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

JAQUES FEARENCE,

1:08-cv-00615-LJO-GSA-PC

Plaintiff,

ORDER RE FINDINGS  
AND RECOMMENDATIONS  
(Doc. 31.)

vs.

L. L. SCHULTEIS, et al.,

ORDER DENYING DEFENDANTS’  
MOTION TO DISMISS FOR FAILURE  
TO EXHAUST  
(Doc. 22.)

Defendants.

ORDER REFERRING CASE BACK  
TO MAGISTRATE JUDGE FOR  
FURTHER PROCEEDINGS

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**I. BACKGROUND**

Jaques Fearence (“Plaintiff”) is a state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On November 6, 2012, the Magistrate Judge entered findings and recommendations, recommending that Defendants’ motion to dismiss for failure to exhaust remedies, filed on December 16, 2011, be granted, dismissing this action in its entirety. (Doc. 31.) On December 7, 2012, Plaintiff filed objections to the findings and recommendations. (Doc. 33.)

In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(B) and Local Rule 304, this Court has conducted a de novo review of this case. Having carefully reviewed the entire file, including Plaintiff’s objections, the Court declines to adopt the findings and recommendations.

1 **II. MOTION TO DISMISS FOR FAILURE TO EXHAUST**

2 The Magistrate Judge found that Defendants carried their burden in demonstrating that Plaintiff  
3 failed to exhaust the remedies available to him, by submitting evidence that Plaintiff failed to file a  
4 timely appeal to the third level of review. Plaintiff argues that prison officials prevented him from  
5 complying with the exhaustion process because they confiscated his 602 appeal document during a cell  
6 search and would not return it to him. Plaintiff provides evidence that he attempted to obtain assistance  
7 by sending letters to the Director of Corrections and the Warden. Plaintiff asserts that he also filed a  
8 second 602 appeal complaining about the confiscation of his property, but he received no response. In  
9 November 2008, after obtaining a copy of his first 602 appeal form from his Central File, Plaintiff filed  
10 an untimely appeal to the third level of review.

11 The regulations in effect in 2005, when Plaintiff submitted his appeals, required that at the formal  
12 levels of review, the appeal be forwarded to the appeals coordinator within fifteen days of the date of  
13 the decision being appealed. 15 CCR §§ 3084.2(c), 3084.6 (2005). The Magistrate Judge found that  
14 Plaintiff failed to exhaust the administrative remedies available to him because he sent letters to the  
15 Director of Corrections and the Warden instead of submitting an appeal to the third level of review. The  
16 Magistrate Judge is correct that letters to prison officials are insufficient to show exhaustion; however,  
17 in this case, Plaintiff's letters to the Director and Warden were not intended to show exhaustion, but  
18 rather to show that Plaintiff attempted to obtain assistance when he was prevented from timely  
19 submitting his appeal to the third level of review. Plaintiff did not send the letters instead of submitting  
20 the appeal, but because he was unable to submit the appeal.

21 The regulations in effect also required prison officials to ensure that appeal forms "are readily  
22 available to all inmates and parolees." 15 CCR § 3084.1(c) (2005). The Magistrate Judge found Plaintiff  
23 at fault for not requesting a copy of his appeal from his Central File until sometime in 2008. In this  
24 instance, however, it was prison officials who were at fault for failing to return Plaintiff's appeal  
25 documents to him so he could properly exhaust his remedies.

26 The Magistrate Judge also found Plaintiff at fault for not sending an explanation of his dilemma  
27 to the Director's Level before his appeal deadline expired. The Court finds it reasonable that Plaintiff  
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1 attempted, instead, to obtain his appeal documents so he could comply with the regulations. The  
2 regulations in effect provided that “[a]n appeal may be rejected ... if [t]he appeal is incomplete or  
3 necessary supporting documents are not attached.” 15 CCR § 3084.3(c). It is not unreasonable for  
4 Plaintiff to believe that he needed a copy of his 602 appeal form before he could prepare and submit an  
5 effective appeal to the third level of review. Further, Plaintiff had no obligation to appeal the Director’s  
6 Level decision rejecting his November 2008 appeal as untimely. Harvey v. Jordan, 605 F.3d 681, 685-  
7 86 (9th Cir. 2010).

8 Defendants have the burden to prove that further administrative remedies were “available” to the  
9 Plaintiff. Brown v. Valoff, 422 F.3d 926, 936-37 (9th Cir.2005); see Ngo v. Woodford, 403 F.3d 620,  
10 625 (9th Cir.2005). However, Defendants have not offered any argument or evidence in opposition to  
11 Plaintiff’s allegations that the grievance process was unavailable to him because prison officials thwarted  
12 his efforts to utilize or exhaust the grievance process. Therefore, Defendants in this case have not met  
13 their burden.

14 Based on the foregoing, the Court finds that Plaintiff exhausted his available administrative  
15 remedies, and therefore Defendants’ motion to dismiss for failure to exhaust must be denied.

16 **III. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

17 Because the Magistrate Judge found that Defendants’ motion to dismiss should be granted, the  
18 Magistrate Judge did not consider Defendants’ motion to dismiss Plaintiff’s Eighth Amendment claim  
19 against defendants Davis and Duffy for failure to state a claim. By this order, the motion to dismiss for  
20 failure to state a claim shall be referred back to the Magistrate Judge for consideration.

21 **IV. CONCLUSION**

22 Accordingly, THE COURT HEREBY ORDERS that:

- 23 1. The Court declines to adopt the Findings and Recommendations entered by the  
24 Magistrate Judge on November 6, 2012;
- 25 2. Defendants’ motion to dismiss for failure to exhaust administrative remedies, filed on  
26 December 16, 2011, is denied; and

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3. This case is referred back to the Magistrate Judge for consideration of Defendants' motion to dismiss Plaintiff's Eighth Amendment claim against defendants Davis and Duffy for failure to state a claim, filed on December 16, 2011.

IT IS SO ORDERED.

**Dated: December 19, 2012**

**/s/ Lawrence J. O'Neill**  
**UNITED STATES DISTRICT JUDGE**