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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

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William Avery Patterson,

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No. CV 07-2627-PHX-GMS (DKD)

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Plaintiff,

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**ORDER**

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vs.

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Joseph M. Arpaio, et al.,

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Defendants.

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Plaintiff William Avery Patterson brought this civil rights action under 42 U.S.C.

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§ 1983 against Maricopa County Sheriff Joseph M. Arpaio (Doc. #1).<sup>1</sup> Defendant moved

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to dismiss for failure to exhaust administrative remedies (Doc. #9). The motion is fully

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briefed (Doc. ##11-12).

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The Court will grant Defendant’s motion and terminate the action.

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**I. Background**

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Plaintiff’s claims arose during his confinement in the Maricopa County Towers

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Jail in Phoenix, Arizona (Doc. #1 at 1). Plaintiff alleged that there were threats made

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against him and he was forced to request administrative segregation protective custody

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(*id.* at 4). Plaintiff claims that in protective custody, he was subjected to squalid living

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conditions and denied proper cleaning supplies and chemicals. He further claimed that

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there was no heat in the jail and that swamp coolers were run continuously all winter for

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<sup>1</sup>Upon screening, the Court dismissed Arizona State Capitol Police and Arizona State Capitol Police Officers Abril and Clark as Defendants (Doc. #6).

1 the purpose of imposing cruel and unusual punishment (id.). Finally, he alleged that the  
2 Towers Jail was infested with mice and rats (id.).<sup>2</sup> Plaintiff sued for injunctive and  
3 compensatory relief (id. at 6).

4 The Court ordered an Answer, and Defendant filed a Motion to Dismiss (Doc. ##6,  
5 9). In his motion, Defendant contended that Plaintiff failed to exhaust his administrative  
6 remedies as required by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a)  
7 (Doc. #9). Defendant proffered the affidavit of Susan Fisher, a Sergeant assigned to the  
8 Inmate Hearing Unit (id., Ex. 1, Fisher Aff. ¶ 1). Fisher averred that the jail’s grievance  
9 system, outlined in Policy DJ-3, does not restrict the type of issue or grievance content  
10 that an inmate may submit (id. ¶¶ 3-4). She further stated that inmates are notified of the  
11 grievance procedures when they receive a copy of the “MCSO Rules and Regulations for  
12 Inmates” (id. ¶ 5). According to the Sheriff’s Office records, Plaintiff received a copy of  
13 these “Rules and Regulations” (id. ¶ 9, Ex. D). Fisher stated that the records also show  
14 that Plaintiff did not file any grievances related to the claims raised in his Complaint (id. ¶  
15 8). Defendant submitted copies of grievances Plaintiff filed while at the jail (id., Ex. 2).  
16 These grievances concern the amount of food given to inmates, Plaintiff’s need for a  
17 lower bunk, and his request for medical attention for a staph infection (id.). Defendant  
18 also proffered a copy of Policy DJ-3 (id., Ex. A).

19 The Court issued an Order informing Plaintiff of his obligation to respond and the  
20 evidence necessary to successfully rebut Defendant’s contentions (Doc. #10).<sup>3</sup> In his  
21 response, Plaintiff stated that he was not given a copy of the “Rules and Regulations”  
22 until April 2008, and therefore, Plaintiff was unaware of the rules governing the  
23 grievance procedures prior to filing his civil action (Doc. #11). He proffered a copy of  
24 his signed acceptance form showing his receipt of the “Rules and Regulations” on April  
25 10, 2008 (id., Ex. 1). Plaintiff also argued that administrative remedies are not always  
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27 <sup>2</sup>Count I, which alleged constitutional violations in connection with Plaintiff’s arrest,  
28 was dismissed pursuant to the abstention doctrine (Doc. #6).

<sup>3</sup>Notice required under Wyatt v. Terhune, 315 F.3d 1108, 1120 n. 14 (9th Cir. 2003).

1 available nor are they provided in a timely manner (id.). He submitted copies of his April  
2 2008 grievance and appeal concerning his broken reading glasses. According to these  
3 forms, it took the Shift Supervisor 17 days to respond, which exceeds the time limit for  
4 responding under Policy DJ-3 (id., Exs. 2-3).

5 In reply, Defendant referred to the Complaint, in which Plaintiff alleged that he did  
6 not file grievances on his claims because he was told that the issues were not grievable  
7 (Doc. #12). Defendant argued that Plaintiff did not offer any specific evidence of when,  
8 where, or how he was denied the opportunity to grieve his claim, nor did he identify who  
9 told him his claims were not grievable (id. at 2-3). Defendant also maintained the  
10 Plaintiff failed to show that he was diligent in attempting to exhaust the grievance  
11 procedures (id. at 3).

12 Plaintiff then filed several notices and motions of “supporting” or “continuing  
13 facts” (Doc. ##15-17, 20-21, 23, 28). He attached copies of grievances and inmate  
14 medical requests to these notices and motions. The Court denied Plaintiff’s motions but  
15 noted that when ruling on the Motion to Dismiss, it may consider any evidence in the  
16 record related to grievances (Doc. ##19, 26).

## 17 **II. Exhaustion**

18 A prisoner must first exhaust “available” administrative remedies before bringing  
19 an action. See 42 U.S.C. § 1997e(a); Vaden v. Summerhill, 449 F.3d 1047, 1050 (9th  
20 Cir. 2006); Brown v. Valoff, 422 F.3d 926, 934-35 (9th Cir. 2005). He must complete the  
21 administrative review process in accordance with the applicable rules. See Woodford v.  
22 Ngo, 126 S. Ct. 2378, 2384 (2006). Exhaustion is required for all suits about prison life,  
23 Porter v. Nussle, 534 U.S. 516, 523 (2002), regardless of the type of relief offered  
24 through the administrative process, Booth v. Churner, 532 U.S. 731, 741 (2001).

25 Exhaustion is an affirmative defense. Jones v. Bock, 127 S. Ct. 910, 919-21  
26 (2007). Defendant bears the burden of raising and proving the absence of exhaustion.  
27 Wyatt, 315 F.3d at 1119. Because exhaustion is a matter of abatement in an  
28 unenumerated Rule 12(b) motion, a court may look beyond the pleadings to decide

1 disputed issues of fact. Id. at 1119-20. Further, a court has broad discretion as to the  
2 method to be used in resolving the factual dispute. Ritza v. Int'l Longshoremen's &  
3 Warehousemen's Union, 837 F.2d 365, 369 (9th Cir. 1988) (quotation omitted).

4 Contrary to Defendant's contention, compliance with the PLRA exhaustion  
5 requirement as to some, but not all, claims does not warrant dismissal of the entire action  
6 (see Doc. #9 at 3). Jones, 127 S. Ct. at 924-26. If the complaint contains both exhausted  
7 and unexhausted claims, the Court should proceed with the exhausted claims. Id. at 924.

### 8 **III. Analysis**

9 As stated, Defendant bears the burden to prove nonexhaustion and therefore must  
10 demonstrate that there were remedies available to Plaintiff. See Wyatt, 315 F.3d at 1119;  
11 Brown, 422 F.3d at 936-37. Defendant submits evidence demonstrating that a grievance  
12 system was available at the jail, that Plaintiff had access to that system, and that  
13 Plaintiff's claims were grievable (Doc. #9, Ex. 1, Fisher Aff. ¶¶ 2-4; Ex. A; Ex. 2).

14 Plaintiff's assertions regarding the jail's grievance procedures are inconsistent. In  
15 his Complaint, he checked the box indicating that administrative remedies existed at the  
16 jail and he wrote that when he requested administrative remedies, they were denied to him  
17 (Doc. #1 at 4). Plaintiff did not provide any specific allegations about who denied him  
18 access to administrative remedies or when this denial occurred. In his response  
19 memorandum, Plaintiff does not repeat this assertion. Instead, Plaintiff argues that he had  
20 no knowledge of the grievance procedures either before or at the time he filed this lawsuit  
21 (Doc. #11 at 1). He states that he was not aware of the grievance policy until April 2008,  
22 when he received a copy of the "Rules and Regulations" (id.). But Defendant proffers  
23 copies of grievances that Plaintiff submitted on January 3, January 20, and February 12,  
24 2008 (Doc. #9, Ex. 2). Thus, Plaintiff had knowledge of the grievance procedures before  
25 April 2008.

26 The grievances Plaintiff submitted with his notices and motions concern his  
27 request for new reading glasses and for treatment of an ingrown toe nail, a staph  
28 infection, and a back injury (Doc. ##15-17, 20-21). None of these issues relate to the

1 claims in Plaintiff's Complaint. And even if they did, the grievances do not help Plaintiff  
2 because they all postdate the Complaint, and the PLRA requires exhaustion *before* an  
3 action is filed. McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002); see Vaden, 449  
4 F.3d at 1051.

5 Plaintiff's generalized and inconsistent assertions regarding the grievance  
6 procedures are insufficient to overcome Defendant's specific evidence that a grievance  
7 system was available at the jail for Plaintiff's claims. On the record before the Court,  
8 Plaintiff failed to exhaust available administrative remedies for the claims in his  
9 Complaint. Defendant's motion will therefore be granted, and Plaintiff's action will be  
10 dismissed without prejudice.

11 **IT IS ORDERED** that Defendant's Motion to Dismiss (Doc. #9) is **granted**. The  
12 Clerk of Court must dismiss this action without prejudice and enter judgment accordingly.

13 DATED this 6<sup>th</sup> day of October, 2008.

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G. Murray Snow  
United States District Judge