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

Edward Charles Johnson,	)	No. CV 08-1097-PHX-MHM (GEE)
Plaintiff,	)	<b>ORDER</b>
vs.	)	
Dora Schiro, et al.,	)	
Defendants.	)	

Plaintiff Edward Charles Johnson brought this civil rights action under 42 U.S.C. § 1983 against Ball, a Correctional Officer (CO) IV with the Arizona Department of Corrections (ADC) (Doc. #1).<sup>1</sup> Defendant filed a Motion to Dismiss for failure to exhaust administrative remedies and, alternatively, for failure to state a claim (Doc. #22). Plaintiff failed to respond.

The Court will grant Defendant’s motion.

**I. Background**

Plaintiff’s claim arose during his confinement at the Arizona State Prison Complex-Lewis Barchey Unit (Doc. #1 at 1). Plaintiff alleged that in response to his grievances, Defendant attempted to endanger Plaintiff’s personal safety by forcing Plaintiff to enter ADC protective custody (*id.* at 4). Plaintiff claimed that Defendant knew that Plaintiff’s safety would be in danger in protective custody, yet displayed malice in forcing the protective

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<sup>1</sup>Upon screening, the Court dismissed 21 other named Defendants (Doc. #5).

1 custody assignment. He further claimed that another officer—CO III Martyn—placed  
2 Plaintiff in danger after he filed a grievance and Defendant failed to take action in response  
3 to Martyn’s actions (id.).<sup>2</sup>

4 The Court screened Plaintiff’s Complaint and ordered service on Defendant (Doc. #5).  
5 Defendant filed an Answer (Doc. #9), and the Court issued a Scheduling Order (Doc. #10).  
6 Then, on March 4, 2009, Defendant filed her Motion to Dismiss for failure to exhaust  
7 administrative remedies and, alternatively, for failure to state a claim (Doc. #22).

## 8 **II. Motion to Dismiss**

### 9 **A. Defendant’s Contentions**

10 In her motion, Defendant contends that Plaintiff failed to exhaust his administrative  
11 remedies as required by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a)  
12 (id.). In support, Defendant submits the affidavit of CO III Golder, the Barchey Unit  
13 Grievance Coordinator (id., Ex. A, Golder Aff. ¶¶ 1-2). Golder explained that the ADC  
14 inmate grievance system is governed by Department Order (DO) 802—Inmate Grievance  
15 System (id. ¶ 5; Attach. 1). Golder attested that a copy of DO 802 is available to inmates in  
16 each prison unit’s library (id. ¶ 7). Golder stated that under DO 802, inmates may grieve  
17 issues related to among other things, staff, visitation, mail, institutional procedures, medical  
18 care, and conditions of confinement (id. ¶ 6).

19 Golder described the steps in a staff grievance: (1) within 10 days of a specific  
20 problem, an inmate submits an inmate letter to his assigned CO III to attempt to informally  
21 resolve the complaint; (2) if the inmate is not satisfied with the CO III’s response, he may  
22 file a formal grievance to the Grievance Coordinator, in which he must describe his attempt  
23 at informal resolution; (3) the Grievance Coordinator logs the staff grievance and then  
24 forwards it to the Warden, Deputy Warden, or Administrator for review and response; (4) if  
25 the inmate is not satisfied with the response, he may submit a grievance appeal to the ADC  
26 Director, whose response is final (id. ¶ 8).

27 Golder attested that the Grievance Coordinator maintains a record of all processed and  
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<sup>2</sup>The Court dismissed Counts I, III, and IV for failure to state a claim (Doc. #5).

1 unprocessed inmate grievances (id. ¶ 10). According to Golder, a review of the Barchey Unit  
2 grievance records reflects that since his confinement began in February 2008, Plaintiff filed  
3 three inmates letters: (1) one dated March 28, 2008, which complained about the conduct of  
4 CO III Martyn (id. ¶ 14); (2) one dated April 7, 2008, which addressed three separate issues  
5 in violation of DO 802’s policy limiting each inmate letter to one issue (id. ¶ 16); and (3) one  
6 dated April 30, 2008, which claimed that Golder violated Plaintiff’s civil rights in his  
7 capacity as a Grievance Coordinator (id. ¶ 17).

8 Golder stated that Plaintiff filed just one inmate grievance on April 23, 2008 (id. ¶ 18).  
9 This inmate grievance claimed that Defendant failed to take action in response to the abuse  
10 of authority, unprofessionalism, and threat to personal safety that arose from CO III Martyn’s  
11 conduct (id. ¶ 12). Golder explained that in this grievance, Plaintiff failed to provide any  
12 documentation of his attempts at informal resolution, i.e. a copy of his inmate letter (id.).  
13 Golder stated that because Plaintiff failed to complete the first step and provide a copy of his  
14 inmate letter and because more than 10 days had passed since the date of the subject incident,  
15 he returned Plaintiff’s grievance as “unprocessed” on April 25 (id.).

16 Defendant argues that because Plaintiff failed to follow the procedural rules with  
17 respect to the single grievance concerning Defendant—the April 23, 2008  
18 grievance—Plaintiff did not properly exhaust his available administrative remedies and his  
19 claim should be dismissed (Doc. #22 at 6). Defendant further argues that even if Plaintiff’s  
20 March 28, 2008 inmate letter was construed as a complaint against Ball, Plaintiff’s April 23  
21 inmate grievance on the subject was untimely. Under DO 802, the CO III had 10 work  
22 days—until April 11—to respond to the inmate letter and Plaintiff then had 10 calendar  
23 days—until April 21—to file his inmate grievance (id. at 7). Defendant concludes that the  
24 April 23 inmate grievance was therefore untimely and constitutes a failure to properly  
25 exhaust (id.).

26 As to Plaintiff’s other two inmate letters, Defendant contends that they did not comply  
27 with the DO 802 requirement that all inmate letters begin with the statement, “I am  
28 attempting to informally resolve the following problem” (id. at 8).

1 Defendant also contends that Plaintiff failed to file any appeals to the ADC Director  
2 with respect to any complaint against Defendant (id.). Defendant proffers the affidavit of  
3 Aurora Aguilar, an ADC Hearing Officer assigned to the Central Office in Phoenix (id., Ex.  
4 B, Aguilar Aff. ¶ 1). Aguilar attested that upon review of the Grievance Appeal Log for the  
5 period of Plaintiff's confinement, she found that there were no grievance appeals to the ADC  
6 Director from Plaintiff concerning Defendant's conduct (id. ¶ 3).

7 Defendant proffers a copy of DO 802 (id., Ex. A), and copies of Plaintiff's inmate  
8 letters and grievances (id., Attachs. 2-7).

9 In the alternative to nonexhaustion, Defendant argues that Plaintiff failed to state a  
10 constitutional claim because he failed to allege that Defendant actually harmed him and he  
11 failed to allege that he was physically injured (Doc. #22 at 8-9). Defendant notes that there  
12 may be claims of injury in the Complaint outside of Count II or they may not be clear due  
13 to Plaintiff's poor handwriting, in which case, Defendant moves the Court for a more definite  
14 statement under Rule 12(e) (id. at 9). Otherwise, Defendant seeks dismissal for failure to  
15 state a claim (id.).

#### 16 **B. Plaintiff's Response**

17 The Court informed Plaintiff of his obligation to respond and the evidence necessary  
18 to successfully rebut Defendant's contentions (Doc. #24).<sup>3</sup> Plaintiff did not file a response.

19 Upon review of Defendant's motion, the Court noted that Defendant's certificate of  
20 service reflected that the motion was addressed to Plaintiff at the Barchey Unit; however, the  
21 address included the incorrect prisoner number (see Doc. #22 at 10). Further, Plaintiff had  
22 since been released from ADC custody. The Court therefore directed Defendant to resend  
23 a copy of the motion to Plaintiff's current address and provided an additional 30 days for  
24 Plaintiff to respond (Doc. #28).

25 Defendant filed his Notice that he resent a copy of the motion (Doc. #29). Plaintiff  
26 still did not file a response. The time for responding has expired, and the motion is ready for  
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28 <sup>3</sup>Notice required under Wyatt v. Terhune, 315 F.3d 1108, 1120 n. 14 (9th Cir. 2003).

1 ruling.

2 **III. Exhaustion**

3 **A. Legal Standard**

4 Under the PLRA, a prisoner must exhaust available administrative remedies before  
5 bringing a federal action concerning prison conditions. See 42 U.S.C. § 1997e(a); Griffin v.  
6 Arpaio, 557 F.3d 1117, 1119 (9th Cir. 2009). Exhaustion is required for all suits about  
7 prison life, Porter v. Nussle, 534 U.S. 516, 523 (2002), regardless of the type of relief offered  
8 through the administrative process, Booth v. Churner, 532 U.S. 731, 741 (2001). And a  
9 prisoner must complete the administrative review process in accordance with the applicable  
10 rules. See Woodford v. Ngo, 548 U.S. 81, 92 (2006).

11 Exhaustion is an affirmative defense. Jones v. Bock, 549 U.S. 199, 212 (2007). Thus,  
12 the defendant bears the burden of raising and proving the absence of exhaustion. Wyatt v.  
13 Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). Because exhaustion is a matter of abatement  
14 in an unenumerated Rule 12(b) motion, a court may look beyond the pleadings to decide  
15 disputed issues of fact. Id. at 1119-20. Further, a court has broad discretion as to the method  
16 to be used in resolving the factual dispute. Ritza v. Int'l Longshoremen's &  
17 Warehousemen's Union, 837 F.2d 365, 369 (9th Cir. 1988) (quotation omitted).

18 **B. Analysis**

19 As stated, Defendant bears the burden of proving lack of exhaustion and therefore  
20 must demonstrate that there were remedies available to Plaintiff. See Wyatt, 315 F.3d at  
21 1119; see also Brown v. Valoff, 422 F.3d 926, 936-37 (9th Cir. 2005). Defendant submits  
22 evidence that a grievance system was available at the jail for Plaintiff's claims (Doc. #22, Ex.  
23 A, Golder Aff. ¶¶ 6-7; Attach. 1). Defendant also proffers copies of Plaintiff's inmate letters  
24 and an inmate grievance, which demonstrate that Plaintiff was aware of the ADC grievance  
25 procedures (id., Attachs. 2-7).

26 In his Complaint, Plaintiff indicated that administrative remedies were available, that  
27 he submitted a request for relief on this claim, and that he appealed it to the highest level  
28 (Doc. #1 at 4). Plaintiff attached to his Complaint a copy of an inmate letter form dated April

1 20, 2008, and addressed to the Director; this form includes an ADC stamp indicating that it  
2 was “received” in the Director’s Office (id., Attach.). Plaintiff wrote on the form that this  
3 was an appeal to the Director pursuant to DO 802, and he complained about the due process  
4 violations connected to his parole status hearing (id.). There are no other grievance forms  
5 attached to the Complaint.

6 Assuming that the form submitted by Plaintiff constitutes an appeal to the Director,  
7 it concerns an issue unrelated to the claim against Defendant and, therefore, does not  
8 demonstrate exhaustion.

9 The grievance documents submitted by Defendant also support a finding that Plaintiff  
10 failed to exhaust his claim against Defendant. Although Defendant’s presentation of these  
11 documents is confusing, on their faces, the documents illustrate the following:

12 (1) Plaintiff submitted a March 28, 2008 inmate letter complaining about Martyn’s  
13 conduct and that it endangered Plaintiff (Doc. #22, Ex. A, Attach. 4).

14 Plaintiff followed this inmate letter with a inmate grievance on April 23, 2008, in  
15 which he stated that after the incident with Martyn, Defendant was called and informed of  
16 the situation (id., Attach. 2). Plaintiff further stated that Defendant advised Plaintiff to  
17 submit an inmate letter, which Plaintiff did on March 28, 2008, but Defendant failed to  
18 comply with DO 802.08, which requires the CO III to investigate the complaint and respond  
19 to the inmate (id.).

20 (2) Plaintiff submitted an April 7, 2008 inmate letter complaining about the lack of  
21 a response to his Director’s Appeal concerning due process violations at his parole hearing  
22 (id., Attach. 5). In this inmate letter, Plaintiff also requests a Notice of Claim form (id.).

23 (3) Plaintiff submitted an April 20, 2008 inmate letter complaining about Martyn’s  
24 and Defendant’s conduct and claiming that Defendant attempted to threaten, harass, and  
25 intimidate Plaintiff (id., Attach. 7).

26 As to the first inmate letter and subsequent inmate grievance, assuming that these  
27 documents satisfy the first two steps in the grievance process (even though Plaintiff failed  
28 to mention Defendant in the inmate letter), the inmate grievance failed to attach a copy of the

1 inmate letter as required under DO 802, and there is no record that Plaintiff appealed the  
2 inmate grievance response (Doc. #22, Ex. A, Attach. 3). Further, as argued by Defendant,  
3 after the 10 work days expired for the CO III to respond to the inmate letter, Plaintiff had just  
4 10 calendar days to file his inmate grievance (*id.*, Attach. 1 (DO. 802.08 § 1.3.2 & 802.09  
5 § 1.1.2)). His inmate grievance was filed 12 calendar days after the response date expired;  
6 thus, it was untimely.

7         With regard to the April 7 inmate letter, it has no connection to the claim against  
8 Defendant.

9         Finally, the April 20 inmate letter referred to Defendant and the claim raised in this  
10 action; however, there is no record that Plaintiff proceeded past the first step of the grievance  
11 process, and Defendant submits evidence that no appeal to the Director was filed (Doc. #22,  
12 Ex. B, Aguilar Aff. ¶ 3).

13         In failing to respond to Defendant’s motion, Plaintiff did not refute the evidence  
14 showing that he failed to exhaust the available administrative remedies for his claim against  
15 Defendant. Defendant’s motion will therefore be granted, and the Court need not address  
16 Defendant’s failure-to-state-a-claim argument.

17 **IV. Failure to Respond**

18         Alternately, the Court has the discretion under Local Rule of Civil Procedure 7.2(i)  
19 to deem Plaintiff’s lack of response as a consent to the granting of Defendant’s Motion to  
20 Dismiss. Plaintiff was warned of this possibility (Doc. #24 at 2). The Ninth Circuit has  
21 upheld a dismissal based on a failure to comply with a similar local rule in the District of  
22 Nevada. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995). Before dismissal on this  
23 basis, the Court must weigh “(1) the public’s interest in expeditious resolution of litigation;  
24 (2) the court’s need to manage its docket; (3) the risk of prejudice to the defendants; (4) the  
25 public policy favoring disposition of cases on their merits; and (5) the availability of less  
26 drastic sanctions.” *Id.* at 53 (quoting Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir.  
27 1986)).

28         The first factor “always favors dismissal.” Yourish v. Cal. Amplifier, 191 F.3d 983,

1 990 (9th Cir. 1999). The second factor usually favors dismissal, and this case is no  
2 exception. See Wanderer v. Johnston, 910 F.2d 652, 656 (9th Cir. 1990). There is no risk  
3 of prejudice to Defendant to resolve the motion in his favor, and judicial efficiency also  
4 favors resolution of this action. Public policy favors disposition of cases on their merits, so  
5 the fourth factor weighs against dismissal. Pagtalunan v. Galaza, 291 F.3d 639, 643 (9th Cir.  
6 2002). For the fifth factor, dismissal without prejudice is the least drastic sanction.

7 In sum, the five-factor analysis weighs in favor of dismissal. The Court will therefore  
8 deem Plaintiff's failure to respond as a consent to the granting of the motion.

9 **IT IS ORDERED:**

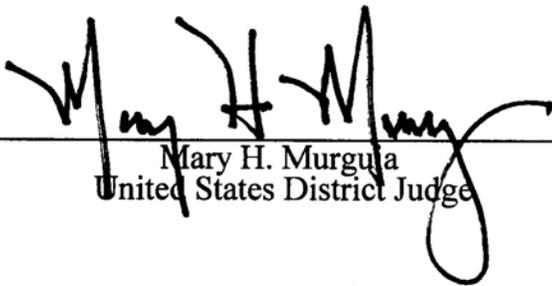
10 (1) The reference to the Magistrate Judge is withdrawn as to Defendant's Motion to  
11 Dismiss (Doc. #22).

12 (2) Defendant's Motion to Dismiss (Doc. #22) is **granted**; Plaintiff's action is  
13 dismissed without prejudice for failure to exhaust or, alternately, for failure to respond.

14 (3) The Clerk of Court must enter judgment of dismissal accordingly.

15 DATED this 16<sup>th</sup> day of December, 2009.

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Mary H. Murguía  
United States District Judge