1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF CALIFORNIA 10 11 BOB BEJARANO, No. 1:11-cv-00589 LJO DLB PC 12 ORDER ADOPTING FINDINGS AND Plaintiff. RECOMMENDATIONS AND GRANTING 13 DEFENDANTS' MOTION FOR SUMMARY v. **JUDGMENT** 14 BEST, et al., (Document 115) 15 Defendants. 16 17 Plaintiff Bob Bejarano ("Plaintiff") is a California state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed this action 18 19 on April 12, 2011, and it proceeds on his February 8, 2012, Second Amended Complaint against 20 Defendants M. Bejarano and O. Best for retaliation in violation of the First Amendment. 21 On December 15, 2015, Defendants filed a motion for summary judgment for failure to 22 exhaust. The matter was referred to a United States magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302. 23 24 On April 28, 2016, the Magistrate Judge issued Findings and Recommendations that the motion for summary judgment be granted and that the action be dismissed without prejudice. The 25 26 Findings and Recommendations were served on the parties and contained notice that any 27 objections must be filed within thirty days. After receiving leave to file late objections, Plaintiff 28 filed his objections on July 22, 2016. Defendants filed their reply on August 8, 2016.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, including Plaintiff's objections and Defendants' reply, the Court finds that the Findings and Recommendations are supported by the record and proper analysis.

In his objections, Plaintiff argues that he (1) filed an appeal; and (2) that prison officials should have forwarded the appeal to the correct institution, as stated in the CDC 602 Route Slip. Plaintiff contends that the Magistrate Judge did not discuss the route slip, and that the officials' failure to forward the appeal thwarted his attempts at exhaustion.

Plaintiff's argument is without merit. Plaintiff cites to the route slip to show that he submitted a grievance in the first instance, but the Magistrate Judge assumed this fact in the Findings and Recommendations. "Viewing the evidence in the light most favorable to Plaintiff, as this Court must, CSATF received the appeal at some point and cancelled it as untimely on July 6, 2010. However, there is no indication that Plaintiff filed a separate appeal on the cancellation." ECF No. 115, at 7. Moreover, contrary to Plaintiff's argument, a remedy remained because he could have appealed the cancellation. *Ross v. Blake*, 136 S.Ct. 1850, 1857-1859 (2010).

Plaintiff also argues that prison officials improperly applied their own regulations, because they *could have* accepted his untimely grievance. 15 Cal.Code Regs. § 3000.5(f). However, as Defendants note, the regulation at issue affords discretion to prison officials to excuse non-compliance with regulatory deadlines, and they are not required to do so. Prison officials' decision not to exercise their discretion to overlook the untimeliness of Plaintiff's grievance does not excuse his failure to exhaust.

Accordingly, IT IS HEREBY ORDERED that:

- 1. The Findings and Recommendations, filed April 28, 2016, are adopted in full;
- 2. Defendants' motion for summary judgment (Document 91) is GRANTED;

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1	3. This action is DISMISSED WITHOUT PREJUDICE for Plaintiff's failure to
2	exhaust.
3	This terminates this action in its entirety.
4	IT IS SO ORDERED.
5	Dated: August 10, 2016 /s/ Lawrence J. O'Neill UNITED STATES CHIEF DISTRICT JUDGE
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