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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JEREMY VILLANUEVA,
Plaintiff,
v.
VOSHALL, et al.,
Defendants.

Case No. 1:17-cv-01586-BAM (PC)
ORDER DISCHARGING ORDER TO SHOW
CAUSE
(ECF No. 9)
ORDER DIRECTING CLERK OF COURT TO
RANDOMLY ASSIGN DISTRICT JUDGE
FINDINGS AND RECOMMENDATIONS
REGARDING DISMISSAL OF ACTION FOR
FAILURE TO EXHAUST
ADMINISTRATIVE REMEDIES
FOURTEEN (14) DAY DEADLINE

Plaintiff Jeremy Villanueva (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff initiated this action on November 29, 2017.

On May 14, 2018, the Court issued an order requiring Plaintiff to show cause, within twenty-one days, why this action should not be dismissed for failure to exhaust administrative remedies. (ECF No. 9.) On May 29, 2018, Plaintiff filed a response to the order to show cause. (ECF No. 10.)

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1 **I. Legal Standard**

2 The Court is required to screen complaints brought by prisoners seeking relief against a
3 governmental entity and/or against an officer or employee of a governmental entity. 28 U.S.C.
4 § 1915A(a). Plaintiff’s complaint, or any portion thereof, is subject to dismissal if it is frivolous
5 or malicious, if it fails to state a claim upon which relief may be granted, or if it seeks monetary
6 relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2); 28 U.S.C.
7 § 1915(e)(2)(B)(ii).

8 Pursuant to the Prison Litigation Reform Act of 1996, “[n]o action shall be brought with
9 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner
10 confined in any jail, prison, or other correctional facility until such administrative remedies as are
11 available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the available
12 administrative remedies prior to filing suit. Jones v. Bock, 549 U.S. 199, 211 (2007); McKinney
13 v. Carey, 311 F.3d 1198, 1199–1201 (9th Cir. 2002). Exhaustion is required regardless of the
14 relief sought by the prisoner and regardless of the relief offered by the process, Booth v. Churner,
15 532 U.S. 731, 741 (2001), and the exhaustion requirement applies to all suits relating to prison
16 life, Porter v. Nussle, 435 U.S. 516, 532 (2002).

17 In rare cases where a failure to exhaust is clear from the face of the complaint, it may be
18 dismissed for failure to state a claim. See, e.g., Albino v. Baca, 747 F.3d 1162, 1169 (9th Cir.
19 2014); Medina v. Sacramento Cty. Sheriff’s Dep’t, No. 2:16-cv-0765 AC P, 2016 WL 6038181,
20 at *3 (E.D. Cal. Oct. 14, 2016) (“When it is clear from the face of the complaint and any attached
21 exhibits that a plaintiff did not exhaust his available administrative remedies before commencing
22 an action, the action may be dismissed on screening for failure to state a claim.”); Lucas v. Dir. of
23 Dep’t. of Corrs., 2015 WL 1014037, at *4 (E.D. Cal. Mar. 6, 2015) (relying on Albino and
24 dismissing complaint without prejudice on screening due to plaintiff’s failure to exhaust
25 administrative remedies prior to filing suit).

26 **II. Discussion**

27 In the complaint, Plaintiff asserts two separate claims regarding the calculation of his time
28 credits. With respect to both claims, Plaintiff checked the boxes on the form complaint

1 indicating that administrative remedies are available at his institution. (ECF No. 1, pp. 3–4.)
2 However, Plaintiff also indicated that he did not appeal either request for relief to the highest
3 level. Rather, Plaintiff states that emergency relief is needed, and he has started the process at the
4 first level. (Id.)

5 Plaintiff’s May 29, 2018 response includes a copy of the Court’s order to show cause,
6 copies of grievances Plaintiff apparently filed in connection with the allegations in this action,
7 and copies of worksheets used to calculate the Earliest Possible Release Dates for inmates
8 sentenced to serve a determinate term. (ECF No. 10.) Plaintiff includes no written explanation as
9 to the significance of any of the documents.

10 Upon review of the documents included in Plaintiff’s response to the order to show cause,
11 it appears that Plaintiff received a response for Appeal Log # DVI-X-15-02840 in November
12 2015, denying his request at the First Level. (Id. at 5–6.) Plaintiff next received a response for
13 Appeal Log Number CCI-0-17-03255 on December 12, 2017, cancelling his appeal at the First
14 Level because the action or decision appealed was not within the jurisdiction of CDCR. (Id. at 8.)
15 On December 28, 2017, Plaintiff received a response for Appeal Log Number CCI-0-17-03398,
16 explaining that he appeared to be appealing the same issues set forth in CCI-0-17-03255.
17 Plaintiff was advised to clarify how he believed the issues had changed from CCI-0-17-03255.
18 (Id. at 10.)

19 Based on these documents, there is no indication that Plaintiff pursued any of these
20 appeals beyond the First Level, nor has Plaintiff provided any explanation for his failure to do so.
21 In addition, Plaintiff received the responses for CCI-0-17-03255 and CCI-0-17-03398 **after** the
22 filing of the complaint in this action, and therefore could not have exhausted his administrative
23 remedies with respect to those appeals prior to filing this action.

24 **III. Order and Recommendation**

25 Accordingly, the order to show cause issued on May 14, 2018, (ECF No. 9), is HEREBY
26 DISCHARGED and the Clerk of the Court is DIRECTED to randomly assign a District Judge to
27 this action.

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1 Furthermore, it is HEREBY RECOMMENDED that this action be dismissed, without
2 prejudice, based on Plaintiff's failure to exhaust administrative remedies prior to filing suit.

3 These findings and recommendations will be submitted to the United States District Judge
4 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **fourteen**
5 **(14) days** after being served with these findings and recommendations, Plaintiff may file written
6 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
7 Findings and Recommendations." Plaintiff is advised that failure to file objections within the
8 specified time may result in the waiver of the "right to challenge the magistrate's factual
9 findings" on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v.
10 Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

11
12 IT IS SO ORDERED.

13 Dated: June 1, 2018

14 /s/ Barbara A. McAuliffe
15 UNITED STATES MAGISTRATE JUDGE
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