**DEANE ROWLAND BROWN. Why his case for returning to Maine was dismissed**

**On November 13, 2006, Deane Brown was without warning shipped out of Maine.**  [Brown's federal complaint](http://penbay.org/wrfr/prisonproject/browncomplaint.pdf) filed); was dismissed for the following reasons, according to US Magistrate Judge Martha Kravchuk, in her [8/28/08 response](But%2C%20at%20the%20same%20time%20I%20do%20not)  and in [her 9/3/08 response to MDOC's motion for dismissal](http://penbay.org/wrfr/prisonproject/legal/recdecexhclms.pdf) :

**1.  Brown did not exhaust his administrative remedies first.**

2.  Brown's attorney failed to seek out and interview the three "John Does", so all complaints against them were dropped

3.  Brown's attorney failed to challenge any of the DOC defendants' "statement of facts", so the court had to assume Brown agreed with them. (!)

***So the denial was a "process" thing. It was not on the merits of his case,*** which Kravchuk actually agreed with in major parts. See below.

**DETAILS**

"I do not know," Krachuk wrote in [her Recommended Decision on the case](http://penbay.org/wrfr/prisonproject/legal/recdecexhclms.pdf), "what prevented counsel from complying with the local rule by submitting a paragraph by paragraph response to the defendants' statement of fact with record citations to the Brown affidavit and/or generating a statement of additional facts with record citations to the affidavit that would have given the defendants an opportunity to respond to Brown's facts in a reasonable manner....Accordingly, I proceed to analyze the merits of this motion on the basis of the facts set forth by the defendants, treating them as undisputed."

“...I do not believe Magnusson has demonstrated that he is entitled to dismissal of the entire complaint as against him for failure to state a claim because the complaint sufficiently alleges that Magnusson should be held liable as a supervisor of Warden Merrill as to Brown's First Amendment retaliation claim regarding the news correspondent prohibition.”

That said, I agree with Magnusson that, per District of Maine Local Rule 7(b), Brown

"has waived any objection to the dismissal as to this defendant of his First Amendment claims of retaliation by being placed in administrative segregation and by being transferred to Maryland and his Eighth Amendment inhumane conditions and Fourteenth Amendment due process claims, as well as the state rights claims he made a perfunctory mention of in his complaint."

“**Local Rule 7(b) Objections to Motions**

*Unless within 21 days after the filing of a motion the opposing party files*

*written objection thereto, incorporating a memorandum of law, the opposing party shall be deemed to have waived objection.*

*Any objections shall include citations and supporting authorities and*

*affidavits and other documents setting forth or evidencing facts on which the*

*objection is based. The deemed waiver imposed herein shall not apply to motionsfiled during trial.”*

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**Excerpts from Kravchuk’s August 28, 2008 Recommended Decision**

To survive a motion to dismiss, Brown must allege "a plausible entitlement to relief." Id. at 1967. Accord Cook v. Gates, 528 F.3d 42, 48 (1st Cir. 2008).

“…I conclude that even without the evidence relied upon here, Brown has adequately stated a claim against Magnusson as Merrill's supervisor with regards to the decision to prohibit Brown from acting as news correspondent in retaliation for Brown's exercise of his First Amendment rights.

**The complaint sufficiently alleges** that Warden Merrill prohibited Brown from acting as correspondent to the press. I do not believe Magnusson has demonstrated that he is entitled to dismissal of the entire complaint as against him for failure to state a claim because the complaint sufficiently alleges that Magnusson should be held liable as a supervisor of Warden Merrill as to Brown's First Amendment retaliation claim regarding the news correspondent prohibition.3

“…my recommendation is that Magnusson's motion to dismiss (Doc.No. 24) be denied in part with respect to the supervisory liability news correspondent prohibition First Amendment retaliation claim. I further recommend that the motion be granted in part, on the basis of waiver, as to Brown's First Amendment administrative segregation and transfer retaliation claims, any Eighth Amendment inhumane conditions claim, any Fourteenth Amendment due process claim, and any state rights claim under department policies and procedures.”

**Excerpts from Kravchuk's recommended decision** from which the above points are drawn:

Page 3 & 4 "Brown is represented by counsel. In responding to the defendants' motion Brown has file a responsive memorandum (see Doc. No. 42) but no response to the defendants' statement of fact or a statement of additional facts. In his opposition memorandum Brown references his affidavit statements "attesting to and expounding upon the various incidents raised in Defendants’ Motion for Summary Judgment on Unexhausted Claims." (Opp'n Mem. at 2.) I do not know what prevented counsel from complying with the local rule by submitting a paragraph by paragraph response to the Case 1:07-cv-00061-JAW Document 60 Filed 09/03/2008 Page 2 of 10
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defendants' statement of fact with record citations to the Brown affidavit and/or generating a statement of additional facts with record citations to the affidavit that would have given the defendants an opportunity to respond to Brown's facts in a reasonable manner. Compare See Clarke v. Blais, 473 F. Supp. 2d 124, 128 (D. Me. 2007) (incorporating pro se litigant's affidavit testimony despite non-compliance with Local Rule 56) [[Note: *“Local Rule 56 states that each party shall set forth the facts “as to which the moving party contends there is no genuine issue of material fact to be tried.”.”*]] As it stands, there is no reason to expect these defendants to respond to each paragraph of the Brown affidavit as if it were a statement of fact or to attempt to identify which of the affidavit statements are material to Brown's opposition. Accordingly, I proceed to analyze the merits of this motion on the basis of the facts set forth by the defendants, treating them as undisputed.

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"I agree with the defendants that there is a significant problem in the fact that Brown has not responded to their statement of facts or generated his own statement of additional facts to support his assertion that he was frustrated in his efforts to exhaust his remedies."
.....
With respect to what can be described as Brown's principle claims, that of the retaliatory acts of placing him in administrative segregation and transferring him out of state, the defendants argue that he never completed efforts to grieve the segregation determinations and that he never filed an appeal of his transfer...."There have been no appeals filed by Deane Brown of the decision to transfer him to Maryland. (Id. ¶ 6.)"

Page 9 Finally, I recommend that any claims Brown envisioned against the five unnamed "John Does" be dismissed without prejudice pursuant to Federal Rule of Civil Procedure 4(m) for failure to make service.

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**Conclusion**. For the reasons set forth above, I recommend that the Court grant summary judgment to the defendants on Brown's Count I First Amendment claim because he did not exhaust it as required by 42 U.S.C. § 1997e(a), that it dismiss Brown's Count IV Eighth Amendment claim pursuant to 42 U.S.C. § 1997e(c), and that it dismiss without prejudice all claims against the five "John Does" for failure to make service.

"....on Brown's Count II retaliation claims for failure to exhaust, although in a separate opinion on a separate motion for summary judgment, I recommend that Defendants O'Farrell, Merrill, and Magnusson be granted summary judgment on that count for the reasons stated in that companion recommended decision."

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