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John Fratus,	)	No. CV-08-01500-ROS
	)	
Plaintiff,	)	<b>ORDER</b>
	)	
vs.	)	
	)	
	)	
Sergeant Peterson, et al.,	)	
	)	
Defendants.	)	
	)	
	)	

## BACKGROUND

Plaintiff allegedly was assaulted again on January 10, 2007. Defendants Beer, McRoberts, Lloren, and Pightling were the officials involved in this incident. There is no

1 record of a grievance in connection with that assault. The present case is a civil rights action  
2 premised on these two assaults.

3 Defendants have moved to dismiss, arguing Plaintiff did not timely complete the  
4 administrative review process for the July 12 incident and did not file any administrative  
5 complaint for the January 10 incident.

## 6 ANALYSIS

### 7 A. Motion to Dismiss Standard

8 Defendants seeks dismissal based on Plaintiff's alleged failure to exhaust his  
9 administrative remedies. When deciding such a motion, "the court may look beyond the  
10 pleadings and decide disputed issues of fact." *Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th  
11 Cir. 2003). If Plaintiff did not exhaust his administrative remedies, this suit must be  
12 dismissed without prejudice. *Id.* A prisoner exhausts administrative remedies only by  
13 complying with all the "procedural rules" imposed by the prison. *Woodford v. Ngo*, 548 U.S.  
14 84, 95 (2006).

### 15 B. Defendants Have Not Established Plaintiff Failed to File a Timely Appeal 16 Regarding the July 12, 2006 Incident

17 Defendants claim Plaintiff did not submit a timely appeal of the second-level response  
18 regarding the July 2006 assault. According to the record, Plaintiff received his second-level  
19 response "two or three days" after October 6, 2006. (Doc. 47 at 2). Plaintiff submitted his  
20 appeal on October 29, 2006. Assuming Plaintiff received the response on October 9, an  
21 appeal submitted on October 29 was within the fifteen working day deadline. Thus, the  
22 rejection of Plaintiff's appeal was improper.<sup>1</sup> Plaintiff will be deemed to have exhausted his  
23 administrative remedies. *See Nunez v. Duncan*, 591 F.3d 1217, 1224 (9th Cir. 2010)

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25 <sup>1</sup> The relevant regulation requires an appeal be submitted "within 15 working days of  
26 [the inmate] *receiving* an unacceptable lower level appeal decision." 15 Cal. Cod. Reg. §  
27 3084.6(c) (emphasis added). Thus, Defendants' focus on October 6—the date the appeal was  
28 sent to Plaintiff—is misplaced. Defendants should have focused on when Plaintiff *received*  
the denial.

1 (“[Prisoner’s] failure to timely exhaust his administrative remedies is excused because he  
2 took reasonable and appropriate steps to exhaust . . . and was precluded from exhausting, not  
3 through his own fault but by the Warden’s mistake.”). The claims against Luna, Hamilton,  
4 Solano, and Cortez must proceed.

5 **C. Plaintiff Did Not File Any Administrative Claim Regarding January 10, 2007**

6 Plaintiff allegedly was assaulted on January 10, 2007. Defendants submitted evidence  
7 that Plaintiff did not file any grievance in connection with this alleged assault. Thus,  
8 Plaintiff failed to exhaust any claims he might assert in connection with this alleged assault.  
9 Defendants Beer, McRoberts, Lloren, and Pightling—the individuals allegedly involved in this  
10 incident—will be dismissed.

11 **D. Plaintiff Is Not Entitled to Summary Judgment or Appointment of Counsel**

12 Plaintiff seeks “summary judgment” against Defendant Robertson based on  
13 Robertson’s failure to respond to the complaint. It appears Plaintiff is not seeking summary  
14 judgment but actually is seeking entry of default and default judgment. Accordingly, the  
15 Court will analyze Plaintiff’s motion as a motion for entry of default.

16 The Clerk has not yet entered default and Defendant Robertson has now appeared and  
17 joined the motion to dismiss filed by the other defendants. Robertson should have responded  
18 to the complaint in a more timely manner, but “cases should be decided on their merits if  
19 possible.” *In re Roxford Foods, Inc.*, 12 F.3d 875, 879 (9th Cir. 1993). Robertson will be  
20 directed to file an answer.

21 Plaintiff also seeks the appointment of counsel. Plaintiff does not have a  
22 constitutional right to appointed counsel in this action, *Rand v. Rowland*, 113 F.3d 1520,  
23 1525 (9th Cir. 1997), and the court cannot require an attorney to represent plaintiff pursuant  
24 to 28 U.S.C. § 1915(e)(1). *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 490  
25 U.S. 296, 298 (1989). However, in certain exceptional circumstances the court may request  
26 the voluntary assistance of counsel pursuant to section 1915(e)(1). *Rand*, 113 F.3d at 1525.  
27 The Court seeks volunteer counsel only in the most serious and exceptional cases and this  
28 is not such a case. The Court will not seek volunteer counsel.

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Accordingly,

**IT IS ORDERED** the Motion to Dismiss (Doc. 25) is **GRANTED IN PART**. Defendants Beer, McRoberts, Lloren, and Pightling are **DISMISSED**. Defendants Luna, Hamilton, Robertson, Solano, and Cortez shall file an answer to Plaintiff's complaint.

**IT IS FURTHER ORDERED** the Motion for Summary Judgment (Doc. 29) is **DENIED**.

**IT IS FURTHER ORDERED** the Motion to Appoint Counsel (Doc. 48) is **DENIED**.

DATED this 22<sup>nd</sup> day of July, 2010.

  
\_\_\_\_\_  
Roslyn O. Silver  
United States District Judge