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4 **UNITED STATES DISTRICT COURT**
5 **EASTERN DISTRICT OF CALIFORNIA**
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7 JOSE A. RODRIGUEZ,
8 Plaintiff,
9 v.
10 A. ESCOBEDO,
11 Defendant.

Case No. 1:15-cv-00404-LJO-BAM-PC
ORDER DISCHARGING ORDER TO
SHOW CAUSE AND DIRECTING
PLAINTIFF TO FILE OPPOSITION TO THE
MOTION TO DISMISS
(ECF NO. 16)
OPPOSITION DUE IN FOURTEEN DAYS

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13 Plaintiff Jose A. Rodriguez is a state prisoner proceeding pro se and in forma pauperis
14 pursuant to 42 U.S.C. § 1983. This matter was referred to a United States Magistrate Judge
15 pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

16 On April 14, 2016, an order was entered, directing Plaintiff to file either an opposition or
17 statement of non-opposition to Defendants’ motion to dismiss. (ECF No. 15.) Plaintiff failed to
18 do so, and on May 17, 2016, an order to show cause was entered, directing Plaintiff to show
19 cause why this action should not be dismissed for failure to prosecute and failure to obey a court
20 order. (ECF No. 16.) On May 31, 2016, Plaintiff filed a response to the order to show cause.
21 (ECF No. 17.) The response appeared to be signed by another inmate, and was not signed by
22 Plaintiff. The response indicated that Plaintiff does not speak English and “is under the ADA for
23 learning and mental illness.” (ECF No. 17.) The response indicates that Plaintiff is seeking help
24 from other inmates. On June 14, 2016, an order was entered, advising Plaintiff that he may
25 represent himself or be represented by an attorney admitted to the bar of this Court and may not
26 delegate that duty to any other individual. The Court granted Plaintiff until July 1, 2016, in
27 which to file a response to the order to show cause on his own behalf, and signed by Plaintiff.
28 Plaintiff was specifically warned that his failure to do so would result in a recommendation that

1 this action be dismissed for failure to prosecute and failure to obey a court order. (ECF No. 19 at
2 2:18.) Plaintiff has not filed a response to the order to show cause.

3 Defendant sought an extension of time to respond to the order to show cause in order to
4 investigate and respond to Plaintiff's claims regarding his ability to respond. On June 29, 2016,
5 Defendant filed a response, supported by the declaration of M. Ayon, the litigation coordinator at
6 the California Men's Colony, where Plaintiff is incarcerated. The declaration indicates that
7 Plaintiff's primary language is Spanish. Plaintiff has a Test of Adult Basic Education (TABE)
8 score of 1.5, meaning that he has the approximate education level of a first-grader. (Ayon Decl. ¶
9 7.) Plaintiff has been assessed for possible inclusion in the Developmental Disability Program
10 (DDP), and it has been determined that Plaintiff does not meet the criteria for participation in the
11 DDP. Specifically, Plaintiff does not require adaptive supportive needs, and has no substantial
12 deficits in self-care, social skills, self-advocacy, or completing activities of daily living. (Id. ¶ 9.)
13 Plaintiff is a participant in the CDCR's Mental Health Services Delivery System (MHSDS) at the
14 Enhanced Outpatient Program (EOP) level of care, the highest level of outpatient mental health
15 care provided under the MHSDS. (Id. ¶ 10.)

16 The Court finds good cause to discharge the order to show cause. Plaintiff may avoid
17 dismissal of this action by filing an opposition to the motion to dismiss. The Court will provide
18 Plaintiff with one further opportunity to file an opposition to the motion to dismiss. Defendant
19 filed a motion to dismiss this action based upon Plaintiff's failure to exhaust his administrative
20 remedies prior to filing suit.

21 The conduct at issue in this lawsuit occurred on 2014. As of 2011, an inmate initiates the
22 grievance process by submitting a CDCR Form 602, colloquially called an inmate appeal (IA),
23 describing "the problem and action requested." Cal. Code Regs., tit. 15, § 3084.2(a). An IA
24 must be submitted within thirty calendar days of the event or decision being appealed, first
25 knowledge of the action or decision being appealed, or receipt of an unsatisfactory departmental
26 response to an appeal filed. Tit. 15 § 3084.8(b). The inmate is limited to raising one issue, or
27 related set of issues, per IA in the space provided on the form and one form attachment in which
28 he/she shall state all facts known on that issue. Tit. 15 § 3084.2(a)(1),(2),(4). All involved staff

1 members are to be listed along with a description of their involvement in the issue. Tit. 15 §
2 3084.2(a)(3). Originals of supporting documents are to be submitted with the IA; if they are not
3 available, copies may be submitted with an explanation why the originals are not available, but
4 are subject to verification at the discretion of the appeals coordinator. Tit. 15 § 3084.2(b). With
5 limited exceptions, an inmate must initially submit his/her IA to the first level. Tit. 15 § 3084.7.
6 If dissatisfied with the first level response, the inmate must submit the IA to the second level,
7 and likewise thereafter to the third level. Tit. 15 § 3084.2, 7. First and second level appeals shall
8 be submitted to the appeals coordinator at the institution for processing. Tit. 15 § 2084.2(c).
9 Third level appeals must be mailed to the Appeals Chief via the United States Mail Service. Tit.
10 15 § 3084.2(d).

11 Plaintiff is directed to respond to Defendant's argument. Defendant argues that the third
12 level of review did not receive Plaintiff's appeal of the second level decision until October 14,
13 2014 – seventy six days after Plaintiff had received the second-level response. Accordingly, the
14 third level of review cancelled Plaintiff's appeal for exceeding the time limits for appealing the
15 second level decision. Tit. 15, § 3084.6(c)(4). The third level memorandum concluded by
16 instructing Plaintiff that pursuant to section 3084.6(e), once an appeal is cancelled, it may not be
17 resubmitted. The original appeal may only be resubmitted if the appeal on the cancellation is
18 granted. Plaintiff was advised that he had thirty days in which to appeal the cancellation.
19 Defendant's argument is clear. Plaintiff did not attach any documents to his complaint indicating
20 that he appealed the third level cancellation of his grievance. Defendant argues that because
21 Plaintiff has not shown that he appealed the cancellation of this third level grievance, or that any
22 appeal of the cancellation was granted, he has failed to exhaust his available administrative
23 remedies.

24 Although Plaintiff may have a low cognitive ability, he is not developmentally disabled,
25 and has the ability, with the assistance of other inmates, to respond to Court orders in this case.
26 Plaintiff may not be represented by a non-lawyer, but he may avail himself of the assistance of
27 other inmates. Plaintiff has filed a complaint which stated a claim against Defendant for
28 excessive force, and has adequately responded to the order directing him to submit documents

1 for service of process, presumably with the assistance of other inmates. Plaintiff may be assisted
2 by other inmates, but he must sign each submission to the Court, as he has done with the
3 complaint, application to proceed in forma pauperis, and notice of submission of documents in
4 this case. It appears that Plaintiff has the ability, with the assistance of other inmates, to respond
5 to Court orders in this action, including this order, which directs Plaintiff to file an opposition to
6 Defendant's motion to dismiss. Plaintiff is directed to respond to Defendant's argument that
7 Plaintiff did not file an appeal of the cancellation of his third level appeal, and that any such
8 appeal was granted. Should Plaintiff fail to file an opposition to the motion to dismiss, the Court
9 will recommend that this action be dismissed for failure to prosecute and to obey a Court order.

10 Accordingly, IT IS HEREBY ORDERED that:

- 11 1. The May 17, 2016, order to show cause is discharged; and
- 12 2. Plaintiff is directed to file an opposition to Defendant's motion to dismiss within
13 fourteen days of the date of service of this order. **Plaintiff's failure to file an**
14 **opposition will result in a recommendation that this action be dismissed for**
15 **failure to prosecute and failure to obey a Court order.**

16 IT IS SO ORDERED.

17 Dated: August 9, 2016

18 /s/ Barbara A. McAuliffe
19 UNITED STATES MAGISTRATE JUDGE