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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JERALD RANDALL,

Plaintiff,

No. 2: 09-cv-2765 KJN P

vs.

M.D. McDONALD, et al.,

Defendants.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____ /

I. Introduction

Plaintiff is a state prisoner proceeding without counsel and in forma pauperis, with an action filed pursuant to 42 U.S.C. § 1983. Pending before the court is defendants’ December 3, 2010 motion to dismiss based upon the grounds that plaintiff failed to exhaust administrative remedies. After carefully reviewing the record, the undersigned concludes that defendants’ motion to dismiss should be denied.

A. Legal Standard re Exhaustion

The Prison Litigation Reform Act of 1995 (“PLRA”) amended 42 U.S.C. § 1997e to provide that “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).

1 Exhaustion in prisoner cases covered by § 1997e(a) is mandatory. Porter v. Nussle, 534 U.S.
2 516, 524 (2002). Exhaustion is a prerequisite for all prisoner suits regarding conditions of
3 confinement, whether they involve general circumstances or particular episodes, and whether
4 they allege excessive force or some other wrong. Porter, 534 U.S. at 532.

5 Exhaustion of all “available” remedies is mandatory; those remedies need not
6 meet federal standards, nor must they be “plain, speedy and effective.” Id. at 524; Booth v.
7 Churner, 532 U.S. 731, 740 n.5 (2001). Even when the prisoner seeks relief not available in
8 grievance proceedings, notably money damages, exhaustion is a prerequisite to suit. Booth, 532
9 U.S. at 741. A prisoner “seeking only money damages must complete a prison administrative
10 process that could provide some sort of relief on the complaint stated, but no money.” Id. at 734.
11 The fact that the administrative procedure cannot result in the particular form of relief requested
12 by the prisoner does not excuse exhaustion because some sort of relief or responsive action may
13 result from the grievance. See Booth, 532 U.S. at 737; see also Porter, 534 U.S. at 525 (purposes
14 of exhaustion requirement include allowing prison to take responsive action, filtering out
15 frivolous cases, and creating administrative records).

16 However, a prisoner need not exhaust further levels of review once he has either
17 received all the remedies that are “available” at an intermediate level of review, or has been
18 reliably informed by an administrator that no more remedies are available. Brown v. Valoff, 422
19 F.3d 926, 934-35 (9th Cir. 2005). Because there can be no absence of exhaustion unless some
20 relief remains available, a movant claiming lack of exhaustion must demonstrate that pertinent
21 relief remained available, whether at unexhausted levels or through awaiting the results of the
22 relief already granted as a result of that process. Brown, 422 F.3d at 936-37.

23 As noted above, the PLRA requires proper exhaustion of administrative remedies.
24 Woodford v. Ngo, 548 U.S. 81, 83-84 (2006). “Proper exhaustion demands compliance with an
25 agency’s deadlines and other critical procedural rules because no adjudicative system can
26 function effectively without imposing some orderly structure on the course of its proceedings.”

1 Id. at 90-91. Thus, compliance with prison grievance procedures is required by the PLRA to
2 properly exhaust. Id. The PLRA’s exhaustion requirement cannot be satisfied “by filing an
3 untimely or otherwise procedurally defective administrative grievance or appeal.” Id. at 83-84.

4 The State of California provides its prisoners the right to appeal administratively
5 “any departmental decision, action, condition or policy which they can demonstrate as having an
6 adverse effect upon their welfare.” Cal. Code Regs. tit. 15, § 3084.1(a) (2010). It also provides
7 them the right to file appeals alleging misconduct by correctional officers and officials. Id. at
8 § 3084.1(e). In order to exhaust available administrative remedies within this system, a prisoner
9 must proceed through several levels of appeal: (1) informal resolution, (2) formal written appeal
10 on a 602 inmate appeal form, (3) second level appeal to the institution head or designee, and
11 (4) third level appeal to the Director of the California Department of Corrections and
12 Rehabilitation. Barry v. Ratelle, 985 F.Supp. 1235, 1237 (S.D. Cal. 1997) (citing Cal.Code
13 Regs. tit. 15, § 3084.5). A final decision from the Director’s level of review satisfies the
14 exhaustion requirement under § 1997e(a). Id. at 1237-38.

15 Non-exhaustion under § 1997e(a) is an affirmative defense which should be
16 brought by defendants in an unenumerated motion to dismiss under Federal Rule of Civil
17 Procedure 12(b). Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). Moreover, the court
18 may look beyond the pleadings to determine whether a plaintiff exhausted his administrative
19 remedies. Id. at 1119-20.

20 Although exhaustion is mandatory, an inmate must only exhaust administrative
21 remedies “as are available.” 42 U.S.C. § 1997e(a). Under the Ninth Circuit law, exhaustion is
22 excused when improper screening of grievances occurs. Sapp v. Kimbrell, 623 F.3d 813, 822
23 (9th Cir. 2010) (citing Nunez v. Duncan, 591 F.3d 1217, 1226 (9th Cir. 2010)). Sapp establishes
24 that “improper screening of an inmate’s administrative grievances renders administrative
25 remedies ‘effectively unavailable’ such that exhaustion is not required under [§ 1997e(a)].” Id.
26 at 823. If prison officials screen out an inmate’s grievances or appeals for improper reasons, the

1 inmate cannot pursue the necessary administrative process, and, consequently, his administrative
2 remedies become “unavailable.” Id.

3 B. Plaintiff’s Allegations

4 This action is proceeding on the amended complaint filed May 10, 2010, as to
5 defendants McDonald and Robertson. Plaintiff alleges that he was placed on three lockdowns.
6 The first lockdown began on December 27, 2008, and lasted for thirty days. The second
7 lockdown began on June 29, 2009, and lasted for fifty days. The third lockdown began on
8 September 11, 2009, and ended on October 20, 2009. Plaintiff alleges that he was not allowed
9 outdoor exercise during these lockdowns, as a result of which he suffered physical ailments and
10 depression.

11 C. Analysis

12 Defendants argue that plaintiff failed to exhaust administrative remedies because
13 all of his grievances regarding the lockdowns were denied as untimely. In particular, defendants
14 initially argued that plaintiff failed to file his grievances within fifteen working days of the dates
15 the lockdowns commenced. In California, the date for filing a grievance is fifteen working days
16 from the date the administrative decision or action being complained of is taken. See Cal. Code
17 Regs. tit. 15, § 3084.6(c). Defendants also observe that plaintiff did not appeal the decisions
18 denying his appeals as untimely to the third level of review.

19 Regarding the lockdown that began on December 27, 2008, defendants state that
20 there is no record of plaintiff submitting an inmate appeal regarding this matter between
21 December 15, 2008 and January 28, 2009. (Dkt. No. 20-2, at 2.) Defendants state that on
22 February 13, 2009, plaintiff submitted a staff complaint against defendant McDonald regarding
23 the lockdown. (Id., at 2-3.) After reviewing the complaint, on February 13, 2009, the Hiring
24 Authority decided not to accept the complaint as a staff complaint. (Id., at 3.) The complaint
25 was sent to the appeals office for treatment as an ordinary inmate appeal. (Id.) The appeal was
26 then screened out as it had not been filed within fifteen working days from the event or decision

1 being appealed. (Id.) Plaintiff did not appeal the screening out of his appeal through the third
2 formal level of review. (Id.)

3 Regarding the lockdown that began on June 29, 2009, defendants state that on
4 August 31, 2009 plaintiff submitted an appeal. (Id.) This appeal was also screened out due to
5 plaintiff's failure to submit the appeal within fifteen working days of the event or decision being
6 appealed. (Id.) Plaintiff re-submitted the same appeal on September 11, 2009, September 22,
7 2009, and September 30, 2009. (Id.) All three of these appeals were screened out due to
8 plaintiff's failure to submit them within fifteen working days. (Id.) Plaintiff did not appeal the
9 screening out of this appeal through the third formal level of review. (Id.)

10 Regarding the lockdown that began September 11, 2009, defendants state that on
11 October 28, 2009, plaintiff submitted an appeal. (Id., at 3-4.) This appeal was screened out for
12 plaintiff's failure to submit it within fifteen working days. (Id., at 4.) Plaintiff re-submitted this
13 appeal on November 9, 2009. (Id.) This appeal was also screened out as untimely. (Id.)
14 Plaintiff did not appeal the screening out of this appeal through the third formal level of review.
15 (Id.)

16 In his opposition, plaintiff argues that his grievances were improperly screened
17 out as untimely because he was not challenging the initiation of a lockdown, but instead was
18 challenging the length of the lockdowns and the injuries he suffered as a result of being locked
19 down for long periods of time. The undersigned observes that plaintiff's grievances were
20 submitted within fifteen working days of the dates the lockdowns ended.

21 In his opposition, plaintiff also argues that a grievance he filed regarding a
22 different lockdown was not screened out as untimely even though it was filed more than fifteen
23 days after the lockdown began. Attached as an exhibit to plaintiff's opposition is a grievance he
24 filed on January 20, 2011, challenging a lockdown that began on December 10, 2010, and which
25 ended on January 20, 2011. (Dkt. No. 32, at 15.) Attached as an exhibit to plaintiff's opposition
26 is a form titled "Inmate Appeal Assignment Notice." (Id., at 14.) This form indicates that

1 plaintiff's grievance regarding the lockdown that began on December 10, 2010, was sent to the
2 staff for a first level response. (Id.) In other words, this grievance was not screened out as
3 untimely.

4 In his opposition, plaintiff further argues that his attempts to appeal his screened
5 out grievances to the next level were improperly denied. In support of this claim, plaintiff cites
6 defendant Robertson's response to his attempt to appeal his grievance challenging the September
7 11, 2009 lockdown to the next level of review. Defendant Robertson screened out this appeal as
8 an abuse of the appeal process because plaintiff had not reasonably demonstrated that the appeal
9 issue adversely affected plaintiff's welfare. (Dkt. 32, at 12.) Defendant Robertson also wrote on
10 the form, "The appeals screening process is not an appealable issue. You do not decide how your
11 appeal is processed." (Id.)

12 On May 3, 2011, defendants were ordered to file further briefing responding to
13 plaintiff's claim that his January 20, 2011 grievance challenging the lockdown that began
14 December 10, 2010 was processed on the merits rather than screened out as untimely.
15 Defendants were also ordered to address the issue of when a grievance challenging the duration
16 of a lockdown is considered timely. Finally, defendants were ordered to address plaintiff's claim
17 that his attempts to appeal his screened out grievance to the next level was improperly denied.

18 In their further briefing, defendants state that inmates challenging the duration of
19 lockdowns have fifteen days from the conclusion of the lockdowns to submit their appeals.
20 Defendants state that plaintiff's January 20, 2011 grievance challenged the duration of the
21 lockdown, but his appeals regarding the lockdowns challenged in the instant action did not.
22 Defendants state that plaintiff's January 20, 2011 appeal explicitly stated that he was challenging
23 the "length of confinement." (See Dkt. No. 32, at 15.)

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1 In their further briefing, defendants also state that the decision to screen out an
2 appeal is not appealable issue. Defendants refer to the declaration of defendant Robertson
3 attached to their further briefing which describes the procedures for challenging appeals screened
4 out as untimely:

5 The decision to screen out an inmate appeal is not an appealable
6 issue. However, inmates will be provided with a CDCR Form 695
7 which provides them with an explanation as to why the appeal was
8 screened out and instructions regarding what action the inmate can
9 take, if any to comply with departmental regulations so he may
10 resubmit his inmate appeal and not have it screened out. In the
11 case of an appeal being screened out for a failure to comply with
12 time limits, the inmate will be provided the opportunity to explain
13 why he could not have submitted the appeal within applicable time
14 limits. Once an appeal has been cancelled, an inmate may file a
15 separate appeal on the cancellation decision. This information is
16 provided to the inmate on the CDCR Form 695.

17 (Dkt. No. 35-1, at 10.)

18 Defendants argue that if it was plaintiff's position was that his appeals were
19 improperly screened out, then once they were cancelled, he could appeal that cancellation
20 decision. Defendants argue that there is no record of plaintiff submitting any separate appeal
21 regarding the cancelling of his appeals as untimely.

22 For the following reasons, the undersigned finds that plaintiff's grievances were
23 improperly screened out as untimely.

24 Attached to plaintiff's amended complaint is a copy of his grievance filed August
25 31, 2009, challenging the June 29, 2009 lockdown. (Dkt. 13, at 25.) In this grievance, plaintiff
26 argued that he was wrongfully placed on lockdown as he was not involved in the incident that led
to its imposition. (Id., at 26.) Plaintiff also argued that during the lockdown, he was denied
access to the exercise yard, the canteen, law library, dayroom and laundry. (Id.) Plaintiff also
argued that during the lockdown he was subject to painful searches. (Id.) Plaintiff also stated
that,

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1 After lockdown ended and I made it to the recreation yard I could
2 feel the negative affects of being denied exercise for 50 days. The
3 lockdown lasted for 50 days. I had to put in a medical slip because
4 I felt weak. I had pain and itching in my legs and my breathing
5 was weak. I suffered injury, both physically and emotionally.

6 (Id.)

7 Plaintiff's August 31, 2009 grievance challenging the June 29, 2009 lockdown
8 had sufficient language to put prison officials on notice that he was challenging the length of this
9 lockdown and the injuries he suffered as a result. This grievance stated the number of days the
10 lockdown lasted and that the length of the lockdown caused plaintiff to suffer injuries.
11 Defendants' argument that this grievance did not challenge the duration of the June 20, 2009
12 lockdown is without merit.

13 According to defendants, plaintiff could have appealed the screening out of his
14 appeals by filing a new grievance after the screened out appeals were cancelled. However, in a
15 September 30, 2009 memorandum screening out one of plaintiff's appeals as untimely, defendant
16 Robertson advised plaintiff that "if you would like to pursue this matter further, you must submit
17 an explanation and supporting documentation explaining why you did not or could not file your
18 appeal within the 15 working day time limit." (Dkt. No. 13, at 18.)

19 Plaintiff apparently followed the procedure described in the September 30, 2009
20 memorandum for challenging his screened out appeal. Plaintiff sent the appeals coordinator, i.e.
21 defendant Robertson, a memorandum informing him that his appeal challenging the June 29,
22 2009 lockdown was improperly screened out as untimely because he was challenging the length
23 of the lockdown. (Id., at 19.) In this memorandum, plaintiff stated that the "event was
24 continuous, the violations were continuous . . ." (Id.) After reviewing this memorandum,
25 defendant Robertson apparently still found that plaintiff's appeal was untimely.

26 Plaintiff's grievance and memorandum regarding the lockdown imposed June 29,
2009, were both improperly screened out as untimely. For these reasons, plaintiff was not
required to file a separate appeal challenging the screened out grievance. Sapp, supra.

1 Accordingly, defendants' motion to dismiss plaintiff's claim challenging the lockdown imposed
2 June 29, 2009, should be denied.

3 Plaintiff's grievance challenging the lockdown that began on September 11, 2009,
4 states that plaintiff should not have been placed on lockdown because he had nothing to do with
5 the incidents leading to the imposition of the lockdown. (Id., at 32.) Plaintiff goes on to state,

6 Still, I was denied outside exercise, contact visits, canteen, library
7 access, laundry exchange, phone calls, dayroom. The lack of
8 exercise negatively affected my health. I have asthma and high
9 blood pressure so outdoor exercise is absolutely necessary to keep
10 myself health. (See sick call slip attached.) I suffered and I'm still
11 suffering."

12 (Id.)

13 After the grievance was screened out as untimely, plaintiff sent a memorandum to
14 the appeals coordinator explaining that he was appealing the injuries he suffered after the
15 lockdown ended:

16 First and foremost, we (I) were (was) placed on lockdown on
17 September 11th. The damage done to my health was recognized
18 after I tried to exercise. My rights were violated until October 20,
19 2009. To simplify it for you, on October 20th 2009 my rights were
20 violated. If you don't want to process the 602 don't process it. I'm
21 not going to play these childish games...

22 (Id., at 30.)

23 The original grievance challenging the lockdown imposed September 11, 2009,
24 was less clear that plaintiff challenged its duration. However, plaintiff's memorandum submitted
25 after the grievance was screened out as untimely made it clear that he was challenging the
26 duration of the lockdown. Because this grievance, and in particular the memorandum clarifying
its scope, was improperly screened out as untimely, the motion to dismiss for failure to exhaust
administrative remedies as to the lockdown imposed on September 11, 2009, should be denied.

Sapp, supra.

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1 The court record contains little documentation regarding plaintiff's attempts to
2 challenge the lockdown imposed on December 27, 2008. Defendants state that because
3 plaintiff's grievance regarding this lockdown was screened out as untimely, the appeals office did
4 not maintain a copy of the appeal. (Dkt. No. 20-2, at 3.) Plaintiff also has not submitted a copy
5 of this appeal. In his opposition, plaintiff admits that he does not have these documents.
6 However, plaintiff argues that this grievance was also improperly screened out as untimely.

7 The failure to exhaust administrative remedies as required by § 1997e(a) is an
8 affirmative defense, and a defendant bears the burden of raising and proving that the plaintiff has
9 not exhausted. Jones v. Bock, 549 U.S. 199, 216 (2007); Wyatt v. Terhune, 315 F.3d 1108, 1117
10 n.9 (9th Cir. 2003). Because the record demonstrates that plaintiff's two grievances challenging
11 the lockdowns imposed June 29, 2009, and September 11, 2009, were improperly screened out as
12 untimely, even after plaintiff made clear that he was challenging their duration, the undersigned
13 does not find that defendants have met their burden of demonstrating that plaintiff failed to
14 exhaust administrative remedies as to his claim challenging the lockdown imposed on December
15 27, 2008. The fact that two of plaintiff's grievances challenging the duration of lockdowns were
16 improperly screened out as untimely suggests that plaintiff's grievance challenging the December
17 27, 2008 lockdown was improperly screened out as well.

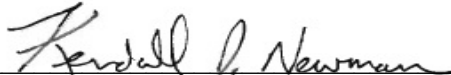
18 Accordingly, IT IS ORDERED that the Clerk of the Court shall appoint a district
19 judge to this action;

20 IT IS HEREBY RECOMMENDED that defendants' motion to dismiss for failure
21 to exhaust administrative remedies (Dkt. No. 20) be denied.

22 These findings and recommendations are submitted to the United States District
23 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
24 one days after being served with these findings and recommendations, any party may file written
25 objections with the court and serve a copy on all parties. Such a document should be captioned
26 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the

1 objections shall be filed and served within fourteen days after service of the objections. The
2 parties are advised that failure to file objections within the specified time may waive the right to
3 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

4 DATED: June 13, 2011

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7 KENDALL J. NEWMAN
8 UNITED STATES MAGISTRATE JUDGE

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