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

Timothy P. Olmos,
Plaintiff,
vs.
Charles Ryan, et al.,
Defendants.

No. CV 10-2564-PHX-GMS-MEA
ORDER

Plaintiff Timothy P. Olmos filed this civil rights action under 42 U.S.C. § 1983 against various officials of the Arizona Department of Corrections (ADC). (Doc. 21.) Defendants move to dismiss certain Counts. (Doc. 132.)

The Court will grant the motion in part and deny it in part.

I. Background

On screening of Plaintiff’s 15-count First Amended Complaint, the Court directed Defendant Charles L. Ryan to answer Count III (conditions of confinement, including insufficient necessities such as food, clothing, and hygiene products and overcrowding); Plaintiff’s due process claims in Counts VII (illegal taking of money from his account), Count VIII (unconstitutional taking of money through failure to pay interest on money in his prisoner account); Count IX (violating state law inmate compensation statutes), Count X (required surrender, without compensation, of orange clothing purchased at the inmate store); and Plaintiff’s free speech claim regarding the incoming-mail policy in Count XI. (Doc. 27.) It also ordered Defendant Allen Ortega to answer the retaliation claim in Count XV. The

1 remainder of the Defendants and claims were dismissed. (Id.)

2 Defendants now move to dismiss claims as follows:

- 3 • failure to exhaust administrative remedies: claims in Count VII (authority to
4 charge for renewal of diabetic diet, rate of pay, and missed special diet meals);
5 Count VIII (interest on inmate trust account); Count IX (pay received for
6 kitchen work); Count X (return of orange jump suit on release); Count XI
7 (items forbidden to receive by mail); and Count XV (retaliation);¹
- 8 • time barred: claims in Count III (overcrowding, inadequate nutrition, and
9 insufficient clothing);
- 10 • not ripe for adjudication: claims in Count VII (charges for uneaten special
11 diets, replacement ID cards, and costs relating to a positive urinalysis); claim
12 in Count IX (rate of pay as a kitchen worker); Count X (relinquishment of his
13 prison uniform); and
- 14 • Count IX wage claims because Plaintiff does not qualify for the pay he seeks
15 under Ariz. Rev. Stat. § 31-254.

16 (Doc. 146 at 10.)

17 Because there are numerous counts in the First Amended Complaint and Defendants
18 assert multiple grounds for dismissal of several of the counts, the Court will address the
19 parties' arguments count by count to determine what claims, if any, remain.

20 **II. Legal Standards**

21 **A. Exhaustion of Administrative Remedies**

22 Under the PLRA, a prisoner must exhaust available administrative remedies before
23 bringing a federal action concerning prison conditions. See 42 U.S.C. § 1997e(a); Griffin
24 v. Arpaio, 557 F.3d 1117, 1119 (9th Cir. 2009). Exhaustion is required for all suits about
25 prison life, Porter v. Nussle, 534 U.S. 516, 523 (2002), regardless of the type of relief offered

26
27 ¹Defendants initially sought dismissal of additional claims on the ground of failure to
28 exhaust administrative remedies but withdrew certain arguments upon reviewing Plaintiff's
response. (See e.g., Doc. 146 at 2, 3.)

1 through the administrative process, Booth v. Churner, 532 U.S. 731, 741 (2001). And a
2 prisoner must complete the administrative review process in accordance with the applicable
3 rules. See Woodford v. Ngo, 548 U.S. 81, 92 (2006).

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

11 **B. Statute of Limitations**

12 Section 1983 of Title 42, U.S.C., does not include its own statute of limitations.
13 TwoRivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999). Therefore, federal courts apply the
14 statute of limitations governing personal injury claims in the forum state. Wilson v. Garcia,
15 471 U.S. 261, 280 (1985); TwoRivers, 174 F.3d at 991. In Arizona, the limitations period
16 for personal injury claims is two years. Id.; see also Ariz. Rev. Stat. § 12-542 (providing that
17 actions for personal injury must be commenced within two years after the cause of action
18 accrues). A court applies state law to determine who has the burden of proof as to the statute
19 of limitations. See Carvalho v. Raybestos-Manhattan, Inc., 794 F.2d 454, 457 (9th Cir. 1986).
20 Under Arizona law, the statute of limitations is an affirmative defense to be pleaded and
21 proved by the defendant. Kerwin v. Bank of Douglas, 379 P.2d 978, 981 (Ariz. 1963).

22 Although the statute of limitations applicable to § 1983 claims is borrowed from state
23 law, federal law continues to govern when a § 1983 claim accrues. Wallace v. Kato, 549
24 U.S. 384, 388 (2007); TwoRivers, 174 F.3d at 991. Under federal law, a claim accrues
25 “when the plaintiff knows or has reason to know of the injury which is the basis of the
26 action.” Id.; Kimes v. Stone, 84 F.3d 1121, 1128 (9th Cir. 1996).

27 The Court must also apply any state rule for tolling to actions brought under § 1983.
28 Hardin v. Straub, 490 U.S. 536, 544 (1989); Johnson v. State of California, 207 F.3d 650,

1 653 (9th Cir. 2000); TwoRivers, 174 F.3d at 992. Under Arizona law, the limitation period
2 is tolled during mandatory exhaustion of administrative remedies. See Brown v. Valoff, 422
3 F.3d 926, 943 (9th Cir. 2005); Arizona Dep’t of Revenue v. Dougherty, 29 P.3d 862 (Ariz.
4 2001); Third & Catalina Assoc. v. City of Phoenix, 895 P.2d 115, 119 (Ariz. Ct. App. 1994);
5 see also Ariz. Rev. Stat. § 12-821.01(c) (cause of action required by law or contract to be
6 submitted to administrative review process does not accrue until process exhausted)).

7 **C. Ripeness**

8 Article III of the Constitution limits this Court’s jurisdiction to “cases” and
9 “controversies,” which necessarily “precludes the exercise of jurisdiction by a federal court
10 unless the plaintiff has suffered some actual injury or faces a threatened injury, and the injury
11 is fairly traceable to the action challenged and is likely to be redressed by a favorable
12 decision.” Culinary Workers Union v. Del Papa, 200 F.3d 614, 617 (9th Cir. 1999) (citing
13 Valley Forge Christian College v. Americans United, 454 U.S. 464, 472 (1982)). Further,
14 when a plaintiff seeks declaratory and injunctive relief, the plaintiff must demonstrate a
15 “substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of
16 a declaratory judgment.” Culinary Workers Union, 200 F.3d at 617 (quoting Ross v. Alaska,
17 189 F.3d 1107, 1114 (9th Cir. 1999) (internal quotation and emphasis omitted)). A claim is
18 not ripe for adjudication if it rests upon “contingent future events that may not occur as
19 anticipated, or indeed may not occur at all.” Texas v. United States, 523 U.S. 296, 300
20 (1998) (internal quotations and citations omitted).

21 **III. Count III**

22 Plaintiff alleges in Count III that ADC provides (1) meals with insufficient nutrition,
23 (2) insufficient clothing between laundering, (3) insufficient hygiene products, (4)
24 insufficient cleaning products, (5) insufficient living facilities, (7) insufficient staff, leading
25 to a delay in escort to the medical unit and increased violence, and (8) no system to notify
26 staff of emergencies. (Doc. 21 at 6.)

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1 **A. Parties Contentions**

2 **1. Defendants**

3 Defendants withdraw their Motion to Dismiss with respect to failure to exhaust
4 administrative remedies on Count III, but they note that Plaintiff fails to presents evidence
5 that Ryan was ever made aware of the overcrowding complaint—an argument that
6 Defendants assert they will present on summary judgment. (Doc. 146 at 2.) Defendants also
7 argue that the claims in Count III are time barred. (Doc. 132 at 15; Doc. 146 at 7.) Plaintiff
8 was transferred to the Winchester Unit on July 23, 2008, but he did not bring this action until
9 November 19, 2010. Defendants assert that any claims arising out of Plaintiff’s grievance
10 about inadequate nutrition and overcrowding are time barred because they accrued before
11 November 28, 2008. (Doc. 132 at 15.) Defendants assert that although Plaintiff claims that
12 he submitted an informal resolution about insufficient clothing and laundry service on June
13 4, 2009, the complaint related to prison operations rather than the ADC policy itself. In
14 addition, because Plaintiff did not claim that Ryan was personally involved in providing
15 clothing and laundry service, the allegation does not state a claim against Ryan. (Id. at 15.)

16 **2. Plaintiff**

17 Plaintiff contends that Defendants did not raise timeliness in response to the
18 grievances. He claims that each day that he was provided a nutritionally inadequate diet
19 constituted a discrete act. (Doc. 144 at 10-11.) Plaintiff was living at Winchester where the
20 lack of grievance forms and unresponsiveness to grievances made administrative remedies
21 unavailable. While Plaintiff was at South Unit, on August 2, 2010, Ryan revised the menu
22 and the means to challenge this menu was cut off because administrative remedies were
23 unavailable. (Id. at 10.)

24 Plaintiff addresses the argument that he has not stated a claim against the Director.
25 (Id. at 11.) He argues that the policies which prohibit him from wearing dirty clothes but do
26 not allow him to wash clothing in his cell make Plaintiff completely reliant on Ryan’s
27 centralized laundry service and that Ryan is responsible for ADC policies pursuant to Ariz.
28 Rev. Stat. § 41-1604(A)(1). Plaintiff’s Informal Resolution complained about the inability

1 to wear clean clothes every day. Plaintiff argues that he has stated a claim. (Id.)

2 **3. Reply**

3 Defendants reassert their argument regarding the statute of limitations and assert that
4 the Ninth Circuit has rejected the continuing-violation theory. (Doc. 146 at 7.) As to the
5 claims regarding inadequate nutrition, they assert that Plaintiff's excuses for not filing a
6 grievance after August 2, 2010 are conclusory. They further argue that there is no
7 *respondeat superior* liability under § 1983 and there is no personal involvement by Ryan.
8 (Id.)

9 **B. Analysis**

10 Defendants have withdrawn their defense regarding exhaustion of administrative
11 remedies on this claim because Plaintiff provided evidence that he submitted his Director's
12 appeal for these claims. (Doc. 146 at 1, ref. Doc. 52-1 at 81.) The referenced document is
13 a Director's Appeal, dated January 2, 2009. It is unclear from the face of this document what
14 issues are covered by it. Defendants note that Plaintiff acknowledges that he was transferred
15 to Winchester in July 2008. (Doc. 146 at 7.) The statute of limitations is tolled during the
16 period of exhaustion of administrative remedies, which could not have been completed until
17 some time after January 2, 2009.² Therefore, the Complaint was filed within two years, and
18 the claims are not time barred.

19 As for Defendants' argument that Plaintiff fails to state a claim, the Court rejects it.
20 The First Amended Complaint has already been screened pursuant to 28 U.S.C. § 1915,
21 which uses the same standard as Federal Rule of Civil procedure 12(b)(6). Resnick v. Hayes,
22 213 F.3d 443, 447 (9th Cir. 2000). Defendants do not cite sufficient grounds to reconsider.

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25 ²As to Defendants' arguments that the Ninth Circuit has rejected the continuing-
26 violation theory, the Court notes that Ngo did not reject the theory but merely refused to
27 apply it in that case. Ngo v. Woodford, 539 F.3d 1108, 1109-10 (9th Cir. 2008). More
28 recently, the Ninth Circuit has stated that an apparent conflict among cases regarding statutes
of limitations is not a conflict but rather different lines of authority that identify different
circumstances that lead to different accrual dates for claims. Pouncil v. Tilton, --- F.3d ---,
2012 WL 5871659 (9th Cir. Nov. 21, 2012).

1 Moreover, it is unclear why Defendants would raise this argument under the guise of
2 timeliness, which is an unrelated issue.

3 But as noted in this Court's Order of November 13, 2012, without a showing of a
4 constitutional violation as to inmates' basic needs, overcrowding itself is not a cognizable
5 claim. (Doc. 141 at 4, citing Toussaint v. Yockey, 722 F.2d 1490, 1492 (9th Cir. 1984).)

6 The motion to dismiss is denied as to claims in Count III.

7 **IV. Count VII**

8 In Count VII, Plaintiff alleges a due process violation by Ryan who promulgated
9 "ADC policies that charge inmates [accounts] for photocopies, legal phone calls, legal
10 supplies (paper, pens, etc.), legal mail postage, repayment for positive urinalysis tests,
11 uneaten special diets, follow-up visits and prescription renewals for chronic diseases in
12 violation of A.R.S. § 31-201.01(I)(12), replacement ID cards and ID clips, and GED testing."
13 (Doc. 21 at 11.)

14 **A. Parties' Contentions**

15 **1. Defendants**

16 Defendants argue that Plaintiff failed to exhaust administrative remedies as to being
17 charged for legal copies, renewing his diabetic diet, deductions from his pay, and missed
18 special diet meals. (Doc. 132 at 3-4.) They assert that the only completed grievance
19 regarding a matter actually affecting him was the grievance concerning legal copies. (Id. at
20 4.) They contend that Plaintiff does not claim to have grieved charges for legal phone calls,
21 legal supplies, legal mail postage, repayment for positive urinalysis, follow up doctor visits
22 and prescription renewals, replacement ID cards and clips, and GED testing costs. (Doc.
23 132, Ex. B, Pl.'s Resp. to Interrog. No. 1.) They also assert that Plaintiff admits that his
24 complaints about being charged for uneaten special diets, replacement ID cards, and costs
25 relating to positive urinalysis pertain to possible future charges. (Id. at 4; ref. Doc. 116 at 2,
26 8.)

27 In their reply, Defendants withdraw their motion to dismiss for failure to exhaust
28 administrative remedies as to this claim, "except with respect to [Plaintiff's] claim that the

1 director had no statutory authority to make various deductions from ADC inmate accounts.”
2 (Doc. 146 at 3.) They request that the Court indicate that the only issue to be litigated in
3 Count VII is Plaintiff’s “general claim that the Director of the ADC has no statutory authority
4 to charge inmates for services provided by the prison, especially since [Plaintiff] failed to
5 present evidence that he ever complained to Director Ryan about specific deductions.” (Id.)
6 They later conclude that as to Count VII, Plaintiff failed to exhaust as to charges “for renewal
7 of a diabetic diet, rate of pay, [and] missed special diet meals.” (Id. at 10.) It is unclear what
8 part of their motion Defendants have withdrawn, but the last statement is the clearest
9 description of remaining exhaustion-defense claims, so the Court will address only diabetic
10 diet, rate of pay, and missed special diet meals.

11 Defendants assert that in his Director’s appeal in Grievance No. A02-056-010,
12 Plaintiff complained only that Director Ryan had no statutory authority to make various
13 deductions from ADC inmate accounts. (Doc. 146 at 3; Doc. 132, Ex. A, Attach. 3.) Plaintiff
14 did not object to specific deductions. (Doc. 146 at 3.) They claim that Plaintiff did not rebut
15 Defendants’ evidence that, when he attempted to grieve additional specific issues relevant
16 to Count VII, he did not do so properly and his grievances were unprocessed. (Id., ref. Doc.
17 8-3 at 41-52.) His Informal Resolution complaining about being charged to renew his
18 diabetic diet was not processed as it was neither signed nor dated. (Doc. 146 at 2; ref. Doc.
19 8-3 at 46.) Defendants assert that the forms require signing and dating. Plaintiff did not
20 contest Defendants’ evidence that his February 10, 2010, grievance was not processed
21 because he was trying to challenge a rate of pay he had been receiving since 2007 and that
22 the grievance was therefore not timely. (Doc.146 at 2; ref. Doc. 8-3 at 47.) He also did not
23 rebut Defendants’ evidence that his January 10, 2008, grievance about being charged for
24 special diet meals was not processed because he did not show that he had tried to resolve his
25 issue informally. (Doc.146 at 2; ref. Doc. 8-3 at 48-49.) They assert that because his
26 grievances were not processed, Plaintiff never made Ryan aware of any of these particular
27 issues.

28 Defendants also contend that certain of the claims in Count VII are not ripe for

1 adjudication; namely, uneaten special diets, replacement ID cards, and cost relating to
2 positive urinalysis. (Doc. 132 at 17.) These relate to possible future charges. Defendants
3 also argue that Plaintiff was not a kitchen worker when he tried to grieve the deductions from
4 his pay. (Id.)

5 Defendants further assert that the claims in Count VII are time barred insofar as they
6 accrued earlier than November 28, 2008, which is two years before the filing date of the
7 Complaint. (Doc. 132 at 15-16.) They note that grievance A02-056-010 was processed
8 within two years of bringing this action but that Plaintiff had previously submitted an
9 informal resolution complaining about being charged for legal copies on January 8, 2008.
10 They contend that the Ninth Circuit has rejected the continuing-violation theory. (Id. at 16.)
11 In their reply, they withdraw their timeliness argument as to charges for renewal of the
12 medical diet. (Doc. 146 at 8.) However, they again state that the claim for charges for legal
13 copies is time barred because the Ninth Circuit has rejected the continuing-violation theory.
14 (Id.)

15 **2. Plaintiff**

16 Plaintiff alleges generally that he had difficulty exhausting remedies at Winchester
17 due to widespread unavailability of forms and failure to properly respond to grievances,
18 including fraudulent refusal to process grievances; he refers to this as Winchester Grievance
19 Fraud. (Doc. 144 at 4.) Grievance Coordinator Martinez made himself unavailable by not
20 responding to inmate letters requesting forms or permitting unfettered access to his office to
21 obtain forms. Complaints were made to ADC staff. In the early part of June 2009, Baker
22 was appointed interim grievance coordinator. Baker called Plaintiff to her office to discuss
23 his informal complaints and referred to most of his claims as “bullshit” and threatened to
24 place him on the grievance abuse list. Plaintiff rewrote all of his grievances and submitted
25 them on June 8, 2009. CO IV Hall told Plaintiff the complaints had merit and Plaintiff met
26 with Deputy Warden Mendoza about a medical grievance not at issue here. In July 2009,
27 Hoyt was named Grievance Coordinator and on July 29, he returned the grievances as having
28 been rejected by Baker. (Id.)

1 As to Count VII, Plaintiff asserts that when he complained to Ryan about charging
2 assessments without authorization, his challenge covered “all illegal monetary assessment
3 policies” and was not limited to those listed. (Id. at 6.) The Deputy Warden determined that
4 legal copies fell within the scope of the grievance by stating that the deductions were proper.
5 The Director affirmed the decision but broadened the scope further by stating that “all
6 deductions taken from your Inmate Bank Account have been within statute and Department
7 policy.” (Id., ref Doc. 132, Ex. A, Attach. 3 at 1.) Plaintiff argues that his demand was to
8 abolish all monetary assessments not rooted in statute. He asserts that he and the Director
9 referred to deductions from inmate accounts that included debits based on transactions at the
10 inmate store, which is important because of his claims as to legal supplies and postage;
11 therefore the response that referred to all deductions included inmate store transactions. (Id.)

12 As to the return of the informal grievance regarding a charge to renew Plaintiff’s
13 medical diet, which was returned because it was not signed or dated, Plaintiff argues that
14 Department Order 802 has no explicit provision for returning documents that are
15 inadvertently unsigned. (Id. at 7; ref. Doc. 8-3 at 47.) The refusal to process the informal
16 resolution was improper.

17 Plaintiff also asserts that the issues of uneaten special diets, replacement ID cards, and
18 costs relating to positive urinalysis are ripe, citing United States v. Williams, 356 F.3d 1045,
19 1049-51 (9th Cir. 2004) and other cases. (Doc. 144 at 14-15.)

20 As to timeliness, Plaintiff addresses charges for legal copies and argues that his claim
21 did not accrue in January 2008 because he was also charged for legal copies in August 2010.
22 (Doc. 144 at 13.)

23 **B. Analysis**

24 The Court will grant the motion in part and deny it in part as to the claims in Count
25 VII.

26 The Court has reviewed the grievance documents for grievance A02-056-010, which
27 relate to this issue. (Doc. 132, Ex. A, Attach. 3 at 1-11.) The inmate letter states that Ryan
28 has exceeded his authority with policies that levy assessments without authorization.

1 “Assessments include, but are not limited to costs associated with: replacement IDs and ID
2 clips, legal supplies, legal mail postage, legal phone calls, and urinalysis testing. My
3 resolution is that the Director remove all illegal monetary assessment policies, and refund all
4 monies assessed via those policies.” (Id. at 3.) The documents do not refer to assessments
5 for renewal of a diabetic diet, rate of pay, [and] missed special diet meals.³ The Court rejects
6 Plaintiff’s argument that assessments for renewal of a diabetic diet, rate of pay, [and] missed
7 special diet meals are included although not specifically referred to. Without the specific
8 reference, prison officials would not be aware of the nature of the claim. See Griffin, 557
9 F.3d at 1120 (“a grievance suffices if it alerts the prison to the nature of the wrong for which
10 redress is sought.”) The Court also rejects Plaintiff’s argument that the medical-diet informal
11 grievance that was returned for failure to sign it was improperly processed. Whether there
12 are specific grounds in DO 802 to reject it based on failure to sign, it was not, in fact signed
13 as required by the form, so the rejection was not improper, and Plaintiff did not pursue the
14 matter further.

15 Plaintiff failed to exhaust his administrative remedies as to assessments for renewal
16 of a diabetic diet and missed special diet meals. The Court agrees that deductions from pay
17 are not part of this claim and are more properly considered in Count IX.

18 As to ripeness, Plaintiff states in his motion for summary judgment, which is not
19 before the Court at this time, that he has been charged for photo copies, legal telephone calls,
20 legal supplies, ID clips, follow-up visits for health services, and prescription renewals for
21 chronic diseases and that Ryan’s policies open him to future debits for uneaten special diets,
22 replacement ID cards, and costs associated with a positive urinalysis. (Doc. 116 at 2, 8.) He
23 states that he is not a drug user and that his claim is designed to cover false positives. He
24 further states in his motion for summary judgment that if his ID card is lost or stolen, he will
25 be charged for a new ID card. (Id. at 8.) The Court finds that the claims for charges for
26 replacement ID cards, uneaten special meals, and positive urinalysis are not ripe for

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28 ³The documents also say nothing about chronic illnesses but Defendants seem to have
withdrawn motion as to this claim.

1 adjudication because they depend upon hypothetical future events that may not occur at all.
2 See Texas, 523 U.S. at 300. Plaintiff's authority is not persuasive; for example in Williams,
3 to which Plaintiff cites, the Court of Appeals held that a challenge to mandatory medication
4 as a condition of supervised release was ripe but distinguished that case from United States
5 v. Linares, 921 F.2d 841 (9th Cir. 1990), where the prisoner was not challenging a condition
6 of his release but rather potential revocation of supervised release. Williams, 356 F.3d at
7 1051. The Court noted that the challenge in Linares was to a hypothetical future revocation
8 of supervised release.

9 As to the statute of limitations defense, again, the statute of limitations is tolled during
10 the period of exhaustion of administrative remedies, which appears to have been completed
11 on November 23, 2010. (Doc. 132, Ex. A, Attach. 3 at 11.) Therefore, the Complaint was
12 filed within two years. Other than a claim for charges regarding legal copies, it is unclear
13 what, if any, charges were assessed that might be outside the statute of limitations, so the
14 Court need not determine at this time whether such claims are time barred. Moreover, as
15 Pouncil v. Tilton, --- F.3d --- , 2012 WL 5871659, at *10-12 (9th Cir. Nov. 21, 2012),
16 demonstrates, the analysis is more complicated than merely labeling an event a discrete act.
17 Pouncil contrasts a line of cases represented by Delaware State College v. Ricks, 449 U.S.
18 250 (1980) and Knox v. Davis, 260 F. 3d 1009, 1014 (9th Cir. 2011), with a line of cases
19 represented by National RR Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002).
20 Defendants have the burden of proof on the statute of limitations defense, and on the briefing
21 and limited record here, the Court cannot say that claims for charges for legal copies are time
22 barred.

23 C. Conclusion

24 The Court will dismiss claims for charges related to assessments for renewal of a
25 diabetic diet and missed special meals because Plaintiff failed to exhaust administrative
26 remedies on these claims. The Court will dismiss claims for replacement ID and positive
27 urinalysis because the claims are not ripe. The motion is denied as to the other claims.

28 ///

1 **V. Count VIII**

2 In Count VIII, Plaintiff raised a claim that his Fifth and Fourteenth Amendment rights
3 were violated by Ryan when he failed to pay either actual or constructive interest on moneys
4 held in Plaintiff's prisoner spendable account and dedicated discharge account. Plaintiff
5 alleges that this amounts to an unconstitutional taking of his property. (Doc. 21 at 12.)

6 **A. Parties Contentions**

7 **1. Defendants**

8 Defendants assert that Plaintiff failed to exhaust administrative remedies as to this
9 claim. They contend that, according to Plaintiff, he has had a prisoner account since 2005
10 and that he has never received an interest payment for funds held in it. (Doc. 132 at 5; ref.
11 Doc. 116 at 10.) After he submitted an Informal Resolution, Plaintiff claims that he initiated
12 a grievance on September 9, 2009, and that, after he received no response, he appealed to the
13 Warden on October 11, 2009. (Doc. 132 at 5, Ex. B at 2.) Plaintiff further claims that he
14 received no response from the Warden and, because the 100-day period to complete a
15 grievance process had expired, the grievance process had become unavailable to him and the
16 therefore had exhausted his administrative remedies. But Defendants argue that because
17 Plaintiff initiated his grievance after July 13, 2009 (when the new version of DO 802 became
18 effective), the 100-day time limit was no longer applicable. (Doc. 132, Ex. A, Attach. 2.)
19 Rather, when Plaintiff received no response to his appeal from the Warden after 20 work
20 days, he was free to submit his appeal to the Director. (Id. at DO 802.01§ 1.11, 802.04 §
21 1.3.) His failure to do so means he did not complete the ADC grievance process and
22 therefore failed to properly exhaust available administrative remedies.

23 Defendants also argue that Plaintiff's claims are time barred because they accrued in
24 2005 when he opened his account and he did not sue until November 2010. (Doc. 132 at 16.)

25 **2. Plaintiff**

26 Plaintiff asserts that he filed his informal resolution on June 24, 2009, so the version
27 of DO 802 effective in March 2000 applied. That version of the grievance process capped
28 the length of the grievance at 100 days and the lack of attentiveness by ADC staff led to an

1 out of time response by ADC at every level so that the time for the process expired and
2 Plaintiff satisfied the exhaustion requirement. (Doc. 144 at 8.)

3 **3. Reply**

4 Defendants dispute that the prior version of DO 802 applied, arguing that testimony
5 shows that “for grievances initiated before July 13, 2009, DO 802 with the effective date of
6 March 3, 2000 applied. Grievances initiated after July 13, 2009, are governed by the policy
7 as revised on that date and subsequent May 28, 2010, modification through Director’s
8 Instruction 287 (‘DI 287’.)” (Doc. 146 at 3, ref. Doc. 132, Ex. A, Aguilar Decl. ¶ 5.)
9 Defendants argue that the date of the grievance, not the date of the informal resolution,
10 determines which grievance policy applies. (Doc. 146 at 3.) They also note that Plaintiff
11 attempted to exhaust according to the new process that did not require the grievance to be
12 responded to by the Grievance Coordinator. (Id. at 4.)

13 **B. Analysis**

14 The Court finds that Plaintiff failed to exhaust his administrative remedies as to the
15 claim in Count VIII. Defendants have met their burden to demonstrate the availability of
16 an administrative process. See Wyatt, 315 F.3d at 1119; see also Brown v. Valoff, 422 F.3d
17 926, 936-37 (2005). Plaintiff fails to provide a legally sufficient excuse for his failure to
18 exhaust the claim in Count VIII.

19 Plaintiff asserts in his Supplemental Responses to Interrogatories that on June 24,
20 2009, he initiated the grievance process on the Director’s refusal to pay interest on the trust
21 account by submitting an informal resolution to CO III Douglas and that when Douglas did
22 not respond, Plaintiff acted with “unrequired diligence” by proceeding to the next level by
23 filing an inmate grievance on September 9, 2009. (Doc. 132, Ex. B at 2.) When he received
24 no response, he “again acted with “unrequired diligence” by moving on to the next level of
25 review by submitting an appeal to the warden on October 11, 2009. The Warden never
26 responded and the 100-day time frame expired. (Id.)

27 The Court finds that the grievance was initiated after the July 13, 2009 effective date
28 of the new version of DO 802, which no longer had a 100-day limit. More important, both

1 grievance procedures provided that expiration of the time limit at any given point entitled the
2 inmate to proceed to the next level. (Doc. 132, Ex. A, Attach. 1, DO 802.07 § 1.2.4, effective
3 March 2000, Attach. 2, DO 802.01 § 1.11, effective July 13, 2009.) In other words, non-
4 response by ADC staff did not excuse failure to proceed to the next step in the process. And
5 the language regarding the 100-day limit states “[t]he maximum length of time for
6 completion of the grievance process is 100 days, from initiation to final disposition.
7 Expiration of the time limit at any level in the process shall entitle the inmate to proceed to
8 the next review level, unless the inmate agrees in writing to the extension.” (Id., Attach. 2,
9 DO 802 § 1.2.4.) A fair reading of this provision indicates that the 100-day limit was not
10 intended to cut off an inmate’s right to the grievance process but rather to place an outside
11 limit on prison officials. Finally, Plaintiff’s explanation for his failure to exhaust is not
12 consistent with his own prior statements. In his First Amended Complaint, he claimed that
13 he did not exhaust this claim because “staff did not reply to a written request for a grievance
14 form.” (Doc. 21, Count III at 12, ref. Count V at 8.)

15 Here, it is undisputed that Plaintiff failed to exhaust his grievance by proceeding to
16 the Director level. Defendants have met their burden to demonstrate the availability of a
17 grievance process, and Plaintiff fails to establish a legally sufficient reason for not exhausting
18 his administrative remedies.

19 The Court will dismiss Count VIII without prejudice.

20 **VI. Count IX**

21 Plaintiff alleges a due process violation; specifically, that Ryan “violated the inmate
22 compensation requirements of A.R.S. § 31-254(A) and A.R.S. § 41-1624.01(A)-(B),” that
23 he “downgraded the skill level of education aides . . . from skilled to semi-skilled when an
24 automated system (called TOSS) was rolled out without changing any of the duties of the
25 position to reflect the lowered skill level, resulting in a 5¢ per hour decrease in
26 compensation,” and that he has “continued the ADC’s policy of not paying kitchen and
27 inmate store workers (who perform labor or services for Defendants Canteen and Keefe, who
28 are private contractors) a minimum of \$2.00 per hour.” (Doc. 21 at 13.) Plaintiff further

1 alleges that Ryan “financially injured” him “by underpaying him 5¢/hour in his current
2 position as an education aide.” (Id.)

3 **A. Parties’ Contentions**

4 Defendants concede that Plaintiff completed the grievance process as to pay he
5 received as an education aide—grievance A02-050-010. (Doc. 146 at 4.) But they assert that
6 he did not exhaust administrative remedies regarding his rate of pay when he worked in the
7 kitchen; they maintain that the grievance he filed was not processed because he was not then
8 employed there, noting that an informal complaint must be submitted within 10 workdays
9 from the date of the action that caused the complaint. (Doc. 132 at 12, Ex. A, Attach. 5 at
10 8-9.) Plaintiff argues that he did not know of his claim because Ryan “hid the claim . . . by
11 publishing a minimum \$2.00 per hour pay scale” in the inmate compensation policy, DO 903.
12 (Doc. 144 at 8.) Plaintiff claims that he stumbled on the claim while researching the claim
13 of compensation as an education aide and that under Cabrera v. City of Huntington Park, 159
14 F.3d 374, 379 (9th Cir. 1998), Plaintiff could not be expected to challenge a problem of
15 which he had no knowledge. (Doc. 144 at 9.) Defendants reply that DO 802 does not refer
16 to a discovery rule, which is consistent with the Ninth Circuit’s rejection of the “continuing
17 violations theory.” (Doc. 146 at 5.)

18 Defendants further argue that the claim regarding kitchen work was not ripe and that
19 had Plaintiff exhausted this claim he might have been entitled to a higher wage if he could
20 establish that he was employed pursuant to a contract with the food service subcontractor,
21 Canteen. (Doc. 132 at 17.) In their reply, Defendants assert that Plaintiff is not entitled to
22 the minimum wage “unless he, not the ADC, was working pursuant to a contract with a
23 private” entity. (Doc. 146 at 9-10, citing Hale v. Ariz., 993 F.2d 1387, 1400 (9th Cir. 1993).)
24 Because Plaintiff was not a party to the contract with the food service subcontractor entitling
25 him to the minimum wage, he is only entitled to compensation the director determines. (Id.)

26 Defendants also ask that this Court be dismissed because Plaintiff has no right to
27 compensation for his work as an education aide, asserting that ADC is not required to pay
28 inmates for work done for ADC, but that inmates are “entitled to compensation for work

1 performed for private parties.” (Doc. 132 at 17, citing Piatt v. MacDougall, 773 F.2d 1032,
2 1036 (9th Cir. 1985), and Hale, 993 F.2d at 1400 .)

3 Plaintiff argues that Defendants’ claim that he has no right to compensation for work
4 done for ADC contradicts the plain language of the Ariz. Rev. Stat. § 31-254(A) and that the
5 state cannot deny compensation without due process. (Doc. 144 at 16.) As to the contract
6 requirement, Plaintiff asserts that he is currently employed as a dishwasher and he spoke to
7 the food service manager who stated that the use of inmate labor under the supervision of the
8 company’s employees “is stipulated in her company’s contract with ADC, and that it is the
9 responsibility of her company’s employees to train inmate laborers in the proper execution
10 of their assigned job duties.” (Id., Ex. C § 4.)

11 **B. Analysis**

12 The Court will deny Defendants’ motion as to Count IX.

13 As to the statute of limitations, the Court rejects Defendants’ argument that because
14 DO 802 contains no reference to a “discovery rule,” no such rule can apply to the timeliness
15 of a grievance. In Ngo, the Ninth Circuit applied statute-of-limitations principles to
16 determine when a claim accrued for purposes of the timeliness of an inmate grievance even
17 though the Court of Appeals did not point to “inevitable consequence” language in the
18 grievance procedure. Ngo, 539 F.3d at 1109-10.

19 Apparently Plaintiff was employed as a kitchen worker in 2007 and in 2009. (Doc.
20 144 at 8.) Under the discovery rule, the limitations period does not begin until the plaintiff
21 “has knowledge of the ‘critical facts’ of his injury, which are ‘that he has been hurt and who
22 has inflicted the injury.’” Bibeau v. Pac. Nw. Research Found., Inc., 188 F.3d 1105, 1108
23 (9th Cir. 1999) (citing United States v. Kubrick, 444 U.S. 111, 122 (1979)); see also
24 McDonald v. Macabuhay, No. CV 07-1022-PHX-GMS, 2009 WL 2432833, at *6, 2009 U.S.
25 Dist. LEXIS 73851, at *14 (D. Ariz. Aug. 10, 2009) (citing Bibeau, 188 F.3d at 1108);
26 Nunez v. City of Los Angeles, 147 F.3d 867, 870 (9th Cir. 1998) (applying the discovery rule
27 to a substantive due process claim but finding the claim barred by the statute of limitations.)
28 On this record, the Court cannot determine whether the discovery rule applies or, if it does,

1 whether the grievance was timely. Although Plaintiff claims that Ryan “hid” the wage issue,
2 he also notes that the \$2.00 minimum was in DO 903.

3 As to Defendants’ statutory arguments, Ariz. Rev. Stat. § 31-254(A), on which
4 Plaintiff relies for this claim, provides that:

5 Each prisoner who is engaged in productive work in any state prison or
6 institution under the jurisdiction of the department or a private prison under
7 contract with the department as a part of the prison industries program shall
8 receive for the prisoner’s work the compensation that the director determines.
9 The compensation shall be in accordance with a graduated schedule based on
10 quantity and quality of work performed and skill required for its performance
11 but shall not exceed fifty cents per hour unless the prisoner is employed in an
12 Arizona correctional industries program pursuant to title 41, chapter 11, article
13 3. If the director enters into a contract pursuant to § 41-1624.01 with a private
14 person, firm, corporation or association the director shall prescribe prisoner
15 compensation of at least two dollars per hour. Compensation shall not be paid
16 to prisoners for attendance at educational training or treatment programs, but
17 compensation may be paid for work training programs.

18 It appears to the Court that Ariz. Rev. Stat. § 31-254(A) applies only to work
19 performed as part of the prison industries program, known as Arizona Correctional
20 Industries, Ariz. Rev. Stat. §§ 41-1621 to 41-1630, and that the \$2.00 per hour provision
21 applies only to work performed where the Director of ADC enters into a contract pursuant
22 to § 41-1624.01 with a private entity. Case law indicates that the prison labor program also
23 permits the establishment of an Inmate-Operated Business Enterprise (IOBE), Hale, 993 F.2d
24 at 1390, and possibly other variations, Bilke v. State, 209 P.3d 1056, 1057 (Ct. App. Ariz
25 2009) (where inmates seeking the minimum wage⁴ were of three types: those working for the
26 correctional industries program, those working for an IOBE, and those who worked for
27 Cutter Biological on prison grounds.) In Hale, inmate Berry worked for an IOBE and sought
28 the minimum wage; the Court held that “[i]n order to show entitlement under § 31-254, a
prisoner must show that he is working pursuant to ‘a contract . . . with a private person, firm,
corporation or association,’” citing Ariz. Rev. Stat. § 31-254(A). 993 F.2d at 1390, 1400.
In other words, as to Berry, the only issue before the Court of Appeals in Hale was Berry’s

⁴At the time of Hale, § 31-254 provided: If the director enters into a contract . . . with
a private [entity] the compensation shall be prescribed by the [private entity] but shall not be
below the minimum wage. Hale, 993 F.2 at 1398.

1 entitlement to the minimum wage; contrary to Defendants’ assertion, the Court of Appeals
2 did not rule that the inmate was entitled to no compensation at all because he was not
3 working for a private entity. In addition, the Correctional Industries statute provides that:

4 A. The director shall compensate prisoners for their services pursuant to
5 § 31-254.

6 B. The director or his designee may contract with any state agency, political
7 subdivision or state department or any private person, firm, corporation or
8 association to provide services or labor rendered by prisoners.

9 Ariz. Rev. Stat. § 41-1624.01. Because Correctional Industries can contract with entities
10 other than private entities, it appears to the Court that, although the \$2.00-per-hour provision
11 is limited to contracts with private entities, the remainder of § 31-254 is not limited to
12 compensation for work performed for private entities.

13 It is not clear from the pleadings whether Plaintiff’s work as an education aide was
14 pursuant to Correctional Industries, and this is not a motion for summary judgment. The
15 Court will not dismiss the claim regarding pay as an education aide. Moreover, as to the
16 claim regarding kitchen work for \$2.00 per hour, the Court disagrees with Defendants’
17 interpretation of the holding in Hale; Hale does not limit the provision to the situation of a
18 contract between private parties and inmates. The plain language of the statute refers to the
19 *Director* entering into a contract with a private entity, not the inmate. See Ariz. Rev. Stat.
20 § 31-254 (A).

21 The Court will deny the motion to dismiss Count IX.

22 **VII. Count X**

23 In Count X, Plaintiff claims that his Fifth and Fourteenth Amendment rights to “due
24 process . . .” were violated by Ryan when he promulgated “an ADC policy that demands that
25 Plaintiff Olmos surrender all orange-colored clothing purchased at the inmate store to ADC
26 staff on his release date without any compensation.” (Doc. 21 at 14.) Plaintiff alleges that
27 “[u]pon release,” he “will incur a property injury by having his clothing taken by ADC staff
28 due to Defendant Ryan’s policy” and he will be injured financially by “being compelled to
purchase replacement clothing.” Although Plaintiff does not allege that he has actually been
injured yet, he seeks both declaratory and prospective injunctive relief. (Id.)

1 **A. Parties Contentions**

2 Defendants assert that Plaintiff submitted a grievance about the issue in Count X but
3 his grievance was unprocessed because he did not show how he was adversely affected since
4 he is not even tentatively scheduled to be released until May 10, 2019. (Doc. 132 at 6.)
5 Plaintiff did not resubmit his grievance. (Id.) Plaintiff claims this was a part of the
6 grievances returned as “false[ly] unprocessed,” and, therefore, Plaintiff exhausted because
7 the process was not available to him. (Doc. 144 at 9.) Defendants reassert that there is no
8 way that Plaintiff can show that he has been adversely affected by the policy at this time and
9 that DO 802 does not provide a process for inmates to attempt to vindicate hypothetical
10 claims about what may happen in the future. (Doc. 146 at 5.)

11 Defendants also argue that this claim is not ripe because Plaintiff has not been
12 released or required to relinquish his uniform. (Doc. 132 at 17; Doc. 146 at 9.)

13 **B. Analysis**

14 The Court holds that this claim is not yet ripe for adjudication. According to Plaintiff,
15 the policy will apply, if at all, only at the time of Plaintiff’s release from custody. At this
16 time, that release is not scheduled until 2019. Plaintiff’s sentence could be extended based
17 on a new conviction or he could die before his release date; in other words, the claim depends
18 upon a hypothetical future event that may not occur at all. See Texas, 523 U.S. at 300. This
19 is not a “substantial controversy . . . of sufficient immediacy and reality.” Aydin Corp. v.
20 Union of India, 940 F.2d 527, 528 (9th Cir. 1991) (internal citations and quotations omitted).

21 The Court will dismiss Count X.

22 **VIII. Count XI**

23 In Count XI, Plaintiff asserted a First Amendment violation by Ryan who instituted
24 “incoming mail policies” that “abridg[e] his free speech rights in a manner that does not pass
25 the Turner test.” (Doc. 21 at 15.) Specifically, the policies prohibit inmate receipt of (1) tax
26 forms; (2) unused greeting cards, stationary, envelopes, and bookmarks; (3) calendars; (4)
27 circulars, catalogs, and ads; (5) information printed off the ADC website that does not
28 threaten security; (6) non-commercially recorded CDs created during the course of a legal

1 proceeding; and (7) prohibiting inmates from joining pre-pay music clubs.

2 **A. Parties Contentions**

3 Plaintiff's only relevant grievances regarding this claim were a complaint about the
4 policy against inmates receiving tax forms and blank stationary and a complaint about the
5 policy prohibiting receipt of mail over ten pages long. (Doc. 132 at 6.) Defendants assert
6 that Plaintiff did not exhaust regarding the other issues. They allege that he has not shown
7 how he was adversely affected by ADC's policies or why he believes that these issues
8 accrued in the first half of 2009. (Doc. 146 at 6.) Plaintiff argues that he began challenging
9 Ryan's bans on receipt of tax forms and stationary but that the grievances were "swallowed
10 up by the Winchester Grievance Fraud, making administrative remedies unavailable." (Doc.
11 144 at 9; ref. Doc. 52-3 at V13-V19.) He argues that the same is true for remedies at South
12 Unit. (Doc. 144 at 9.)

13 **B. Analysis**

14 The Court will grant the motion as to unused greeting cards and bookmarks;
15 calendars; circulars, catalogs, and ads; information printed off the ADC website that does not
16 threaten security; non-commercially recorded CDs created during the course of a legal
17 proceeding; and prohibiting inmates from joining pre-pay music clubs. The Court will grant
18 the motion as to blank stationary. Finally, the Court will also dismiss the claim related to tax
19 forms.

20 As to the first group of items, Defendants provide evidence that a grievance procedure
21 was available, and it appears that Plaintiff did not even attempt to exhaust as to those issues.
22 Plaintiff submits grievance documents for only the stationary and tax-forms issues. A
23 generalized assertion that the grievance procedure was unavailable is not sufficient to excuse
24 a failure to exhaust administrative remedies. See Sapp v. Kimbrell, 623 F.3d 813, 823-24 (9th
25 Cir. 2010) (although there is an exception to the PLRA exhaustion requirement when prison
26 officials render the administrative remedies procedure effectively unavailable by improperly
27 screening grievances, to fit within this exception, the prisoner must show, *inter alia*, that he
28 attempted to exhaust his remedies—especially that he actually filed a grievance or

1 grievances.).

2 As to the tax forms, Plaintiff's documents show that on June 8, 2009, he filed a
3 grievance stating that "ADC policy does not permit an inmate to receive tax forms via mail,
4 which does not permit inmates like myself to follow the law by having all the forms to file
5 a proper tax return." (Doc. 52-3, V 14.) The proposed resolution is "the excision of all ADC
6 policies that do not pass the Turner test, including the above." (Id.) This was returned
7 unprocessed on the grounds that it was out of time frames, that Plaintiff was asked to provide
8 documentation essential to the grievance, and that "Written Instruction Grievances shall only
9 pertain to complaints that relate to the appropriateness or fairness of Department Written
10 Instructions." (Id., V 15.) The First Amended Complaint alleges that the harm in Count XI
11 is opening of legal mail, seizure of a CD, and return of mail. (Doc. 21 at 15.) Plaintiff never
12 claims—either in the First Amended Complaint or the grievance documents—that he actually
13 needed a tax form that was unavailable to him or that he was, in fact, unable to file a proper
14 tax return. Without specific harm, Plaintiff cannot state a claim for a hypothetical denial of
15 tax forms. The Court will dismiss this claim. See 28 U.S.C. §1915(e)(2)(B)(ii); 28 U.S.C.
16 § 1915(A)(b)(1); 42 U.S.C. § 1997e.

17 Finally, as to the denial of blank stationary, the grievance dated June 8, 2009, states
18 that on March 6, 2009, mail staff seized blank stationary as contraband, which adversely
19 affected Plaintiff because he did not have the paper; he claims in the grievance that he
20 previously had no access to grievance forms. (Doc. 52-3, V 17.) It was returned
21 unprocessed for the same reasons given as to the tax-forms grievance. The Court finds that
22 the grievance was not improperly returned as unprocessed, and Plaintiff does not explain why
23 he did not attempt to resubmit the grievance with proof of seizure of the stationary.
24 Therefore, Plaintiff failed to exhaust administrative remedies.

25 The claims in Count XI will be dismissed.

26 **IX. Count XV**

27 In Count XV, Plaintiff alleged retaliation after he wrote to the Kansas Department of
28 Corrections (KDOC) about the access to the courts it provides to inmates," and the KDOC

1 notified ADC administration of the inquiry and included a copy of Plaintiff's letter. Plaintiff
2 alleged that unknown ADC staff ordered Ortega to "take care" of Plaintiff, even though an
3 unbiased review of the letter in question made it clear that the letter did not violate either
4 state law or ADC policy," and that Ortega initiated disciplinary proceedings by charging
5 Plaintiff with fraud. (Doc. 21 at 19.)

6 **A. Parties' Contentions**

7 Defendants argue that although Plaintiff claims to have exhausted his retaliation claim
8 against Ortega because Plaintiff appealed his disciplinary citation in case #10-A02-0089,
9 even if Plaintiff used all appeals available to him in the disciplinary process, this would not
10 have exhausted his retaliation claim. (Doc. 132 at 14, ref. Ex. B at 5.) DO 802.01 § 1.1
11 provides that inmates may use the grievance process to "address inmate complaints related
12 to any aspect of institutional life or conditions of confinement that directly and personally
13 affects the inmate grievant, including Department Orders, Director's Instructions, Institution
14 and Post Order, Technical Manuals and written instructions, procedures and the actions of
15 staff." (Doc. 132, Ex. A, Attach. 2.) Plaintiff could have pursued a grievance under DO 802
16 complaining that Ortega improperly wrote him up and disciplined him for corresponding with
17 the KDOC. His failure to do so means that he did not exhaust his administrative remedies.
18 (Doc. 132 at 14.)

19 Plaintiff argues that Defendants have acknowledged that Plaintiff is seeking redress
20 for retaliatory discipline and that DO 802.01 § 1.3.1 prohibited him from using the grievance
21 process to challenge a disciplinary report. (Doc. 144 at 10.) Therefore, Plaintiff exhausted
22 his remedies.

23 Defendant reply that remedies remained available under DO 802 and that had Plaintiff
24 prevailed on such a grievance, Ortega could have been subject to adverse personnel action.
25 (Doc. 146 at 6.) Because remedies remained available to Plaintiff under DO 802, Plaintiff
26 was required to exhaust under DO 802. (Id.)

27 **B. Analysis**

28 The Court will deny the motion to dismiss as to the claim in Count XV. Defendants

1 do not dispute that Plaintiff completed the disciplinary grievance procedure and do not meet
2 their burden to demonstrate that Plaintiff was required to exhaust this issue again using
3 another administrative procedure.

4 DO 802.01 § 1.3 states that the Grievance Procedure “does not serve as a duplicate
5 appeal process or substitute appeal process” for, among other matters, the Inmate
6 Disciplinary Procedures. (Doc. 132, Ex. A, Attach. 2.) It does not, however, state that, in
7 order to be properly exhausted, some issues may have to be pursued under more than one
8 administrative remedy procedure. Although Defendants assert that remedies remained
9 available to Plaintiff under DO 802, they cite to nothing in the procedure. Moreover, it is
10 unclear from the record what issues were raised in the disciplinary appeal. If the issue of
11 retaliation was raised, arguably prison officials were afforded an opportunity to address the
12 retaliation issue; this would satisfy the primary purpose of a grievance system: “to notify the
13 prison of a problem.” See Griffin, 557 F.3d at 1120. Defendants fail to meet their burden to
14 show that Plaintiff did not exhaust his administrative remedies, and the motion will be denied
15 as to Count XV.

16 **IT IS ORDERED:**

17 (1) The reference to the Magistrate Judge is withdrawn as to Defendants’ Motion to
18 Dismiss (Doc. 132).

19 (2) Defendants’ Motion to Dismiss (Doc. 132) is **granted in part and denied in part**
20 as follows:

21 (a) **granted:**

22 (i) Count VII—claims for assessments for renewal of diabetic diet and missed
23 special meals are dismissed without prejudice for failure to exhaust
24 administrative remedies, and claims for assessment for replacement ID cards
25 and positive urinalysis are dismissed without prejudice as not ripe;

26 (ii) Count VIII is **dismissed** without prejudice for failure to exhaust
27 administrative remedies;

28 (iii) Count X is **dismissed** without prejudice as not ripe;

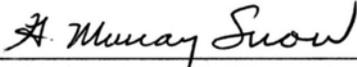
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(iv) Count XI is **dismissed** without prejudice for failure to exhaust administrative remedies, except for the claim for tax forms, which is **dismissed** for failure to state a claim; and
(b) **denied** in all other respects.

(3) The remaining claims are:

- (a) Count III;
- (b) Count VII for assessment to inmate accounts for photocopies, legal phone calls, legal supplies (paper, pens, etc.), legal mail postage, follow-up visits and prescription renewals for chronic diseases, and GED testing;
- (c) Count IX; and
- (d) Count XV.

DATED this 31st day of January, 2013.



G. Murray Snow
United States District Judge