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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RICKY L. BROWN,
Plaintiff,
v.
D. PEREZ,
Defendant.

Case No. 1:19-cv-01638-DAD-JLT (PC)

**FINDINGS AND RECOMMENDATIONS
TO GRANT DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT FOR FAILURE
TO EXHAUST**

(Doc. 26)

21-DAY DEADLINE

Defendant moves for summary judgment on the grounds that Plaintiff failed to exhaust administrative remedies prior to filing suit. (Doc. 26.) For the reasons set forth below, the Court recommends that Defendant’s motion be granted.

I. SUMMARY OF FACTS

Ricky L. Brown initiated this action on November 18, 2019. Pl.’s Compl. (Doc. 1). At all times relevant to this action, Plaintiff was incarcerated at California State Prison, Corcoran. *Id.* 1.

In his complaint, Plaintiff contends that Correctional Officer D. Perez used excessive force against him on January 23, 2017. *Id.* 3-4. Plaintiff alleges the officer placed him in plastic restraints that were excessively tight then left him in a cell for 11 hours. *Id.* 3. He further alleges that he had no access to food, water, or a toilet during those hours. *Id.* 4.

Plaintiff filed an administrative grievance regarding the incident on February 13, 2017. Def.’s Statement of Undisputed Facts (“SUF”) ¶¶ 17-18 (Doc. 26-3 at 3); Moseley Decl. Ex. B

1 (Doc. 26-3 at 17-20). In the grievance, Plaintiff alleged that “Officer Perez applied hand-restraints
2 on him excessively tight.” Def.’s SUF ¶ 17.

3 On October 24, 2017, the California Department of Corrections and Rehabilitation Office
4 of Appeals cancelled Plaintiff’s appeal at the third level of review because Plaintiff “refused to be
5 interviewed or cooperate with the reviewer during the appeal review process.” *Id.* ¶ 19; Moseley
6 Decl. Ex. B. Specifically, “[w]hen CDCR staff attempted to interview Plaintiff on April 16, 2017
7 . . . , Plaintiff refused to exit his cell to participate in an interview and . . . refused to sign the
8 Right’s and Responsibility form.” Def.’s SUF ¶ 20.

9 Plaintiff appealed the cancellation on November 5, 2017. *Id.* ¶ 22; Moseley Decl. Ex. C
10 (Doc. 26-3 at 36-39). On February 8, 2018, the CDCR Office of Appeals denied the appeal,
11 stating that Plaintiff’s prior appeal was appropriately canceled pursuant to section 3084.6(c)(8) of
12 the California Code of Regulations. Def.’s SUF ¶ 23; Moseley Decl. Ex. C (Doc. 26-3 at 34).
13 Plaintiff filed no other grievances concerning the events underlying this action prior to initiating
14 the action on November 18, 2019. *See* Def.’s SUF ¶¶ 9-18, 22-25.

15 **II. LEGAL STANDARDS**

16 **A. Summary Judgment**

17 Summary judgment is appropriate when the moving party “shows that there is no genuine
18 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
19 Civ. P. 56(a). The moving party “initially bears the burden of proving the absence of a genuine
20 issue of material fact.” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citing
21 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The moving party may accomplish this by
22 “citing to particular parts of materials in the record, including depositions, documents,
23 electronically stored information, affidavits or declarations, stipulations . . . , admissions,
24 interrogatory answers, or other materials,” or by showing that such materials “do not establish the
25 absence or presence of a genuine dispute, or that an adverse party cannot produce admissible
26 evidence to support the fact.” Fed. R. Civ. P. 56(c)(1)(A),(B). When the non-moving party bears
27 the burden of proof at trial, “the moving party need only prove that there is an absence of
28 evidence to support the non-moving party’s case.” *Oracle Corp.*, 627 F.3d at 387 (citing *Celotex*,

1 477 U.S. at 325); *see also* Fed. R. Civ. P. 56(c)(1)(B).

2 Summary judgment should be entered against a party who fails to make a showing
3 sufficient to establish the existence of an element essential to that party’s case, and on which that
4 party will bear the burden of proof at trial. *See Celotex*, 477 U.S. at 322. “[A] complete failure of
5 proof concerning an essential element of the nonmoving party’s case necessarily renders all other
6 facts immaterial.” *Id.* at 322–23. In such a circumstance, summary judgment should be granted,
7 “so long as whatever is before the district court demonstrates that the standard for the entry of
8 summary judgment . . . is satisfied.” *Id.* at 323.

9 **B. Exhaustion of Administrative Remedies**

10 The Prison Litigation Reform Act provides that “[n]o action shall be brought with respect
11 to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in
12 any jail, prison, or other correctional facility until such administrative remedies as are available
13 are exhausted.” 42 U.S.C. § 1997e(a). Exhaustion of administrative remedies is mandatory and
14 “unexhausted claims cannot be brought in court.” *Jones v. Bock*, 549 U.S. 199, 211 (2007).
15 Inmates are required to “complete the administrative review process in accordance with the
16 applicable procedural rules, including deadlines, as a precondition to bringing suit in federal
17 court.” *Woodford v. Ngo*, 548 U.S. 81, 88, 93 (2006). The exhaustion requirement applies to all
18 inmate suits relating to prison life, *Porter v. Nussle*, 534 U.S. 516, 532 (2002), regardless of the
19 relief sought by the prisoner or offered by the administrative process, *Booth v. Churner*, 532 U.S.
20 731, 741 (2001).

21 The failure to exhaust administrative remedies is an affirmative defense, which the
22 defendant must plead and prove. *Jones*, 549 U.S. at 204, 216. The defendant bears the burden of
23 producing evidence that proves a failure to exhaust; and, summary judgment is appropriate only if
24 the undisputed evidence, viewed in the light most favorable to the plaintiff, shows the plaintiff
25 failed to exhaust. *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014). On a motion for summary
26 judgment, the defendant must prove (1) the existence of an available administrative remedy and
27 (2) that Plaintiff failed to exhaust that remedy. *Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir.
28 2015) (citations omitted). If the defendant meets this burden, “the burden shifts to the plaintiff,

1 who must show that there is something particular in his case that made the existing and generally
2 available administrative remedies effectively unavailable to him. . .” *Id.* If the plaintiff fails to
3 meet this burden, the court must dismiss the unexhausted claims or action without prejudice. *See*
4 *Lira v. Herrera*, 427 F.3d 1164, 1175 (9th Cir. 2005).

5 C. CDCR Grievance Process

6 The CDCR has an administrative grievance system for prisoners to appeal a policy,
7 decision, action, condition, or omission by the department or staff if it has an adverse effect on
8 prisoner health, safety, or welfare. Cal. Code Regs. tit. 15, §§ 3084.1(a) (2017), 3999.226(a).
9 Compliance with 42 U.S.C. § 1997e(a) requires California-state prisoners to utilize CDCR’s
10 grievance process to exhaust their claims prior to filing suit in court. *See Sapp v. Kimbrell*, 623
11 F.3d 813, 818 (9th Cir. 2010); *see also Woodford*, 548 U.S. at 85-86. Administrative appeals are
12 generally subject to two to three levels of review before the remedy is deemed exhausted. Cal.
13 Code Regs. tit. 15, §§ 3084.1(b) (2017), 3084.7(d)(3) (2017), 3999.226(g), 3999.230(h); *see also*
14 *Sapp*, 623 F.3d at 818.

15 III. DISCUSSION

16 The Prison Litigation Reform Act requires “proper exhaustion,” which means that “the
17 prisoner must complete the administrative review process in accordance with the applicable
18 procedural rules . . . as a precondition to bringing suit in federal court.” *Woodford*, 548 U.S. at 88,
19 93. The rules that must be followed, in other words, “are defined not by the PLRA, but by the
20 prison grievance process itself.” *Jones*, 549 U.S. at 218. “The level of detail necessary in a
21 grievance to comply with the grievance procedures will vary from system to system . . . , but it is
22 the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion.”
23 *Id.*

24 In 2017, California regulations required prisoners to pursue a grievance or appeal through
25 three levels of review in order to exhaust administrative remedies. Cal. Code Regs. tit. 15, §§
26 3084.1(b) (2017), 3084.7(d)(3) (2017). The regulations provided that “[a]n appeal may be
27 cancelled” if “[t]he appellant refuses to be interviewed or to cooperate with the reviewer.” *Id.* §
28 3084.6(c)(8) (2017). A cancellation (as opposed to a denial on the merits) “does not exhaust

1 administrative remedies.” *Id.* § 3084.1(b)(2017); *see also Wilson v. Zubiata*, 718 F. App’x 479,
2 481 (9th Cir. 2017).

3 Before filing his complaint, Plaintiff submitted one grievance related the incidents
4 underlying this case. *See* Def.’s SUF ¶¶ 9-18, 22-25. The CDCR Office of Appeals cancelled the
5 appeal because Plaintiff refused to be interviewed as part of the appeal process on April 16, 2017,
6 and because he refused to sign a Rights and Responsibility form. *Id.* ¶¶ 19-20. Per the terms of
7 California Code of Regulations section 3084.6(c)(8), provided above, the cancellation was proper.
8 Therefore, Plaintiff failed to properly exhaust the remedy.

9 In his opposition, Plaintiff states that correctional officers interviewed him about the
10 subject incidents on February 22, 2017. Pl.’s Opp’n 2 (Doc. 34 at 2). However, it is unclear
11 whether this interview constituted part of the grievance-review process, as opposed to a separate
12 use-of-force investigation. *See* Def.’s Reply 4-5 (Doc. 35 at 4-5). More to the point, Plaintiff does
13 not dispute that he failed to sign a Rights and Responsibility form or to submit to an interview on
14 April 16, 2017, *see generally* Pl’s Opp’n, which clearly *did* constitute part of the grievance-
15 review process, *see* Def.’s SUF ¶¶ 19-21. Based on these facts, and pursuant to state regulations,
16 CDCR’s cancellation of Plaintiff’s appeal was appropriate.

17 The Supreme Court has explicitly held “that the PLRA exhaustion requirement requires
18 proper exhaustion.” *Woodford*, 548 U.S. at 93. To properly exhaust, prisoners must comply with
19 the prison’s grievance procedures. *Jones*, 549 U.S. at 218. That is, “the prison’s requirements . . .
20 define . . . proper exhaustion.” *Id.* Plaintiff did not comply with the CDCR’s procedures with
21 respect to his grievance regarding the incidents underlying this action. Therefore, Plaintiff did not
22 properly exhaust his administrative remedies.

23 **IV. CONCLUSION AND RECOMMENDATIONS**

24 Based on the foregoing, the Court RECOMMENDS that Defendant’s motion for summary
25 judgment (Doc. 26) be GRANTED and this action DISMISSED for failure to exhaust
26 administrative remedies.

27 These Findings and Recommendations will be submitted to the United States District
28 Judge assigned to this case, pursuant to 28 U.S.C. § 636(b)(1). **Within 21 days** of the date of

1 service of these Findings and Recommendations, Plaintiff may file written objections with the
2 Court. The document should be captioned, “Objections to Magistrate Judge’s Findings and
3 Recommendations.” Plaintiff’s failure to file objections within the specified time may result in
4 waiver of her rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing
5 *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

6
7 IT IS SO ORDERED.

8 Dated: August 5, 2021

/s/ Jennifer L. Thurston
CHIEF UNITED STATES MAGISTRATE JUDGE

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