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

8
9 Michael More,

No. CV 19-04530-PHX-DGC (CDB)

10 Plaintiff,

11 v.

ORDER

12 Arizona Department of Corrections, et
13 al.,

14 Defendants.
15

16 Plaintiff Michael More, who is currently confined in the Arizona State Prison
17 Complex-Lewis, Bachman Unit, brought this civil rights action pursuant to 42 U.S.C.
18 § 1983. Defendant J. Scott moves for summary judgment based on failure to exhaust
19 administrative remedies and on the merits. (Doc. 51.) Plaintiff was informed of his rights
20 and obligations to respond pursuant to *Rand v. Rowland*, 154 F.3d 952, 962 (9th Cir. 1998)
21 (en banc) (Doc. 53), and he did not respond. The Court will grant the Motion for Summary
22 Judgment.

23 **I. Background**

24 On screening of Plaintiff’s seven-count Second Amended Complaint under 28
25 U.S.C. § 1915A(a), the Court determined that Plaintiff stated a First Amendment religious
26 free exercise claim in Count Five against Defendant Scott, the Bachman Unit Manager for
27 Trinity Food Service, Inc., based on Scott’s alleged failure to allocate a separate set of
28 utensils for the preparation of kosher foods in accordance with kosher dietary

1 requirements. (Doc. 18.) The Court directed Scott to answer the claim and dismissed the
2 remaining claims and Defendants. (*Id.*)

3 **II. Summary Judgment Standard**

4 A court must grant summary judgment “if the movant shows that there is no genuine
5 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
6 Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The
7 movant bears the initial responsibility of presenting the basis for its motion and identifying
8 those portions of the record, together with affidavits, if any, that it believes demonstrate
9 the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

10 If the movant fails to carry its initial burden of production, the nonmovant need not
11 produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d 1099,
12 1102-03 (9th Cir. 2000). But if the movant meets its initial responsibility, the burden shifts
13 to the nonmovant to demonstrate the existence of a factual dispute and that the fact in
14 contention is material, i.e., a fact that might affect the outcome of the suit under the
15 governing law, and that the dispute is genuine, i.e., the evidence is such that a reasonable
16 jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
17 242, 248, 250 (1986); *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th
18 Cir. 1995). The nonmovant need not establish a material issue of fact conclusively in its
19 favor, *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968); however,
20 it must “come forward with specific facts showing that there is a genuine issue for trial.”
21 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal
22 citation omitted); *see* Fed. R. Civ. P. 56(c)(1).

23 At summary judgment, the judge’s function is not to weigh the evidence and
24 determine the truth but to determine whether there is a genuine issue for trial. *Anderson*,
25 477 U.S. at 249. In its analysis, the court must believe the nonmovant’s evidence and draw
26 all inferences in the nonmovant’s favor. *Id.* at 255. The court need consider only the cited
27 materials, but it may consider any other materials in the record. Fed. R. Civ. P. 56(c)(3).

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1 **III. Exhaustion**

2 **A. Legal Standard**

3 Under the Prison Litigation Reform Act, a prisoner must exhaust “available”
4 administrative remedies before filing an action in federal court. *See* 42 U.S.C. § 1997e(a);
5 *Vaden v. Summerhill*, 449 F.3d 1047, 1050 (9th Cir. 2006); *Brown v. Valoff*, 422 F.3d 926,
6 934-35 (9th Cir. 2005). The prisoner must complete the administrative review process in
7 accordance with the applicable rules. *See Woodford v. Ngo*, 548 U.S. 81, 92 (2006).
8 Exhaustion is required for all suits about prison life, *Porter v. Nussle*, 534 U.S. 516, 523
9 (2002), regardless of the type of relief offered through the administrative process, *Booth v.*
10 *Churner*, 532 U.S. 731, 741 (2001).

11 The defendant bears the initial burden to show that there was an available
12 administrative remedy and that the prisoner did not exhaust it. *Albino v. Baca*, 747 F.3d
13 1162, 1169, 1172 (9th Cir. 2014); *see Brown*, 422 F.3d at 936-37 (a defendant must
14 demonstrate that applicable relief remained available in the grievance process). Once that
15 showing is made, the burden shifts to the prisoner, who must either demonstrate that he, in
16 fact, exhausted administrative remedies or “come forward with evidence showing that there
17 is something in his particular case that made the existing and generally available
18 administrative remedies effectively unavailable to him.” *Albino*, 747 F.3d at 1172. The
19 ultimate burden, however, rests with the defendant. *Id.* Summary judgment is appropriate
20 if the undisputed evidence, viewed in the light most favorable to the prisoner, shows a
21 failure to exhaust. *Id.* at 1166, 1168; *see Fed. R. Civ. P. 56(a)*.

22 If the defendants move for summary judgment for failure to exhaust and the
23 evidence shows that the plaintiff did, in fact, exhaust all available administrative remedies,
24 it is appropriate for the court to grant summary judgment sua sponte for the nonmovant on
25 the issue. *See Albino*, 747 F.3d at 1176 (pro se prisoner did not cross-move for summary
26 judgment on issue of exhaustion, but because he would have succeeded had he made such
27 a motion, sua sponte grant of summary judgment was appropriate).

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1 **B. Facts¹**

2 **1. ADC Grievance Procedures**

3 The Arizona Department of Corrections (ADC) has an Inmate Grievance Procedure,
4 set forth in Department Order (DO) 802, as to which prisoners receive written and verbal
5 instruction, both during their initial intakes and as part of their orientation processes at any
6 subsequent facility. (Doc. 51 at 4; Doc. 51-1 at 2, 12 (DO 802 § 11.0).)²

7 ADC’s Inmate Grievance Procedure is a multi-step process, beginning with the
8 requirement that a prisoner first attempt to resolve his issue informally through discussion
9 with staff in the area most responsible for the complaint. (Doc. 51-1 at 5 (DO 802 § 2.1).)
10 If a prisoner is unable to resolve his issue in this way, he may submit an Inmate Informal
11 Complaint Resolution form to the Correctional Officer (CO) III in his unit within 10 days
12 of the date of the action that caused the complaint, after which the CO III must investigate
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14
15 ¹ Because Plaintiff failed to file a response or controverting statement of facts, the
16 Court will consider Defendant’s supported facts undisputed unless they are clearly
17 controverted by Plaintiff’s first-hand allegations in the verified Complaint or other
18 evidence on the record. Where the nonmovant is a pro se litigant, the Court must consider
as evidence in opposition to summary judgment all the nonmovant’s contentions set forth
in a verified complaint or motion. *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004).

19 ² Defendant did not set forth the facts regarding this process in his Separate
20 Statement of Facts, as required under Local Rule 56.1(a); nor did he provide specific
21 citations to DO 802 in his Memoranda of Law, leaving it to the Court to locate the
22 provisions upon which he relies to set forth the required steps of ADC’s grievance process.
23 Because Defendant attached a copy of DO 802 to his Motion, and Plaintiff has had an
24 opportunity to respond, the Court will in its discretion consider the relevant facts set forth
25 in that attachment. Counsel for Defendant should be aware, however, of his obligations to
26 comply with Federal and Local Rules. Defendant has an obligation under Federal Rule of
27 Civil Procedure 56(c)(1)(A) and Local Rule 56.1(1)(a) to “cite to the specific admissible
28 portion of the record where the fact finds support.” *See S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir. 2003) (in summary judgment briefing “[g]eneral references without page or line numbers are not sufficiently specific”); *see also Orr v. Bank of America*, 285 F.3d 764, 775 (9th Cir. 2002) (internal quotation omitted) (“Judges need not paw over the files without assistance from the parties.”).

1 and attempt to resolve the issue and provide the prisoner a written response within 15 days
2 of receiving the Informal Complaint. (*Id.* at 6 (DO 802 §§ 2.2–2.3).) If the issue is still
3 unresolved at this stage, the next step is for the prisoner to file a Formal Grievance with
4 the CO IV Grievance Coordinator within 5 days of receipt of the CO III’s response, after
5 which the CO IV Grievance Coordinator must log and assign a number to the Formal
6 Grievance, using the Unit Coordinator Grievance Log. (*Id.* (DO 802 § 3.0).) Within 15
7 days of receipt of the Formal Grievance, the Deputy Warden must issue a written response
8 to the prisoner. (*Id.* at 6–7 (DO 802 §§ 3.4–3.6).)

9 If, after completing the required steps of both the informal and formal grievance
10 processes, the prisoner is unsatisfied with the response of the Deputy Warden, the final
11 step is for the prisoner to file an Inmate Grievance Appeal with the CO IV Grievance
12 Coordinator, who must log and number the Grievance Appeal and forward all documents
13 to the Central Office Appeals Officer. (*Id.* at 7 (DO 802 § 4.0).) Within 30 days of receipt,
14 the Central Office Appeals Officer must prepare and submit a response to the Director for
15 a signature. (*Id.*) The Director’s response is final and marks the conclusion of the ADC
16 grievance process. (*Id.*)

17 At any stage in the grievance process, unless notified of an extension of timeframes,
18 the expiration of the time for a response entitles the prisoner to move on to the next step of
19 the grievance process, even without a response. (*Id.* at 5 (DO 802 § 1.10).) Under such
20 circumstances, the prisoner has the same time to proceed to the next step of the process as
21 if he had received a response, with the time to proceed beginning to run the day after a
22 response was due. (*Id.* (DO 802 § 1.10.1).)

23 **2. Plaintiff’s Grievances**

24 On May 18, 2019, Plaintiff submitted an Inmate Informal Complaint Resolution,
25 complaining that his kosher diet was being prepared without proper utensils. (Doc. 17 at
26 28.) On June 1, 2019, Plaintiff filed another Inmate Informal Complaint Resolution on the
27 same issue and additionally complaining about the lack of variety and the improper
28 substitutions of non-kosher items into the kosher diet. (*Id.* at 22.) On June 11, 2019,

1 Plaintiff filed an Inmate Grievance, stating that he had not received a response to his
2 Informal Complaints and again complaining that his kosher meals were not being prepared
3 or served with proper utensils. (*Id.* at 31.)

4 On June 5, 2019, CO III Jones responded to Plaintiff's June 1, 2019 Informal
5 Complaint Resolution, stating that Trinity Manager Scott was "unable to provide me a list
6 of approved Kosher Items of procedures" and that Plaintiff's complaint was considered
7 resolved at this level and he "may proceed to the next level of the grievance process." (*Id.*
8 at 32.) On July 11, 2019, Plaintiff filed an Inmate Grievance with the CO IV Grievance
9 Coordinator, complaining that the CO III's response had not resolved his issue at all and
10 that his complaint was being ignored. (*Id.* at 34.)

11 On July 16, 2019, Plaintiff's July 11, 2019 Inmate Grievance was marked
12 "unprocessed" and returned to Plaintiff with a coversheet, noting that Plaintiff had not
13 provided proof that he had first submitted an Informal Complaint to his assigned CO III,
14 and there was no informal response attached. (Doc. 52-1 at 2-3.)

15 On his Second Amended Complaint in this action, Plaintiff checked the boxes
16 indicating that (1) administrative remedies were available to him, (2) he had submitted a
17 request for administrative relief as to his claim against Defendant Scott in Count Five, but
18 (3) he had not appealed his request for relief to the highest level. (*Id.* at 26.) In explanation
19 for his failure to pursue his request to the highest level, he wrote: "My Informal and
20 Grievance were not answered." (*Id.*)

21 C. Discussion

22 The above evidence is sufficient to show that Plaintiff had administrative remedies
23 available to him to grieve Defendant's alleged failure to allocate separate utensils for
24 preparing and serving kosher foods, and he did not fully exhaust his administrative
25 remedies as to that issue. The burden therefore shifts to Plaintiff to show either that he did
26 exhaust or that "something in his particular case . . . made the existing and generally
27 available administrative remedies effectively unavailable to him." *Albino*, 747 F.3d at
28 1172.

1 Because Plaintiff did not respond to Defendant’s Motion, the only evidence before
2 the Court regarding this showing are the statements Plaintiff made in, and the documents
3 he attached to, his Second Amended Complaint. This evidence is sufficient to show that
4 Plaintiff filed both an Informal Complaint (Doc. 17 at 28) and an Inmate Grievance (*Id.* at
5 34) regarding the lack of separate utensils used for the kosher diet. Additionally, in his
6 July 11, 2019 Inmate Grievance, Plaintiff wrote that he received a response to his Informal
7 Complaint, and he complained that the response — that Defendant could not provide a list
8 of kosher items and procedures — had not resolved his issue. (*Id.*)

9 The evidence therefore does not support that Plaintiff did not receive a response to
10 his Informal Complaint, as he stated in his Second Amended Complaint. Plaintiff also does
11 not dispute that he failed to attach his Informal Complaint to his Inmate Grievance and
12 that, as a result, his Inmate Grievance was returned to him unprocessed. (Doc. 52-1 at
13 2–3.)

14 Construing the facts in Plaintiff’s favor, the Court takes as true that Plaintiff did not
15 receive a response to his Inmate Grievance. This does not show, however, that the ADC
16 grievance process was effectively unavailable to him. As set forth above, if a prisoner does
17 not receive a response at any level of the grievance process, he may move to the next step
18 of that process, using the same timeframe for doing so as if a response had been received.
19 (Doc. 51-1 at 5 (DO 802 § 1.10).) Plaintiff has not shown either that he did proceed to the
20 next and final level of the grievance process or that he was effectively prevented from
21 doing so.

22 Absent any such showing, Plaintiff fails to create a genuine issue of material fact
23 either that he did exhaust his administrative remedies or that the exhaustion requirement
24 should be excused. The Court will therefore grant Defendant’s Motion for Summary
25 Judgment and will dismiss this action without prejudice based on failure to exhaust
26 administrative remedies.³

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28 ³ Because the Court will dismiss this action for failure to exhaust, it need not discuss
Defendant’s alternative arguments for summary judgment on the merits.

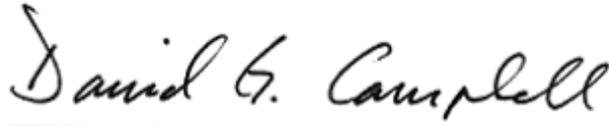
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IT IS ORDERED:

(1) The reference to the Magistrate Judge is **withdrawn** as to Defendant's Motion for Summary Judgment (Doc. 51).

(2) Defendant's Motion for Summary Judgment (Doc. 51) is **granted**, and the action is **dismissed** without prejudice based on failure to exhaust administrative remedies. The Clerk of Court must enter judgment accordingly.

Dated this 28th day of April, 2021.



David G. Campbell
Senior United States District Judge