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

VALENTINE E. UNDERWOOD,

1:08-cv-00986-AWI-GSA-PC

Plaintiff,

ORDER REGARDING FINDINGS
AND RECOMMENDATIONS
(Doc. 79.)

vs.

M. KNOWLES, et al.,

ORDER DENYING DEFENDANTS'
MOTION TO DISMISS
(Doc. 54.)

Defendants.

_____ /

Valentine E. Underwood (“Plaintiff”) is a state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983. The complaint alleges that on November 21, 2006, Defendants Northcutt and Martin, along with Defendants Caviness, Lantz, Trujillo, Truitt, and Fambrough, pepper sprayed Plaintiff, hit Plaintiff in the face with the pepper spray can, struck Plaintiff repeatedly with a baton, and kicked and punched Plaintiff. Defendants contend that Plaintiff has not exhausted his allegations as required by 42 U.S.C. § 1997e(a), Booth v. Churner, 532 U.S. 731, 741 (2001), and Woodford v. Ngo, 548 U.S. 81, 90 (2006). 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 January 12, 2011, the Magistrate Judge issued [Findings and Recommendations](#) that recommended Defendants' motion to dismiss for failure to exhaust remedies, filed on July 21, 2010, be granted, and this action be dismissed without prejudice. (Doc. 79.) On February 3, 2011, Plaintiff filed [objections](#) to the Findings and Recommendations. (Doc. 83.)

1 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(B) and Local Rule 304,
2 this court has conducted a de novo review of this case. Having carefully reviewed the entire file,
3 including Plaintiff's objections, the court has determined that this action cannot be dismissed at this
4 time for Plaintiff's failure to exhaust administrative remedies.

5 In his opposition to Defendants' motion and in the objections, Plaintiff concedes he
6 did not complete the inmate appeals process to the Director's Level. However, Plaintiff argues and
7 presents evidence that he was prevented from appealing because of prison officials' interference.

8 Of relevance to the outcome of the pending motion, Plaintiff alleges the following.

9 Plaintiff argues that he submitted a timely appeal concerning the excessive
10 force incident of November 21, 2006, but it was ignored by prison officials and he
never received a response.

11 Plaintiff asserts that on or about November 29, 2006, he submitted an appeal
concerning the excessive force incident giving rise to this action, but prison officials
12 failed to process and respond to his appeal. (Cmp., Doc. 1 at 20 ¶21; Decl. of
Underwood, Doc. 61 at 17 ¶4.) Plaintiff voiced his concerns about his appeals not
being processed and was instructed to give the appeal to Officer Forte who would
13 then give it to Lieutenant Hurley. (Cmp., Doc. 1 at 20 ¶21.) On or about December 4,
2006, Officer Forte told Plaintiff he gave the appeal to Lieutenant Hurley to submit to
14 the Appeals Coordinator. (Decl. Of Underwood, Doc 61 at 17 ¶3.) On December 11,
2006, Plaintiff inquired to the Appeals Coordinator in writing about the appeal.
15 (Cmp., Doc. 1 at 19 ¶13.) On or about December 13, 2006, Captain Frauenheim told
Plaintiff he received the appeal from the Appeals Coordinator. (Decl. Of Underwood,
16 Doc 61 at 17 ¶5; Cmp., Doc. 1 at 20 ¶22.) Plaintiff asked Captain Frauenheim about
the appeal several times, and Frauenheim stated it was being taken care of. (Decl. Of
17 Underwood, Doc 61 at 17 ¶6.) On December 26, 2006, Plaintiff sent legal mail to the
Office of Internal Affairs, California Prison Focus, and The Prison Law Office, asking
18 for assistance with the appeal. (Cmp., Doc. 1 at 20 ¶24, Exh. 26.) On December 27,
2006, Plaintiff wrote to the Center for Constitutional Rights via legal mail explaining
19 his situation and asking for assistance. (Cmp., Doc. 1 at 20 ¶25, Exh. 26.) Plaintiff
never received a response to this appeal. (Decl. of Underwood, Doc. 61 at 17 ¶7.)

20 Plaintiff claims he inquired about this appeal many times. He submits a copy
of a medical appeal dated December 29, 2006, in which he inquired about the
21 excessive force appeal and its whereabouts, stating, "I'm very much concern [sic]
with a 602 I gave to C/O Forte ASUI who assured me he gave it to ASI Lieutenant
22 Hurley. I was told by committee to give it 602 to Lieutenant Hurley. The 602 in
question is in reference to a physical altercation with D-yard staff on 11-21-06."
23 (Opposition, Exh. 1 at 5.) He also submits a copy of a letter to the Chief of Inmate
Appeals, in which he inquired about the appeal concerning the November 21, 2006
24 incident, "Please also inquire about a 602 I wrote on a incident in which I was beat up
by CO's. It accured [sic] on 11/21/06. I've wrote the Appeals Coordinator asking
25 them if they've received it several times only to receive no response." (Opposition,
Exh. 2 at 5.) He also submits a copy of an appeal dated January 30, 2007 concerning
26 C/O Johnson's behavior, in which he inquired about the excessive force appeal,
declaring under penalty of perjury, "Staff had beat me, kicked me, bite me to point of
27 me needing my head, hand and ribs x-rayed! I also was given a tetanus shot &

1 antibiotic for the bite wound on my right hand. This incident accured [sic] on
2 11/21/06. There is a 602 pending which was submitted on December 4, 2006 to ASUI
3 Lt. Hurley on that incident.” (Opposition, Exh. 3 at 8.) He also submits a copy of an
4 appeal concerning RVR violations in which he makes a statement dated June 24,
5 2007 about CCII Pfeiffer, “Also, he didn’t review the 602 I submitted on the incident
6 which Captain Frauenheim has!” (Opposition, Exh. 4 at 2 ¶H.)

7 January 12, 2011 Findings and Recommendations at 6-7 (Document #79). In addition to these
8 allegations, Plaintiff also alleges, and the Magistrate Judge considered, steps Plaintiff took to exhaust
9 once he was transferred from Kern Valley State Prison (“KVSP”) to California Correctional
10 Institution at Tehachapi (“CCI”).

11 Plaintiff argues that the appeal he filed at CCI, after he was transferred there,
12 addressed the excessive force incident at KVSP and should have been processed
13 instead of being rejected as untimely.

14 On July 30, 2007, after he was transferred to CCI, Plaintiff submitted an
15 appeal concerning the excessive force incident of November 21, 2006. (Cmp., Doc 1,
16 Exh. 31; Oppn., Exh 8.) In the appeal, Plaintiff claimed he was re-submitting a prior
17 appeal he submitted on or about November 29, 2006, to which he never received a
18 response. *Id.* The July 30, 2007 appeal was screened out by the Appeals Coordinator
19 on August 9, 2007 as untimely, and he was informed that if he would like to pursue
20 the matter further, he must submit an explanation and supporting documentation
21 explaining why he did not or could not file the appeal timely. *Id.* On September 26,
22 2007, Plaintiff appealed the decision to the Director of Appeals in Sacramento. *Id.*
23 On November 7, 2007, Plaintiff received a response from N. Grannis, Chief of the
24 Inmate Appeals Branch, informing Plaintiff that he must contact the Appeals
25 Coordinator if he disagreed with the decision about his appeal. *Id.*

26 January 12, 2011 Findings and Recommendations at 9 (Document #79).

27 The issue in this action is whether the steps Plaintiff took to appeal the excessive
28 force incident are sufficient. Defendants and the Magistrate Judge combined Plaintiff’s attempts to
29 appeal at KVSP and CCI and found Plaintiff did not fully exhaust because Plaintiff did not follow
30 instructions in the CCI appeal response that stated Plaintiff was to contact the appeals coordinator if
31 Plaintiff disagreed with CCI’s decision.

32 The Ninth Circuit has held that a prisoner’s failure to timely exhaust his
33 administrative remedies is excused when a prisoner takes reasonable and appropriate steps to exhaust
34 his administrative remedies but was precluded from exhausting not through fault of his own, but by a
35 prison official’s mistake. *Nunez v. Duncan*, 591 F.3d 1217, 1224 (9th Cir. 2010). The inmate in
36 *Nunez* filed his informal and formal complaints with the warden within the time period required by

1 the administrative rules. Id. at 1224-25. The warden provided the inmate with an incorrect legal
2 citation that was “restricted” from inmates and thus could not timely be obtained by the inmate
3 despite his “reasonable and appropriate steps to obtain it.” Id. at 1225. After several months of
4 unsuccessful attempts to obtain the regulation, Nunez filed the next level appeal. The Ninth Circuit
5 excused the inmate's failure to timely exhaust because he “took reasonable and appropriate steps to
6 exhaust his [claim] and was precluded from exhausting, not through his own fault but by the
7 Warden's mistake.” Nunez, 591 F.3d at 1224.

8 In Sapp v. Kimbrell, 623 F.3d 813 (9th Cir. 2010), the Ninth Circuit held that
9 “improper screening of an inmate's administrative grievances renders administrative remedies
10 ‘effectively unavailable’ such that exhaustion is not required under the PLRA.” Id. at 823. To show
11 the appeal process is “unavailable”, the inmate must establish (1) that he actually filed a grievance or
12 grievances that, if pursued through all levels of administrative appeals, would have sufficed to
13 exhaust the claim that he seeks to pursue in federal court, and (2) that prison officials screened his
14 grievance or grievances for reasons inconsistent with or unsupported by applicable regulations. Id. at
15 823-24.

16 Plaintiff’s evidence shows that he gave a timely written appeal to Officer Forte as he
17 had been instructed to do. This appeal concerned the excessive force incident at issue in this action.
18 Plaintiff’s evidence reveals that Officer Forte gave the appeal to Lieutenant Hurley. Plaintiff was
19 later told the appeal had been submitted to the Appeals Coordinator, Captain Frauenheim had
20 received the appeal, and the appeal was being “taken care of”. Plaintiff verbally asked about the
21 appeal. He also asked for information about the appeal in writing, and reminded prison officials
22 about the appeal. Plaintiff’s evidence shows that Plaintiff did everything he was asked to do
23 regarding his appeal while at KVSP. While it is not entirely clear why Captain Frauenheim did not
24 respond to the appeal or why the appeal was never formally processed, prison officials
25 misinformation about how to appeal excuses Plaintiff’s failure to continue with his appeal to the
26 Director’s Level. Plaintiff’s evidence shows that Plaintiff’s appeal was not properly processed and
27 responded to. Thus, based on the arguments and evidence currently before the court, Plaintiff’s
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1 failure to exhaust is excused.

2 Defendants maintain that Plaintiff did not do enough to obtain review of his grievance
3 because Plaintiff did not continue to appeal the excessive force incident once he was moved to CCI.
4 Plaintiff did file an appeal at CCI about the excessive force incident at KVSP. This appeal was
5 screened out as untimely, and Plaintiff was informed that he needed to submit an explanation and
6 supporting documentation on why the appeal was not filed earlier. The parties agree Plaintiff did
7 not re-submit the appeal at CCI with additional information and documentation. The court declines
8 to find that Plaintiff needed to continue to appeal the excessive force incident that occurred at KVSP
9 at every subsequent prison to which he was transferred. Plaintiff did file inquires about his
10 administrative grievance while still at KVSP, a step District Courts have found significant in other
11 cases. See e.g. Newman v. McLean, 2009 WL 688859, at *6 (N.D.Cal. 2009) (“[p]laintiff did not
12 pursue all the remedies that were available since he could have appealed the alleged improper
13 screening out of the inmate appeal as being duplicative but failed to do so”); Smiley v. Martinez,
14 2010 WL 309459, at *3 (N.D.Cal.2010) (plaintiff did not timely challenge the screening out of his
15 appeals based on untimeliness and duplication). The court finds Plaintiff’s bona fide efforts while at
16 KVSP were sufficient, and that further review was “effectively unavailable”. See Nunez, 591 F.3d at
17 1226.

18 The court notes that at this time only Plaintiff has provided evidence concerning the
19 appeal Plaintiff gave to Officer Forte. If Defendants have conflicting evidence, Defendants may re-
20 file their motion to dismiss and request the court conduct an evidentiary hearing on this issue.

21 Accordingly, THE COURT HEREBY ORDERS that:

- 22 1. The court declines to adopt the Findings and Recommendations issued by the
23 Magistrate Judge on January 12, 2011;
- 24 2. Defendants' motion to dismiss, filed on July 21, 2010, is DENIED without
25 prejudice; and

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3. This action is referred to the Magistrate Judge for further proceedings.

IT IS SO ORDERED.

Dated: March 31, 2011



CHIEF UNITED STATES DISTRICT JUDGE