

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 20, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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.

No. 99-1673

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. WILLIAM N. LEDFORD,

PETITIONER-APPELLANT,

v.

WILLIAM NOLAND,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
RICHARD J. CALLAWAY, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

¶1 PER CURIAM. William Ledford appeals from an order dismissing his certiorari petition. We affirm because we conclude that, as far as is shown by this record, the decision he wants reviewed has not yet been issued in final form.

¶2 Ledford filed a certiorari petition in circuit court seeking review of a decision by the Inmate Complaint Examiner, William Nolan, under the prison

Inmate Complaint Review System (ICRS). The trial court dismissed the petition on the ground that it was filed more than forty-five days after the decision sought to be reviewed. *See* WIS. STAT. § 893.735(2) (1997-98).¹ Ledford appeals. The record before us consists of nothing more than the papers Ledford attached to his petition; there is no actual certiorari record. His papers show the following history.

¶3 Ledford filed an ICRS complaint, the substance of which is immaterial to this opinion. The complaint was denied by the “appropriate reviewing authority.” *See* WIS. ADM. CODE § DOC 310.12. Ledford sought the next level of review, which is the corrections complaint examiner (CCE). Pursuant to WIS. ADMIN. CODE § DOC 310.13(5), the CCE is supposed to send the inmate a “written receipt of the appeal.” That occurred in this case, in the form of a letter which also stated: “You can expect a decision by the Secretary within 47 working days. If you do not receive a decision or other notices within that time, you may write directly to [the Secretary’s office].” That letter was dated June 22, 1998.

¶4 On December 11, 1998, Ledford wrote to the secretary and told him that neither the CCE nor the secretary’s office had made any response to his complaint. Ledford further stated that if he did not receive a response by December 18, he would consider the complaint denied and take further legal action. Ledford then filed his certiorari petition in mid-January 1999.

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶5 On appeal, respondent William Noland argues that Ledford's certiorari petition was properly dismissed as untimely. He argues that under WIS. ADMIN. CODE § DOC 310.13(7), when the CCE did not respond to Ledford after thirty-five days, the written decision of the appropriate authority became the final ICRS decision, and the forty-five days to file for certiorari began to run.

¶6 We do not agree with Noland's interpretation of the rules. Noland is correct that the above rule provides that the initial decision shall be affirmed if the CCE does not make a recommendation in the prescribed time. However, the next sentence provides that the department shall notify the inmate of all decisions in writing. As we read WIS. ADMIN. CODE §§ DOC 310.13 and 310.14, once an appeal has been taken to the CCE, the inmate is always to receive some type of further decision or notification, and the decision by the "appropriate authority" never becomes the final ICRS decision. The department appears to share our interpretation in its letter to Ledford. The letter clearly suggests that some type of "decision or other notices" will be issued.

¶7 Because we have concluded that the final ICRS decision on Ledford's complaint has not been issued, we also conclude that the forty-five day period to petition for certiorari did not start to run. *See* WIS. STAT. § 893.735(2) (certiorari action to be commenced within 45 days of the date of the decision or disposition to be reviewed). Although we disagree with Noland's argument on appeal, we may affirm the trial court decision for a reason not relied on by the trial court. *See State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985). We conclude that because Ledford's material shows that the department has not issued its final decision on the ICRS complaint, Ledford has not exhausted his administrative remedies. Failure to plead exhaustion of remedies is grounds for dismissal for failure to state a claim. *See State ex rel. Smith v. McCaughtry*,

222 Wis. 2d 68, 72, 586 N.W.2d 63 (Ct. App. 1998). Accordingly, we affirm the dismissal of Ledford's certiorari petition.

¶8 To obtain certiorari review, Ledford must exhaust his remedies by obtaining a final decision or notice from the department. He should again contact the department to do that. If the department will not provide him with a final decision or notice, Ledford may have a remedy by a petition to the circuit court for a writ of mandamus.

By the Court.—Order affirmed.

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

