretrial proceedings in any civil action in which an inmate's participation is required or permitted by telephone, video conference or other telecommunications technology without removing the inmate from the facility in which an inmate is confined.

(b) Subject to the agreement of the official with custody over an inmate, the court may conduct hearings at the correctional facility in which an inmate is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference or other communications technology in any hearing held at the facility.

(c) No court may compel the commissioner of the Division of Corrections or warden of any correctional facility operated by the Division of Corrections or the executive director of the West Virginia Regional Jail and Correctional Facility Authority or any administrator of any facility operated by the West Virginia Regional Jail and Correctional Facility Authority to transport to court any inmate having a maximum security classification if the warden or administrator of the facility tenders to the court an affidavit attesting to the custody level of the inmate and stating that, in the warden's or administrator's opinion, the inmate possesses a substantial risk of escape if transported. If a warden or administrator files an affidavit, then the warden or administrator shall, upon demand of the court, provide suitable room to conduct any trial or hearings at which an inmate's presence is required. The warden or administrator shall allow the court, counsel and all court personnel access to the correctional facility to conduct the proceedings the court considers necessary.

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§25-1A-6. Loss of good-time credit.

Upon a finding by the court that a civil action is frivolous, malicious or intended to harass the party against whom the civil action is brought or that the inmate knowingly testified falsely or otherwise knowingly presented false evidence or information to the court, the court may order that the inmate forfeit earned good-time credit. A court may take additional evidence to determine the appropriate amount of good-time credit to be forfeited.

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§25-1A-7. Court-ordered payments.

Any compensatory damages awarded to an inmate in connection with a civil action, after deduction for any attorney fees, shall be paid directly to satisfy any outstanding court-ordered payments pending against the inmate, including, but not limited to, restitution or child support. The remainder of the award after full payment of all pending court orders shall be forwarded to the inmate.

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§25-1A-8. Attorney fees.

(a) In any action based upon prison conditions brought under any statute or Constitutional provision, if attorney fees are recoverable pursuant to any state statute, no attorney fees shall be awarded to a prisoner, except to the extent that:

(1) The fees were directly and reasonably incurred by an attorney in proving an actual violation of prisoner's rights protected by the Constitution or statute; and

(2) The amount of the fees is proportionately related to the court-ordered relief for the violation, or the fees were directly and reasonably incurred in enforcing the relief ordered for the violation.

(b) Nothing in this section shall prohibit a prisoner from entering into an agreement to pay an attorney fee in excess of the amount authorized in this section, if the fee is paid by the prisoner rather than by another party to a civil action.

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§25-1A-9. Limitations on civil actions brought by prisoners in forma pauperis.

(a) Absent an order of a circuit court permitting the filing, an inmate is not permitted to proceed in forma pauperis when bringing a civil action or appealing a judgment in a civil action or proceeding if he or she has, on three or more occasions, while incarcerated or detained in any correctional facility, brought an action or appeal in any court of this state that was dismissed on the grounds it was frivolous, malicious, or failed to state a claim upon which relief may be granted, unless the inmate is under imminent danger of serious physical injury.

(b) Any civil action asserting an inmate is under imminent danger of serious physical injury shall state with particularity the factual basis of the assertion.

(c) The provisions of subsection (a) of this section do not apply to an inmate seeking a writ of habeas corpus ad subjiciendum relating solely to the propriety of an inmate's custody.

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