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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

VASILIS SAKELLARIDIS,
Plaintiff,
v.
J. CABRERA,
Defendant.

Case No. 1:15-cv-01776-DAD-MJS (PC)

**FINDINGS AND RECOMMENDATION
TO GRANT DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

(ECF No. 19)

**FOURTEEN (14) DAY OBJECTION
DEADLINE**

I. Procedural History

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action brought pursuant to 28 U.S.C. § 1983. The action proceeds against Defendant Cabrera on Plaintiff's First Amendment retaliation claim. (ECF No. 9.)

Before the Court is Defendant's October 28, 2016 motion for summary judgment. (ECF No. 19.) Plaintiff filed an opposition (ECF No. 21), and Defendant filed a reply (ECF No. 26). The matter is deemed submitted. Local Rule 230(/).

II. Legal Standard

A motion for summary judgment is the proper means to raise a prisoner's failure to exhaust administrative remedies. Albino v. Baca, 747 F.3d 1162, 1166 (9th Cir. 2014). Defendants have the burden of proving Plaintiff failed to exhaust available

1 administrative remedies. See Jones, 549 U.S. at 216 (failure to exhaust is an affirmative
2 defense). A defendant's burden of establishing an inmate's failure to exhaust
3 administrative remedies has been characterized by the Ninth Circuit as "very low."
4 Albino v. Baca, 697 F.3d 1023, 1031 (9th Cir. 2012).

5 The Court shall grant summary judgment if the movant shows that there is no
6 genuine dispute as to any material fact and the movant is entitled to judgment as a
7 matter of law. Fed. R. Civ. P. 56(a); Wash. Mut. Inc. v. United States, 636 F.3d 1207,
8 1216 (9th Cir. 2011). "If undisputed evidence viewed in the light most favorable to the
9 prisoner shows a failure to exhaust, a defendant is entitled to summary judgment under
10 Rule 56." Albino, 747 F.3d at 1166. If material facts are disputed, summary judgment
11 should be denied, and the Court should decide disputed factual questions relevant to
12 exhaustion "in the same manner a judge rather than a jury decides disputed factual
13 questions relevant to jurisdiction and venue." Id. at 1169-71.

14 Each party's position, whether it be that a fact is disputed or undisputed, must be
15 supported by (1) citing to particular parts of materials in the record, including but not
16 limited to depositions, documents, declarations, or discovery; or (2) showing that the
17 materials cited do not establish the presence or absence of a genuine dispute or that
18 the opposing party cannot produce admissible evidence to support the fact. Fed R. Civ.
19 P. 56(c)(1). In judging the evidence at the summary judgment stage, the Court may not
20 make credibility determinations or weigh conflicting evidence, Soremekun v. Thrifty
21 Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007), and it must draw all inferences in the
22 light most favorable to the nonmoving party, Comite de Jornaleros de Redondo Beach
23 v. City of Redondo Beach, 657 F.3d 936, 942 (9th Cir. 2011).

24 **III. Factual Summary**

25 **A. Plaintiff's Claims**

26 Plaintiff's claims arose at California State Prison – Corcoran. His allegations may
27 be summarized essentially as follows:
28

1 On June 2, 2015, Defendant Cabrera ordered Plaintiff to relinquish a religious
2 lunch because he did not have his "RMA" card on him. Plaintiff complied, but told
3 Defendant that he would "write her up" for denying him a religious meal. Defendant
4 responded that she would "write [him] up." At some point after this incident, Defendant
5 retaliated against Plaintiff by issuing a false Rules Violation Report ("RVR") for "willfully
6 delaying a peace officer" based on Defendant's false claim that Plaintiff delayed the
7 steam line movement for approximately ten minutes.

8 **B. Facts Relating to Exhaustion**

9 The following facts are undisputed.

10 On June 16, 2015, in relation to the above encounter, Plaintiff submitted a staff
11 complaint, Appeal Log No. CSPC-4-15-03450. This is the only appeal Plaintiff claims to
12 have filed in relation to the instant matter. (ECF No. 19-3 at 9 (deposition of Plaintiff).)
13 Therein, Plaintiff complained that Defendant made false statements against him and
14 issued a false RVR in order to retaliate against Plaintiff for threatening to exercise his
15 right to an administrative appeal.

16 Plaintiff's appeal form contains various boxes reserved for "Staff Use Only." The
17 box for the first level of review is blank. For the second level of review, a check-box
18 reflects that Plaintiff's appeal was "rejected" on June 22, 2015, and refers to an attached
19 letter. (ECF No. 19-5 at 18.)

20 The attached letter is dated July 1, 2015 and is titled "Screening at the Second
21 Level." (ECF No. 19-5 at 43.) It states as follows:

22 Your appeal is dated 6/16/15. Your appeal was forwarded to
23 the Hiring Authority on 7/1/15. The Hiring Authority has
24 reviewed your appeal and determined no staff misconduct
25 occurred. If you wish to appeal the RVR you must clarify
26 your appeal as stating such. You must also attach a copy of
27 the Final RVR including all items listed as evidence within
28 the RVR and resubmit your appeal within 30 days.

(ECF No. 19-5 at 9.)

Boilerplate type at the bottom of the letter states as follows:

Be advised that you cannot appeal a rejected appeal, but

1 should take the corrective action necessary and resubmit the
2 appeal within the timeframes specified in CCR 3084.6(a) and
3 CCR 3084.8(b). Pursuant to CCR 3084.6(e), once an appeal
4 has been canceled, that appeal may not be resubmitted.
However, a separate appeal can be filed on the cancellation
5 decision. The original appeal may only be resubmitted if the
6 appeal on the cancellation is granted.

7 Plaintiff did not follow these instructions and instead submitted his appeal directly
8 to the Third Level, stating:

9 CSP-CORCORAN Hiring Authority failed to process/accept
10 staff complaint making a determination that no staff
11 misconduct occurred without processing the 602 affording
12 appellant Due Process. Request Third Level Decision.

13 (Id.)

14 At the Third Level, Plaintiff's appeal was rejected on the ground that Plaintiff had
15 bypassed lower levels of review. (ECF No. 19-5 at 4.)

16 **IV. Analysis**

17 **A. Legal Standards**

18 **1. Exhaustion Generally**

19 The Prison Litigation Reform Act ("PLRA") stipulates, "No action shall be brought
20 with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by
21 a prisoner confined in any jail, prison, or other correctional facility until such
22 administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).
23 Therefore, prisoners are required to exhaust all available administrative remedies prior
24 to filing suit. Jones v. Bock, 549 U.S. 199, 211 (2007).

25 The California Department of Corrections and Rehabilitation has an
26 administrative grievance system for prisoner complaints. Cal. Code Regs. tit. 15
27 § 3084.1. The process is initiated by submitting a CDCR Form 602. Id. at § 3084.2(a). It
28 is completed at the third level of review, also known as the Director's Level of Review.
Id. at § 3084.7.

"The primary purpose of a [prisoner's administrative] grievance is to alert the
prison to a problem and facilitate its resolution, not to lay groundwork for litigation."

1 Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009). “A grievance need not include
2 legal terminology or legal theories unless they are in some way needed to provide
3 notice of the harm being grieved. A grievance also need not contain every fact
4 necessary to prove each element of an eventual legal claim.” Id. Instead, the grievance
5 must “alert the prison to the nature of the wrong for which redress is sought,” and must
6 give the prison an opportunity “to reach the merits of the issue.” Id. at 1120-21.

7 An inmate may be excused from the exhaustion requirement where
8 administrative remedies were “effectively unavailable.” Nunez v. Duncan, 591 F.3d
9 1217, 1226 (9th Cir. 2010). Administrative remedies may be considered “effectively
10 unavailable” where prison officials fail to respond to a properly filed grievance or
11 administrative appeals are improperly screened. Sapp v. Kimbrell, 623 F.3d 813, 822-23
12 (9th Cir. 2010). To fall within this exception, an inmate must establish, “(1) that he
13 actually filed a grievance or grievances that, if pursued through all levels of
14 administrative appeals, would have sufficed to exhaust the claim that he seeks to
15 pursue in federal court, and (2) that prison officials screened his grievance or
16 grievances for reasons inconsistent with or unsupported by applicable regulations.” Id.
17 at 823-24.

18 **2. Staff Complaints**

19 Staff complaints alleging misconduct constitute an exception to the regular
20 appeal process. Cal. Code Regs. tit. 15 § 3084.9(i). Such complaints initially are
21 forwarded to the appeals coordinator. § 3084.9(i)(1). They then must be forwarded to
22 the Hiring Authority or similar designee within five working days. § 3084.9(i)(3). The
23 Hiring Authority must review the complaint to determine whether the allegations warrant
24 a request for an Internal Affairs investigation or confidential inquiry. § 3084.9(i)(3).
25 Alternatively, “[i]f the hiring authority makes a determination that the complaint shall not
26 be accepted as a staff complaint, it shall be processed as a routine appeal”
27 § 3084.9(i)(1).

28 If an appeal is accepted as a staff complaint, the institution must eventually

1 provide the inmate with specified information regarding the result of the complaint
2 inquiry. § 3084.9(i)(4). If an internal affairs investigation is initiated, the inmate must be
3 informed of the investigation and, eventually, its outcome. If a confidential inquiry is
4 initiated, the inmate must be informed of the inquiry and, eventually, whether the
5 findings determined that staff did or did not violate policy.

6 **B. Discussion**

7 Plaintiff's attempt to appeal to the Third Level was rejected and is therefore
8 insufficient to exhaust his administrative remedies. Cal. Code Regs. tit. 15,
9 §§ 3084.1(b)(administrative remedies not exhausted on any issue not addressed at all
10 required levels of review; cancellation or rejection does not exhaust administrative
11 remedies). The Court therefore will consider whether Plaintiff's appeal was improperly
12 screened and, thus, whether administrative remedies were effectively unavailable to
13 him.

14 At the outset, the Court must note that the institution's response to Plaintiff's
15 appeal was defective in various ways. First, hand-written notes on Plaintiff's appeal form
16 indicate that his appeal was rejected on June 22, 2015. However, the attached letter
17 indicates that the appeal was not transmitted to the Hiring Authority until July 1, 2015.
18 This July 1, 2015 transmission violates the requirement that appeals alleging staff
19 misconduct be presented to the Hiring Authority within five working days. § 3084.9(i)(3).
20 More significantly, however, it appears that the Appeals Coordinator, and not the Hiring
21 Authority, made an initial determination to reject Plaintiff's appeal on June 22, 2015.
22 This runs contrary to the provisions specifying that the Hiring Authority, and not the
23 Appeals Coordinator, must determine whether the appeal shall be accepted as a staff
24 complaint. § 3084.9(i)(1); 3084.5(b)(4).

25 Second, this hand-marked box on the Appeal Form is the only indication that
26 Plaintiff's appeal was rejected. The letter from the Hiring Authority does not specify that
27 Plaintiff's appeal was rejected or screened out. Nor does it state, as Defendant
28 contends in declarations attached to the instant motion, that Plaintiff's appeal "did not

1 meet staff complaint criteria.” (ECF No. 19-5 at 2.) To the contrary, the letter states that
2 “[t]he Hiring Authority has reviewed your appeal and determined no staff misconduct
3 occurred.” This implies not that the complaint was screened out, but that an inquiry was
4 conducted and a determination was made regarding the merits of Plaintiff’s misconduct
5 allegations. Such conclusions generally would appear to be reserved for appeals that
6 have been accepted as staff complaints, not for appeals that are disposed of in the
7 screening stage. See § 3084.9(i)(4)(B).

8 Indeed, confusion regarding what, precisely, the Hiring Authority did with
9 Plaintiff’s complaint appears to extend even to Defendant’s counsel in this action, who
10 presumably has extensive experience with the administrative appeal process but
11 nonetheless relies on section 3084.9(i)(2) in support of her argument on this motion.
12 However, that provision applies only to staff complaints that have been accepted; it
13 does not apply to staff complaints that are screened out or rejected.

14 Despite these defects and the possibility for confusion that they created, it is
15 apparent that both Plaintiff and the institution understood that Plaintiff’s staff complaint
16 had been rejected. In his attempt to appeal to the Third Level he stated: “CSP-
17 CORCORAN Hiring Authority failed to process/accept staff complaint”
18 Furthermore, Plaintiff was specifically instructed as to how he could pursue his appeal
19 as a regular appeal. While rejected staff complaints should ordinarily be processed as
20 regular appeals as a matter of course, § 3084.9(i)(1), Plaintiff’s complaint involved an
21 RVR. “A disciplinary action cannot be appealed until the hearing process is completed,
22 including any re-hearing.” Cal. Code Regs. tit. 15, § 3084.9(g)(1). As Plaintiff’s staff
23 complaint was rejected mere days after his RVR was issued, it is unlikely that the
24 hearing process was completed, or that Plaintiff had documents necessary to proceed
25 with his administrative appeal at that time. Certainly, documents adjudicating the RVR
26 are not contained in the appeal record that has been presented to the Court. (See ECF
27 No. 19.)

28 Plaintiff apparently did not wish to follow his institution’s instructions or pursue a

1 regular appeal. However, there is nothing in the regulations that would require the
2 institution to process Plaintiff's appeal as a staff complaint simply based on Plaintiff's
3 preference. The documents before the Court reflect that Plaintiff had administrative
4 remedies available to him that he chose not to pursue. Accordingly, Plaintiff failed to
5 exhaust his administrative remedies and Defendant's motion for summary judgment
6 should be granted.

7 **VI. Conclusion and Recommendation**

8 The Court finds that Plaintiff failed to exhaust available administrative remedies.
9 Accordingly, it is HEREBY RECOMMENDED that Defendant's motion for summary
10 judgment be GRANTED.

11 The findings and recommendation are submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
13 **fourteen** (14) days after being served with the findings and recommendation, any party
14 may file written objections with the Court and serve a copy on all parties. Such a
15 document should be captioned "Objections to Magistrate Judge's Findings and
16 Recommendation." Any reply to the objections shall be served and filed within fourteen
17 (14) days after service of the objections. The parties are advised that failure to file
18 objections within the specified time may result in the waiver of rights on appeal.
19 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923
20 F.2d 1391, 1394 (9th Cir. 1991)).

21
22 IT IS SO ORDERED.

23 Dated: February 1, 2017

24 /s/ Michael J. Seng
25 UNITED STATES MAGISTRATE JUDGE
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