

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 30, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2005AP6
STATE OF WISCONSIN**

Cir. Ct. No. 2004CV1277

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. DARRICK A. ALEXANDER,

PETITIONER-APPELLANT,

V.

DANIEL BENIK,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
JAMES L. MARTIN, Judge. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Darrick Alexander appeals from an order dismissing his petition for certiorari review of a prison disciplinary decision.

Before commencing a circuit court action for certiorari review, prisoners must exhaust their administrative remedies. WIS. STAT. § 801.02(7)(b) (2003-04).¹ In this case, the trial court held that Alexander failed to comply with this exhaustion test. We agree, and therefore affirm.

¶2 The prison disciplinary committee found Alexander guilty of a disciplinary offense on February 10, 2004. Alexander had two avenues of administrative appeal: an appeal to the warden on any issue pertaining to the decision, WIS. ADMIN. CODE § DOC 303.76(7); and after the warden appeal, an appeal raising procedural issues under the inmate complaint review system (ICRS), WIS. ADMIN. CODE § DOC 310.08(3). He appealed to the warden and received an adverse decision on March 5, 2004. He filed an ICRS appeal on March 12, 2004. While the latter appeal remained pending, he commenced this certiorari review action on April 4, 2004. On April 6, 2004, the ICRS appeal resulted in a decision in Alexander's favor, setting aside the February 10 decision and remanding the matter back to the committee with instructions to issue a modified decision correcting certain procedural errors and omissions. On April 21, 2004, the committee issued its modified decision on remand.

¶3 Alexander failed to meet his exhaustion requirements in two different ways. First, he filed his certiorari petition while his administrative appeal to the ICRS remained pending. "A case filed before exhaustion has been accomplished must be dismissed." *Perez v. Wisconsin Department of Corrections*, 182 F.3d 532, 537 (7th Cir. 1999). That is true even if the prisoner

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

seeks review on a substantive issue not addressed in the ICRS appeal. *See State ex rel. Smith v. McCaughtry*, 222 Wis. 2d 68, 70, 586 N.W.2d 63 (Ct. App. 1998) (Abrogated in unrelated part by *State ex rel Hensley v. Endicott*, 2001 WI 105, ¶13, 245 Wis. 2d 607, 629 N.W.2d 686). Second, the subject of this proceeding is the committee's February 10, 2004 decision. However, the ICRS decision of April 6, 2004, vacated that decision, and the disciplinary committee issued a substantially revised decision on April 21, 2004. Although he remained aggrieved by that decision he did not appeal it to the warden or through the ICRS, even though both avenues were again available to him. Instead, he continued to seek court review of the vacated decision, after it ceased to have any legal effect.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

