May 1976

Prisoner's Rights--The Need for an Inmate Grievance Commission in West Virginia

Thomas W. Kupec
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Administrative Law Commons, Civil Rights and Discrimination Commons, and the Law Enforcement and Corrections Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol78/iss3/8
PRISONER'S RIGHTS—THE NEED FOR AN INMATE GRIEVANCE COMMISSION IN WEST VIRGINIA

The Fourth Circuit Court of Appeals recently overruled a Maryland District Court decision which captured the attention of prison officials throughout the country. The court of appeals decided that the district court erred in forcing a state prisoner to exhaust all available administrative remedies prior to bringing a 42 U.S.C. § 1983 civil rights action in federal court. This controversy between administrators and advocates of prisoners' right will likely continue, however, until the Supreme Court directly confronts the problem. However the Supreme Court decides the issue, it would be highly advantageous for West Virginia to implement efficient administrative procedures to deal with prisoners' complaints.

McCray v. Burrell dealt with the application of the exhaustion doctrine in § 1983 cases. The exhaustion doctrine is not new to federal courts, having been applied for many years in habeas corpus actions. As Mr. Justice Harlan explained this doctrine, although a federal court has jurisdiction of a particular proceeding, it may, in its sound discretion, refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest. Further, it is in the public interest that federal courts "should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." The doctrine, then, is rooted in federal-state comity which requires the state to have the first opportunity to correct its

---

2 See J. W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS § 10.6.1 (Supp. 1974) [hereinafter cited as PALMER].
4 Id. at 360 and text accompanying notes 50-56 infra.
5 See text accompanying notes 84-94 infra.
7 See Ex parte Royall, 117 U.S. 241 (1886); C.A. WRIGHT, LAW OF FEDERAL COURTS 212 (2nd ed. 1970) [hereinafter cited as WRIGHT].
9 Id. at 676.
10 Id.
own errors prior to federal court intervention. Or, as phrased by Justice Harlan: "[A]ssuming that the federal court [has] jurisdiction, should it, as a matter of sound . . . discretion . . . decline to exercise that jurisdiction." The issue, therefore, is not whether the federal court has jurisdiction over the prisoner's case, but rather, whether the court should exercise that jurisdiction.

42 U.S.C. § 1983 was passed shortly after the Civil War but was rarely used for access to the federal courts until Monroe v. Pape was decided in 1961. That case dealt with an action brought under 42 U.S.C. § 1983 against several Chicago police officers for the unwarranted raid of a home and the unlawful arrest of the occupant. The Supreme Court detailed the history of the statute and gave it such a broad interpretation that the federal courts were, in effect, opened to any plaintiff deprived of his constitutional rights by anyone acting under color of state law. Section 1983 was held to give a federal right fully supplementary to any state remedy.

Monroe seemed a firm and complete answer to the question of whether exhaustion of state remedies was required before bringing a § 1983 action in federal court. However, the Court was again faced with that same question in McNeese v. Board of Education.

[Hereinafter cited as § 1983].

Id. at 183.

Id. The facts of Monroe are fairly notorious. Thirteen Chicago police officers broke into Monroe's house in the middle of the night and forced Monroe's family to stand naked in the middle of the living room while they ransacked the house. Monroe was subsequently detained on open charges for ten hours.

Justice Douglas said for the majority that "[i]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Id. at 183.

in which it held that "the Civil Rights Act [§ 1983] may not be defeated because relief was not first sought under state law which provided a remedy." In reaching this conclusion, the Court explored the state remedies available to the plaintiffs and the existing inadequacies of those remedies. As the Court reasoned: "[w]hen federal rights are subject to such tenuous protection, prior resort to a state proceeding is not necessary." In stressing the futility or unavailability of state remedies, the Court indicated that if there were adequate remedies it might hold otherwise.

The Court again addressed the issue in three per curiam opinions and again held that the exhaustion doctrine did not apply to § 1983 cases. However, the Court left the issue somewhat confused. In the most recent of the three, Wilwording v. Swenson, the Court cited the prior cases on the exhaustion doctrine and then noted that the plaintiff was incarcerated in a state where there was no available remedy for the hearing of prisoners' claims. This case impliedly suggest that the law may not be settled with respect to a § 1983 action brought by a prisoner in a state which has provided him with adequate state administrative remedies.

It has never been seriously contended that a prisoner bringing a § 1983 action in federal court need exhaust state court remedies' Yet it seems singularly inappropriate for the Court to have stressed the ineffectiveness of the available administrative remedies if it meant that a court could never require exhaustion of administra-

---

18 Id. at 671.
19 Id. at 675. The McNeese case was a § 1983 action involving school boundaries. The Court pointed out that the administrative official, the superintendent of schools, could only ask the Attorney General to rectify the complaint by an appropriate proceeding in court if the complaint were found to be meritorious. The Supreme Court found this remedy inadequate in that the protections afforded were so tenuous that it was unnecessary to resort to them. The Supreme Court also noted that the superintendent had no power to order corrective action and could only take steps leading to a remedy in state court, a requirement which was rejected in Monroe.
20 Id. at 676.
22 See Palmer, supra note 2, at 138.
24 Id. at 250-52.
tive remedies in a § 1983 action. At least dissenting opinions in those cases would indicate that the issue is still open.28

Recent cases have further confused the issue. In *Gibson v. Berryhill*, the Court indicated that in certain instances, exhaustion of administrative remedies would be required.29 Yet the Court found the remedies in question so defective and inadequate as to deny the plaintiff due process of law.28 In *Preiser v. Rodriguez*,29 the Court did not specifically discuss whether available state remedies should be exhausted under § 1983, but it did set the foundation for some sort of administrative review regarding conditions of confinement.30 In *Procunier v. Martinez*,31 Justice Powell stated for the Court that the “problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree.”32 He further noted that “courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.”33 Justice Powell recognized that the courts are ill-suited to act as front line agencies for the resolution of prisoners grievances and noted with approval the Chief Justice’s suggestion of instituting internal administrative procedures for disposition of inmate grievances.34

The position of the Court is unclear at the present time. As one court stated, “[n]o decision of the Supreme Court squarely holds that the complaint of a state prisoner, which . . . is capable of prompt and complete redress by an administrative official, can be brought directly into a federal district court under § 1983 without any attempt [to exhaust these remedies].”35 While most of the federal court cases which have addressed the issue of exhaustion have not required it, none of those cases appear to have dealt with an effective state administrative remedy.36

---

27 *411 U.S. 564, 574 (1973).*
26 *Id. at 579.*
25 *411 U.S. 475 (1973).*
24 *Id. at 489-95.*
23 *416 U.S. 396 (1974).*
22 *Id. at 404-05.*
21 *Id. at 405.*
20 *Id. n.9.*
When the District Court of Maryland decided *McCray v. Burrell*, it found that an adequate administrative remedy existed to hear prisoner grievances. Recognizing that federal intervention has remedied the worst examples of retrogressive American penology, the court held that the time had come to take a careful and critical look at the continued validity of the sweeping interpretation given § 1983.

**McCray** involved allegations by a Maryland prisoner for actions taken against him by prison officials. The defendants moved to dismiss the complaint on the grounds that Maryland law established an Inmate Grievance Commission designed to investigate and correct grievances asserted by prisoners incarcerated in Maryland, and that McCray had failed to use this remedy. They contended that this unique procedure, which permitted a full hearing and subsequent judicial review, required a prisoner to exhaust these available state administrative remedies before bringing his action in federal court. The district court dismissed the case.

In a detailed opinion, the court noted the staggering increase in federal courts' caseloads, largely due to a vast increase in prisoners' § 1983 complaints. Numerous statistics were offered to substantiate the fact that "there is little hope for relief from the swelling ranks of petitioning prisoners." When federal courts act as the initial forum for any prisoner who alleges a deprivation of his constitutional rights, an allegation often without merit, a tremendous amount of court time is required to dispose of the action. This along with the increased caseloads of the federal courts have caused the length of time from the date a prisoner files a meritorious claim asserting an infringement of his constitutionally protected rights to the date of disposition to become so great that often neither equitable nor legal relief is effective in protecting the

---

(1970), would have required exhaustion unless the administrative remedies were inadequate or resort to them futile. See Palmigiano v. Mullen, 491 F.2d 978 (1st Cir. 1974); Stevenson v. Bd. of Educ. of Wheeler County, Georgia, 426 F.2d 1154 (5th Cir. 1970); Boyd v. Smith, 353 F. Supp. 844 (N.D. Ind. 1973); Romans v. Crenshaw, 354 F. Supp. 868 (S.D. Tex. 1972).

27 367 F. Supp. at 1201.
28 Id. at 1194.
29 The action was brought against a captain at a Maryland Penitentiary who was represented by the Attorney General of the State of Maryland.
30 For a discussion of this procedure, see text accompanying notes 85-94.
31 367 F. Supp. at 1194.
32 Id. at 1195.
prisoner's rights. This can also be seen as the courts' reaction "to prisoners who have 'cried wolf' many times too often."\textsuperscript{41}

The district court thus held that § 1983 could no longer be read as a mandate to federal courts to accept all state prisoners' claims "no matter how hard or how successfully the state has tried to set its own prison house in order,"\textsuperscript{45} and that "[t]he least the federal court can do is to give the State system a chance to continue to purge itself of its abuses."\textsuperscript{46} Exhaustion of Maryland's administrative remedies would therefore be required before a prisoner could bring his claim into federal court.\textsuperscript{47} Pursuant to this holding, the district court dismissed other prisoners' § 1983 actions where the administrative remedies were not exhausted.\textsuperscript{48} A few of these decisions were consolidated with McCray and appealed to the Fourth Circuit Court of Appeals.\textsuperscript{49} The circuit court reversed the district court.\textsuperscript{50} Although indicating agreement with the district court, the circuit court nevertheless concluded that exhaustion could be required only by congressional action or Supreme Court mandate.\textsuperscript{51} Finding neither, the court held that "we have no alternative but to hold that exhaustion may not be required."\textsuperscript{52}

In a survey of the Supreme Court cases, the circuit court found that they "would appear" to show that exhaustion of available state administrative remedies is not a prerequisite to maintaining a § 1983 action in federal court.\textsuperscript{53} Although these decisions were open to interpretation, the circuit court found no support to "conclude that the Supreme Court has held, or will hold that exhaustion in these circumstances will be required."\textsuperscript{54} The court therefore held that, on balance, the Supreme Court has not required exhaus-
tion in cases similar to McCray and that it is inappropriate to consider the policy considerations which might dictate a different course of decision. The State of Maryland was told that any policy considerations "must be addressed to the Supreme Court, which alone can overrule its prior decisions, or to the Congress, which has authority to amend the statute."

The circuit court, in effect, washed its hands of the matter and left it to the Supreme Court. This might have been a tenable position had the issue truly been settled by the Supreme Court or had insufficient policy reasons existed for the court to hold otherwise. But this was not the case. The Supreme Court has not been clear on the issue and strong policy considerations do support the application of the exhaustion doctrine in prisoners' § 1983 actions.

Perhaps the most influential of these policy considerations is the astronomical rise in prisoners' civil rights litigation since 1961. In fiscal year 1972, 3,348 § 1983 actions were filed by state prisoners in federal court, an increase of 1,435.8% over 1961 and an increase of 14.9% over 1971. Federal courts simply are not equipped to handle this increase in caseload and yet do proper justice to those cases brought before them. Consequently, Chief Justice Burger has recommended that prison complaints be handled, at least initially, by either administrative procedures or referral to magistrates.

---

55 Id. at 365.
56 Id.
58 Over 750 prisoner cases were placed on the Supreme Court's docket for the October term of 1971. Total state and federal prisoner cases filed in lower federal courts in 1971 were over 16,000, a staggering increase given that virtually no prisoners' cases were filed in federal court fifteen years ago. Federal Judicial Center, Report of the Study Group on the Case Load of the Supreme Court, 57 F.R.D. 573, 586 (1972); Editorial, Prison Ombudsmen Provide a Safety Valve, 56 Judicature 314 (1973).
59 In fiscal year 1972, 252 civil rights petitions were filed by federal prisoners, an increase of 1,580% over 1961, and an increase of 17.8% over 1971. During the first half of fiscal 1973, 155 civil rights actions were instituted by federal prisoners, and 1,891 were instituted by state prisoners. 1973 Annual Report of the Administrative Director of the United States Courts 20; Aldisert, Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload, 1973 Law & Social Order 557 [hereinafter cited as Aldisert].
60 See Boyd v. Dutton, 405 U.S. 1, 8 (1972) (Powell, J., dissenting opinion).
Given the accessibility of federal courts, it is not surprising how many prisoners bring § 1983 actions. Having more time on their hands than the average citizen, prisoners can write a court as easily as they can write home. Many of these prisoners’ § 1983 cases lack merit and an internal administrative agency could filter out such cases before they reach a federal court. Without such an agency, unmeritorious suits will continue to consume more and more federal court time and delay the adjudication of valid complaints.

The Supreme Court in Preiser v. Rodriguez dealt with a prisoner’s case which required an initial determination of its basis as a habeas corpus action or a § 1983 action. Concluding that it was a habeas corpus action, the court discussed the rationale for applying the rule of exhaustion in federal habeas corpus actions. The Court first recognized how important the administration of its prisons is to a state and how a state is in a far better position to deal with them than a federal court. The strong consideration of com-

[hereinafter cited as Burger]. In making his plea for reform, Chief Justice Burger noted the backlog in federal court of 126,000 cases and the growing avalanche of prisoner petitions, from virtually none twenty years ago to 16,000 per year currently. See also 1973 Annual Report of Administrative Director of the United States Courts.

42 Aldisert, supra note 59, at 574. See also Burger, supra note 61.

43 As the Supreme Court has noted, “the capacity of our criminal justice system to deal fairly and fully with legitimate claims will be impaired by a burgeoning increase of frivolous prisoner complaints.” Procunier v. Martinez, 416 U.S. 396, 405 n.9 (1974). The federal courts must spend a great deal of time and money to evaluate each prisoner’s § 1983 suit filed in federal court, and this expenditure is compounded by the increasing number of § 1983 suits filed in federal courts. Many prisoner complaints are exaggerated or unfounded and are used only to disrupt the system. It becomes a difficult and tedious task for a federal court to sort the valid claims from the unfounded ones. These problems are best handled internally by administrative bodies since they are more familiar with the day-to-day operations of the prison. Aldisert, supra note 59; Burger, supra note 61.


45 Id. at 490-94.

46 As the Court stated:

It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are bound-
ity therefore requires that "the States [be given] the first opportunity to correct the errors made in the internal administration of their prisons."76 The states' compelling interest in the administration of their own prison systems,68 coupled with other factors of special concern in prisoners' rights cases,69 necessitates the use of restraint in handling prisoner cases.

The recent identification of the above factors by the Supreme Court indicates that the Court may be willing to apply the exhaustion doctrine to prisoners' § 1983 cases unless policy reasons demand otherwise. Section 1983 protects individuals from state infringement of their federal rights, and surely no one will deny that liberty is an individual's most precious right.70 Yet the courts have long applied an exhaustion doctrine to the habeas corpus action,71 specifically recognized in the Constitution and protected from suspension,72 even though it is designed to protect that most precious right, liberty. Since exhaustion is required to test the legality of confinement, can there be a policy reason why no such exhaustion should be required when testing the conditions of confinement?73

---

68 Id. at 491-92.
69 Id. at 492.
70 This logic led to the "hands-off doctrine" in which federal courts traditionally abstained from hearing prisoners' suits against their keepers. See Goldfarb and Singer, Redressing Prisoners' Grievances, 39 Geo. Wash. L. Rev. 175 (1970).
71 Prisoner cases cannot be handled like the usual case. First, an attorney must usually be appointed to insure that the prisoner is able to adequately present his case. Then there is the cost of transporting the plaintiff and his witnesses to the federal courthouse. Security precautions must be highly maintained as federal courts are open to the public and the plaintiff or his witnesses may present a real danger to the community. The plaintiff may also call witnesses who are now residing in institutions far removed from the courthouse. All this is at federal expense and may well arise prior to a court's finding that the claim was lacking in merit.
72 See Pay v. Noia, 372 U.S. 391 (1963); see also Wright, supra note 7 at 209.
73 Ex parte Royall, 117 U.S. 241 (1886).
The requirement that a prisoner exhaust all state administrative remedies before bringing a § 1983 action does not deny him access to federal courts. The rationale of the exhaustion doctrine is to first expose a prisoner complaint to a knowledgeable internal tribunal capable of sorting out the bona fide complaints from those used only to disrupt the system. Federal courts would then be called upon to hear only those cases which are clearly of constitutional dimension. The courts would be provided with a record of the administrative procedures and the relevant facts necessary to make a quick and fair determination of the case. Time spent in court by prison officials would accordingly be minimized and more prompt relief would be made available to the prisoner with a valid claim.

Because of the state's intense interest in the administration of its prisons and other policy considerations, federal courts should be willing to use the exhaustion doctrine where there is an adequate administrative agency to hear prisoner grievances. The historical reasons for not requiring exhaustion are no longer applicable today. When prisoner cases were first brought in federal court, no available agencies for prisoners' complaints existed, and the states were doing little or nothing to better the conditions of the prisons. As a result, federal courts were compelled to deal with almost all prisoner grievances, fully cognizant that they were neither the best forum possible for the resolution of the complaints nor the best forum for the reformation of the penal system.74

Now, as states are attempting to improve the conditions, federal district courts are bound by past precedents which hold the exhaustion doctrine inapplicable to § 1983 actions. Courts now seem to be seeking a compelling reason to modify or overrule these past cases and apply the exhaustion doctrine to prisoners' § 1983 actions brought in those states which offer an adequate means for the prisoner to redress his grievances. Yet the issue is so historically entrenched in our court system that only Congress or the Supreme Court can now change it as the district courts feel compelled to hold as they do.75

The exhaustion doctrine is based on the adequacy of the ad-

administrative procedure to deal with the given problem. The remedy must be one in fact and not just in theory. The test for determining the adequacy of the available administrative state remedies is three-fold. First, the court must analyze the theoretical due process adequacy of the state remedy, particularly in assuring that the remedy does not contain the forbidden indicia of pre-judgment which renders exhaustion inappropriate. Second, the court must look at the remedy in practice to see that it is being administered in an even-handed and fair manner. Only if the state remedy meets these first two tests, can the court apply the third, a weighing of the state's interest in the subject matter of the federal litigation.

The state's interest in the administration of its prisons is paramount. But no matter how strong, the exhaustion doctrine cannot be applied unless the state has furnished the plaintiff with an available and adequate remedy. Any state remedy will be given close scrutiny by the courts to determine its adequacy and fairness.

The procedure requirements that a court would find sufficient in prisoners' § 1983 actions are difficult to determine since the Supreme Court has not yet addressed the issue. In the district court opinion in McCray, the court found the Maryland Inmate Grievance Commission an adequate state remedy. The circuit court pointed out a few possible deficiencies in the Commission, but held that it did not have to determine the adequacy of the Commission because of its decision on the exhaustion issue. However, in light of the lack of any procedures in West Virginia, the Maryland Act is highly desirable even if it failed to meet the due process requirements of the courts.

Whether the Supreme Court refuses to hear the appeal of

---

80 See discussion in text accompanying notes 14-26 supra.
81 367 F. Supp. at 1210.
82 516 F.2d at 365.
McCray or whether it unequivocally decides that there can never be any exhaustion requirement under § 1983, the State of West Virginia should nonetheless implement viable administrative procedures to deal with prisoners' grievances.\textsuperscript{3} A grievance commission, simply by virtue of its familiarity with staff and population attitudes and the day-to-day operations of the prison itself, could provide a surer index of the validity of a given complaint than could a federal court. The actual filing and disposition of complaints would also be facilitated through such a commission, and much federal litigation would thereby be eliminated. Clearly, the existence of this type of administrative procedure could have only positive results for the prisoners, the prison officials, and the state as a whole. The alternative, state inaction, would permit federal courts to continue to dictate what will and should be done within the state prisons.

Using the Maryland Act\textsuperscript{4} or the North Carolina Act\textsuperscript{5} as a

---

\textsuperscript{3} Any procedure which would aid the federal courts in understanding the problems of the state prison and in clarifying the issue is of value for at least these reasons. Hayes v. Secretary of Dep't. of Pub. Safety, 455 F.2d 798, 781 (4th Cir. 1972).

\textsuperscript{4} 41 Md. Code Ann. § 204F (Supp. 1975):

(a) Commission established; appointment and terms of members; chairman; vacancies; compensation and expenses.—The Inmate Grievance Commission is established as a separate agency within the Department of Public Safety and Correctional Services. It shall consist of five members appointed by the Governor with the advice of the Secretary of Public Safety and Correctional Services. Of the five members so appointed, not less than two shall be lawyers qualified to practice law in the State of Maryland and not less than two members shall be persons of knowledge and experience in one or more of the fields under the jurisdiction of the Department of Public Safety and Correctional Services. Of the members initially appointed, two shall be for a term of four years, one shall be for a term of three years, one shall be for a term of two years and one shall be for a term of one year. Thereafter, all reappointments shall be for terms of four years. The Governor, with the advice of the Secretary of Public Safety and Correctional Services shall designate the chairman from time to time. The Governor, with the advice of the Secretary of Public Safety and Correctional Services, shall fill any vacancy which occurs before the expiration of a term for the balance of the term so remaining. Each member of the Commission shall receive per diem compensation as provided in the budget for each day actually engaged in the discharge of his official duties as well as reimbursement for all necessary and proper expenses, in accordance with the standard travel regulations.

(b) Appointment and salary of executive director; investigative, secretarial and clerical employees.—The Secretary of Public Safety and
Correctional Services, with the advice of the Commission, and with the approval of the Governor, shall appoint an executive director of the Commission who shall serve at the pleasure of the Secretary and who shall receive such salary as provided in the budget. In addition, the Secretary may provide the Commission with such investigative, secretarial and clerical employees as may be necessary for the efficient administration of the powers and duties of the Commission and as provided in the budget.

(c) Removal of members.—The Governor, upon the recommendation of the majority of the Commission or upon the recommendation of the Secretary, may remove any member of the Commission for one or more of the following:

(1) Conviction of a crime involving moral turpitude or of any criminal offense the effect of which is to prevent or interfere with the performance of Commission duties.
(2) Failure to regularly attend meetings of the Commission.
(3) Failure to carry out duties assigned by the Commission or its chairman.
(4) Acceptance of another office or the conduct of other business conflicting with or tending to conflict with the performance of Commission duties.
(5) Any other ground which, under law, necessitates or justifies the removal of a State employee.

(d) Submission of grievance or complaint.—Any person confined to an institution within the Division of Correction, or otherwise in the custody of the Commissioner of Correction, or confined to the Patuxent Institution, who has any grievance or complaint against any officials or employees of the Division of Correction or the Patuxent Institution, may submit such grievance or complaint to the Inmate Grievance Commission within such time and in such manner as prescribed by regulations promulgated by the Commission. If, and to the extent that, the Division of Correction or the Patuxent Institution has a grievance or complaint procedure applicable to an inmate’s particular grievance or complaint, and if the Inmate Grievance Commission deems such procedure reasonable and fair, the Commission may by regulations require that such procedure be exhausted prior to the submission of the grievance or complaint to the Commission.

(e) Preliminary review.—When a grievance or complaint is submitted to the Inmate Grievance Committee, the Commission, or any member thereof or the executive director, if so provided by the Commission’s regulations, shall preliminarily review the grievance or complaint. If upon such preliminary review the grievance or complaint is determined to be on its face wholly lacking in merit, it may be dismissed, by the reviewing commissioners or commissioner or executive director as the case may be, without a hearing or without specific findings of fact. Such order of dismissal shall be forwarded to the complainant within 60 days after submission of the grievance or complaint and shall constitute the final decision of the Secretary of Public Safety and Correctional Services for purposes of any judicial review.

(f) Hearings and disposition by Commission; review by Secretary of Public Safety and Correctional Services.—Whenever, after the prelimi-
inary review provided for in subsection (e), a grievance or complaint is
not found to be on its face wholly lacking in merit, the Commission shall
as promptly as practicable hold a hearing on the grievance or complaint.
At least three members of the Commission shall sit at any hearing, and
decisions shall be by a majority of those sitting. A record of the testimony
presented at the hearing shall be kept according to the rules and regu-
lations promulgated by the Commission. The Commission's decision shall
be issued promptly after the hearing in the form of an order which shall
include a statement of the findings of fact, the Commission's conclusions
and its disposition of the complaint. The types of disposition shall be as
follows:

(1) If after the hearing, the Commission finds in its order that the
complaint is wholly lacking in merit and should be dismissed, such an
order of dismissal shall be promptly forwarded to the complainant and
shall constitute the final decision of the Secretary of Public Safety and
Correctional Services for purposes of any judicial review.

(2) However, if after the hearing, the Commission in its order finds
that the inmate's complaint was in whole or in part meritorious, such
order shall be promptly forwarded to the Secretary of Public Safety and
Correctional Services. Within fifteen days of the receipt of such an order,
the Secretary by order shall affirm the order of the Commission, or shall
reverse or modify the order where he disagrees with the findings and
conclusions of the Commission. The Secretary shall order that the appro-
priate official of the institution in question accept in whole or in part the
recommendation of the Commission or the Secretary may take whatever
action he deems appropriate in light of the Commission's findings. The
order of the Secretary shall be promptly forwarded to the complainant,
and the Secretary's order shall constitute the final decision for purposes
of judicial review.

(g) Access to documentary evidence; subpoenas; oaths and
affirmations.—The Commission, with the approval of the Secretary of
Public Safety and Correctional Services, shall at all reasonable times
have access to, for the purposes of examination, and the right to copy,
any documentary evidence of any person or institution being investigated
or proceeded against and may require by subpoena the attendance and
testimony of witnesses and the production of all documentary evidence
of any person relating to any matter under investigation. The presiding
commissioner at a hearing may administer oaths and affirmations.

(h) Right of inmate to appear before Commission; opportunity to
call witnesses; representation by counsel.—The inmate shall have the
right to appear before the Commission and shall have the opportunity to
call a witness or a reasonable number of witnesses depending upon the
circumstances and the nature of the complaint, subject to the discretion
of the Commission as to the relevancy of the testimony and questions and
the number of witnesses sought to be called. The inmate shall have a
reasonable opportunity to question any witnesses who testify before the
Commission. Such rights of the inmate shall not be unreasonably with-
held or restricted by the Commission. If the inmate requests that he be
represented at the hearing by an attorney of his own choosing he shall be
permitted such representation at his own expense.

(i) Record of complaints.—A record shall be kept of all complaints
STUDENT NOTES

The State of West Virginia could and should implement comparable procedures. An Inmate Grievance Commission of West Virginia could review any grievance or complaint of a person incarcerated within a state institution against any official or employee of the institution. Such a Commission would not review a person's trial or conviction, nor would it handle requests for transfer, reclassification or early release. These matters would still be handled by the internal administration of the institution. If, however, such a request were denied for an unjust or unfair reason, it might become an issue for the Commission.

The Commission should be a separate agency from the institution, consisting of five members experienced in penology but not currently employed in any of the state's penal institutions. Each and their disposition which shall be open to public inspection during regular business hours.

(j) Conduct of hearings at certain institutions.—For the performance of its duties, the Commission may conduct hearings at the institutions under the supervision and control of the Division of Correction or at the Patuxent Institution.

(k) Rules and regulations.—The Commission, subject to the approval of the Secretary, shall have the power to adopt rules and regulations for the conduct of its proceeding as provided for in this section.

(l) Judicial review.—No court shall be required to entertain an inmate's grievance or complaint within the jurisdiction of the Inmate Grievance Commission unless and until the complainant has exhausted the remedies as provided in this section. Upon the final decision of the Secretary of Public Safety and Correctional Services, the complainant shall be entitled to judicial review thereof. Proceedings for review shall be instituted in the circuit court of the county or in the Baltimore City Court, as the case may be, in which is located the institution where the complainant is confined. Review by the court shall be limited to a review of the record of the proceedings before the Commission and the Secretary's order, if any, pursuant to such proceedings. The court's review shall be limited to a determination of whether there was a violation of any right of the inmate protected by federal or State laws or constitutional requirements.

85 North Carolina was the second state to establish an Inmate Grievance Commission of some complexity, free from control by the actual administration of the state prison system. N. CAR. GEN. STAT. § 148-101-115 (1974).

86 Two members should be lawyers qualified to practice law in the State of West Virginia. Two should be experienced in corrections and the fifth member should be a responsible lay person with some interest in the field. This is to assure that legal principles are adhered to but there is an understanding of the impact on the prison and the community as a whole for any decision which has to be made.

87 The rationale behind this requirement would be to keep the Commission and the prison system from acting as one agency. The Commission must be both famil-
member of the Commission should receive per diem compensation for each day actually engaged in the discharge of official duties, as well as reimbursement for all necessary and proper expenses. Removal and replacement of the members could be handled in the same manner as that of other state employees.

Complaint procedures should be kept to a minimum. Complaints could be filed in letter form, specifying briefly the exact nature of the complaint or grievances. All complaints should be sent to one office for preliminary review to determine if any complaint should be dismissed for lack of merit on its face. If a complaint is found to merit consideration, an independent investigation could be made by the Commission to ascertain the pertinent facts and determine if the problem is capable of easy and fair resolution. A hearing could then be arranged at the institution at the earliest convenient time. Hearings would only be as formal as necessary to insure that everyone's rights, including those of prison personnel, are protected. Specific rules of evidence need not apply in the hearing although a verbatim record should be made and witnesses should be questioned under oath. At least three members of the Commission should be present at the hearings. A copy of the Commission's conclusion, in the form of a written statement containing findings of fact and the disposition of the complaint, should be given to the complainant.

The procedure should be kept to minimal complexity in order to encourage prisoners to use these procedures. The letter, simple in form, need only include the date the complaint or grievance took place, the name and identification number of the inmate making the complaint, the person or persons responsible for the act or condition complained of, and the names and addresses, if known, of any witnesses desired to be at the hearing.

Holding the hearing at the institution prevents some of the problems indicated above when all witnesses must go to federal courts. The time and days of the Commission hearings should remain constant to help facilitate penal activities.

The protection of the rights of prison personnel is an easily overlooked area but one of utmost importance. The morale of the personnel can be destroyed if they see these procedures used only as a weapon to gain revenge against them.

If for some reason three members could not be present to decide on the grievance, then the Governor could appoint someone to replace the member on an interim basis.

The inmate and the Commission should have the right of access to records and documentary evidence related to the grievance. Both should also have the right to question and cross-examine any witness who testifies before the Commission.
an assistant in his office would then review and affirm, reverse, or modify the order and direct any necessary action in the matter.

Both the Maryland and North Carolina Acts allow counsel to be present to assist the inmate. This is an important factor in providing for fair inmate representation.1

Any time the Commission should find that something at an institution is unlawful or improper and the finding is upheld by the Governor, the Commission should have the authority to implement such procedures as are necessary to correct the deficiency within the institution. If at any time the prisoner's claim is dismissed, he has the right to appeal to any court within the state which has jurisdiction for review of the proceeding.

The implementation of an Inmate Grievance Commission in West Virginia would be a progressive step for the state. Not only would the Commission help the prisoners with their grievances, it would also benefit prison officials in the administration of their prisons. Demands on court time would thereby be minimized and the opportunity for prompt relief of prisoners' complaints would be maximized.

The proposed procedure should be viewed not only as a method to avoid or defer federal court intervention, but also as a way to improve grievance procedures to better meet the needs of prisoners, courts and the community. The above suggestions and factors, by no means exclusive, should at least warrant legislative attention.

Thomas W. Kupec

---

1 It may be possible in West Virginia to use law students to represent the inmates at the hearing and thereby tap a resource otherwise untapped and also give law students valuable experience in the field of corrections.