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6 UNITED STATES DISTRICT COURT
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8 EASTERN DISTRICT OF CALIFORNIA

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10 AARON D. SEYMOUR,

11 Plaintiff,

12 v.

13 H. SHIRLEY, et al.,

14 Defendants.

Case No. 1:21-cv-01485-AWI-EPG (PC)

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT BE
GRANTED

(ECF No. 31)

OBJECTIONS, IF ANY, DUE WITHIN
TWENTY-ONE DAYS

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17 **I. INTRODUCTION**

18 Aaron D. Seymour (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma*
19 *pauperis* in this civil rights action. This case is proceeding on Plaintiff’s Eighth Amendment
20 conditions of confinement claim against defendants Shirley, DeGough, and Cronjager¹ based
21 on allegations that the water at Wasco State Prison is contaminated, and that Defendants have
22 not appropriately responded to the issue. (ECF Nos. 14, 18, & 40).²

23 On April 14, 2022, Defendants filed a motion for summary judgment on the ground that
24 Plaintiff failed to properly exhaust his available administrative remedies before filing this case.
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27 ¹ This case was originally allowed to proceed against defendants “Doe 1, De[G]ough, and Doe 2.” (ECF
28 No. 18, p. 2). However, the Doe defendants were later identified, and the Court ordered that “[r]eferences to Doe 1 will be treated as if they referred to H. Shirley,” and “[r]eferences to Doe 2 will be treated as if they referred to J. Cronjager.” (ECF No. 40, p. 2).

² Page numbers refer to the ECF page numbers stamped at the top of the page.

1 (ECF No. 31). On May 4, 2022, the Court granted Plaintiff until July 8, 2022, to file his
2 response to Defendants' motion for summary judgment and opened discovery solely on the
3 issue of whether Plaintiff exhausted available administrative remedies. (ECF No. 38). On May
4 23, 2022, Plaintiff filed his opposition. (ECF No. 41). On May 26, 2022, Defendants filed
5 their reply. (ECF No. 42).

6 Based on the undisputed facts, the Court finds that Plaintiff exhausted his available
7 administrative remedies, but he did so after he filed the operative complaint. Accordingly, the
8 Court recommends that Defendants' motion for summary judgment be granted, and that the
9 case be dismissed without prejudice to Plaintiff refiling his claim now that it appears to be
10 exhausted.

11 **II. SUMMARY OF CLAIMS**

12 This case is proceeding on Plaintiff's Eighth Amendment conditions of confinement
13 claim against defendants Shirley, Degough, and Cronjager based on allegations that the water
14 at Wasco State Prison is contaminated, and that Defendants have not appropriately responded
15 to the issue. (ECF Nos. 14, 18, & 40). In allowing this claim to proceed past screening, the
16 Court found as follows:

17 Liberaally construing Plaintiff's complaint, the Court finds that Plaintiff
18 sufficiently alleges that he is forced to drink, bathe with, and eat with
19 contaminated water, and that this contaminated water poses an excessive risk to
20 his health and safety, to proceed past the screening stage. According to Plaintiff,
21 he has already suffered numerous symptoms, including severe kidney pain,
22 headaches, hair loss, and rashes.

23 The more difficult question is who Plaintiff alleges is responsible. Upon
24 reviewing Plaintiff's First Amended Complaint, the Court finds that Plaintiff
25 sufficiently alleges that [defendant Shirley] (the Warden of Wasco State Prison),
26 defendant De[G]ough (the Wasco State Prison Water System Contractor), and
27 defendant [Cronjager] (the head of the Health and Safety Division of Wasco
28 State Prison) knew of the contaminated water issue but failed to act. According
to Plaintiff's First Amended Complaint, all of these defendants appear to be
directly responsible for the health and safety of inmates at Wasco State Prison.
Moreover, it appears that all of these defendants reside and/or work in Kern
County, and Plaintiff alleges that the issue is occurring throughout Kern County.
Finally, Plaintiff alleges that the news, newspaper, and media have televised the
rampant harm, and citizens have been banned from consuming this water.
Based on these allegations, and liberaally construing Plaintiff's complaint, the

1 Court finds that Plaintiff's Eighth Amendment conditions of confinement claim
2 against defendants [Shirley], De[G]ough, and [Cronjager] should proceed past
screening.

3 (ECF No. 14, pgs. 12-13 (footnotes omitted); ECF No. 18, p. 2).

4 All other claims were dismissed. (ECF No. 18, p. 2).

5 **III. SUMMARY JUDGMENT**

6 a. Defendants' Motion (ECF No. 31)

7 Defendants filed a motion for summary judgment on April 14, 2022. (ECF No. 31).

8 Defendants move for summary judgment on the ground that Plaintiff failed to properly exhaust
9 his available administrative remedies before filing this case. (Id.).

10 Defendants assert that regulations were in place "governing the filing and resolution of
11 inmate grievances."³ (Id. at 4). The process has two levels, and "[i]t is only a substantive
12 response at the second level of review that exhausts administrative remedies." (Id.).

13 Defendants also assert that Plaintiff utilized the administrative remedies regarding his
14 claim in this case, and that he "exhausted those administrative remedies when he obtained a
15 second level of review from the CDCR Office of Appeals in Sacramento on November 17,
16 2021." (Id.). However, Plaintiff "did not exhaust administrative remedies until 54 days after
17 he filed his initial complaint on September 24, 2021 and 9 days after he filed his first amended
18 complaint on November 8, 2021." (Id.) (citations omitted). Accordingly, Defendants argue
19 that this action should be dismissed because Plaintiff failed to properly exhaust administrative
20 remedies. (Id. at 5).

21 In support of their motion, Defendants submit among other things: the declaration of B.
22 Keyfauver, the Grievance Coordinator at Wasco State Prison; a grievance submitted by
23 Plaintiff with Log. No. 161850; the first level response; and the second level response.

24 b. Plaintiff's Opposition (ECF No. 41)

25 Plaintiff filed his opposition on May 23, 2022. (ECF No. 41).

26 Plaintiff argues that the administrative remedy was not available because the grievance
27 procedure operates as a dead end, with Wasco State Prison officials unable or consistently

28 ³ A grievance is also referred to as an appeal or a 602.

1 unwilling to provide any relief. (Id. at 2). Plaintiff argues that Wasco State Prison officials
2 consistently close grievances filed by inmates, including Plaintiff, as a means to avoid
3 accountability. (Id.). This is done before staff considers the merits of the grievance. (Id.).
4 Plaintiff also argues that Wasco State Prison officials prevent inmates from using the grievance
5 procedure through machinations. (Id.).

6 Plaintiff argues that his grievance was erroneously closed in a biased manner because
7 Keyfauver calculated the due date for his grievance from the date posted on the memo Plaintiff
8 referenced, and not on the date of Plaintiff’s grievance. (Id.). This was done to “detour”
9 Plaintiff’s grievance process. (Id.). Keyfauver did the same thing in the case of Paul Keller v.
10 Kathleen Allison. (Id. at 3). Plaintiff argues that this shows machinations on the part of Wasco
11 State Prison. (Id.). Moreover, Plaintiff never received a remedy in response to his grievance.
12 (Id. at 4).

13 Plaintiff also argues that exhaustion is not required (id. at 3 & 5), but even if it is, a
14 grievance is sufficient if it gives prison officials the time and opportunity to address complaints
15 internally (id. at 3). And here, Plaintiff gave prison officials fair opportunity to address his
16 complaint “by allowing 51 of 60 days to pass until the filing of the Amended complaint.” (Id.).
17 Plaintiff also asserts that he raised the issue of contaminated water with staff outside of the
18 grievance process as well. (Id. at 5).

19 Plaintiff also asserts that officials who processed his grievance never addressed the
20 merits of his grievance, even though he was complaining about a grave danger to inmates
21 housed at Wasco State Prison. (Id. at 6).

22 Plaintiff also asserts that his grievance should have been processed as an emergency
23 grievance. (Id. at 8).

24 Plaintiff also includes facts and arguments that are not relevant to the issue of whether
25 Plaintiff exhausted his available administrative remedies, including arguments related to the
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1 merits of his case.⁴

2 In support of his opposition, Plaintiff submits among other things: his declaration; the
3 first level response to his grievance; the second level response to his grievance; the first level
4 response to a grievance filed by inmate Paul Keller; and a log of grievances filed by Plaintiff.

5 c. Discussion

6 i. *Legal Standards for Summary Judgment*

7 Summary judgment in favor of a party is appropriate when there “is no genuine dispute
8 as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ.
9 P. 56(a); Albino v. Baca (“Albino II”), 747 F.3d 1162, 1169 (9th Cir. 2014) (*en banc*) (“If there
10 is a genuine dispute about material facts, summary judgment will not be granted.”). A party
11 asserting that a fact cannot be disputed must support the assertion by “citing to particular parts
12 of materials in the record, including depositions, documents, electronically stored information,
13 affidavits or declarations, stipulations (including those made for purposes of the motion only),
14 admissions, interrogatory answers, or other materials, or showing that the materials cited do not
15 establish the absence or presence of a genuine dispute, or that an adverse party cannot produce
16 admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1).

17 A party moving for summary judgment “bears the initial responsibility of informing the
18 district court of the basis for its motion, and identifying those portions of ‘the pleadings,
19 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
20 any,’ which it believes demonstrate the absence of a genuine issue of material fact.” Celotex
21 Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). If the moving party
22 moves for summary judgment on the basis that a material fact lacks any proof, the Court must
23 determine whether a fair-minded jury could reasonably find for the non-moving party.
24 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (“The mere existence of a scintilla
25 of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on
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27 ⁴ The Court notes that Plaintiff states that defense counsel did not provide answers to Plaintiff’s
28 interrogatories (ECF No. 41, p. 1), but there is no indication that the interrogatories were relevant to the issue of
exhaustion or that Plaintiff needed the responses to properly respond to the motion for summary judgment.

1 which the jury could reasonably find for the plaintiff.” “[A] complete failure of proof
2 concerning an essential element of the nonmoving party’s case necessarily renders all other
3 facts immaterial.” Celotex, 477 U.S. at 322. Additionally, “[a] summary judgment motion
4 cannot be defeated by relying solely on conclusory allegations unsupported by factual data.”
5 Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

6 In reviewing the evidence at the summary judgment stage, the Court “must draw all
7 reasonable inferences in the light most favorable to the nonmoving party.” Comite de
8 Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 942 (9th Cir. 2011). It
9 need only draw inferences, however, where there is “evidence in the record ... from which a
10 reasonable inference ... may be drawn...”; the court need not entertain inferences that are
11 unsupported by fact. Celotex, 477 U.S. at 330 n. 2 (citation omitted). Additionally, “[t]he
12 evidence of the non-movant is to be believed....” Anderson, 477 U.S. at 255.

13 In a summary judgment motion for failure to exhaust, the defendants have the initial
14 burden to prove “that there was an available administrative remedy, and that the prisoner did
15 not exhaust that available remedy.” Albino II, 747 F.3d at 1172. If the defendants carry that
16 burden, “the burden shifts to the prisoner to come forward with evidence showing that there is
17 something in his particular case that made the existing and generally available administrative
18 remedies effectively unavailable to him.” Id. However, “the ultimate burden of proof remains
19 with the defendant.” Id. “If material facts are disputed, summary judgment should be denied,
20 and the district judge rather than a jury should determine the facts.” Id. at 1166.

21 ii. *Legal Standards for Exhaustion of Administrative Remedies*

22 The California prison grievance system has two levels of review. Cal. Code Regs. tit.
23 15, §§ 3483, 3486.⁵ Generally, “[c]ompletion of the review process by the Office of Appeals
24 constitutes exhaustion of all administrative remedies available to a claimant within the
25 Department.” Cal. Code Regs. tit. 15, § 3486.

26 Section 1997e(a) of the Prison Litigation Reform Act of 1995 (“PLRA”) provides that

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28 ⁵ Section 3486 was subsequently repealed, but the process still has two levels of review. Cal. Code Regs.
tit. 15, § 3481(a)

1 “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any
2 other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until
3 such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).

4 Prisoners are required to exhaust the available administrative remedies prior to filing the
5 operative complaint. Jones v. Bock, 549 U.S. 199, 211 (2007); McKinney v. Carey, 311 F.3d
6 1198, 1199-1201 (9th Cir. 2002) (per curiam); Saddozai v. Davis, 35 F.4th 705 (9th Cir. 2022).
7 The exhaustion requirement applies to all prisoner suits relating to prison life. Porter v. Nussle,
8 534 U.S. 516, 532 (2002). Exhaustion is required regardless of the relief sought by the prisoner
9 and regardless of the relief offered by the process, unless “the relevant administrative procedure
10 lacks authority to provide any relief or to take any action whatsoever in response to a
11 complaint.” Booth v. Churner, 532 U.S. 731, 736, 741 (2001); see also Ross v. Blake, 578 U.S.
12 632, 639-40, 642 (2016).

13 As discussed in Ross, 578 U.S. at 648, there are no “special circumstances” exceptions
14 to the exhaustion requirement. The one significant qualifier is that “the remedies must indeed
15 be ‘available’ to the prisoner.” Id. at 639. The Ross Court described this qualification as
16 follows:

17 [A]n administrative procedure is unavailable when (despite what
18 regulations or guidance materials may promise) it operates as a
19 simple dead end—with officers unable or consistently unwilling
20 to provide any relief to aggrieved inmates. See 532 U.S., at 736,
21 738, 121 S.Ct. 1819....

22 Next, an administrative scheme might be so opaque that it
23 becomes, practically speaking, incapable of use....

24 And finally, the same is true when prison administrators thwart
25 inmates from taking advantage of a grievance process through
26 machination, misrepresentation, or intimidation.... As all those
27 courts have recognized, such interference with an inmate’s
28 pursuit of relief renders the administrative process unavailable.
And then, once again, § 1997e(a) poses no bar.

Id. at 643-44 (footnote omitted).

“When prison officials improperly fail to process a prisoner’s grievance, the prisoner is
deemed to have exhausted available administrative remedies.” Andres v. Marshall, 867 F.3d

1 1076, 1079 (9th Cir. 2017).

2 If the Court concludes that Plaintiff has failed to exhaust, the proper remedy is dismissal
3 without prejudice of the portions of the complaint barred by section 1997e(a). Jones, 549 U.S.
4 at 223-24; Lira v. Herrera, 427 F.3d 1164, 1175-76 (9th Cir. 2005).

5 *iii. Undisputed Facts*

6 The Court finds that the following facts are undisputed:⁶

- 7 • Plaintiff filed the complaint commencing this action on September 24, 2021.
8 (ECF No. 1).
- 9 • Plaintiff filed his First Amended Complaint on November 8, 2021. (ECF No.
10 13).
- 11 • Plaintiff filed a grievance related to the issue of contaminated water.
12 Defendants' Statement of Undisputed Facts, ¶ 5.
- 13 • Plaintiff's grievance is dated September 6, 2021. (ECF No. 31-2, p. 5).
- 14 • The final response to Plaintiff's grievance was issued on November 17, 2021.
15 Defendants' Statement of Undisputed Facts, ¶ 6.

16 *iv. Analysis*

17 It is undisputed that Plaintiff received a response from the final level of review on
18 November 17, 2021. Additionally, Defendants admit, and Plaintiff does not dispute, that this
19 response exhausted the available administrative remedies. However, prisoners are required to
20 exhaust the available administrative remedies prior to filing the operative complaint. Jones v.
21 Bock, 549 U.S. 199, 211 (2007); McKinney v. Carey, 311 F.3d 1198, 1199-1201 (9th Cir.
22 2002) (per curiam); Saddozai v. Davis, 35 F.4th 705 (9th Cir. 2022). Here, it is undisputed that
23 Plaintiff filed the operative complaint on November 8, 2021. As it is undisputed that Plaintiff
24 did not exhaust administrative remedies until after the date he filed the operative complaint,
25 Defendants are entitled to summary judgment on the issue of exhaustion.

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27 ⁶ Plaintiff failed to respond to Defendants' Statement of Undisputed Facts, and Defendant failed to
28 respond to Plaintiff's Statement of Facts. However, after reviewing the parties' filings, the Court has determined
that neither side disputes these facts.

1 Plaintiff makes several arguments as to why Defendants are not entitled to summary
2 judgment, but none are persuasive.

3 Plaintiff argues that remedies were not available because prison officials prevent
4 inmates from using the grievance procedure through machinations. An administrative remedy
5 is unavailable “when prison administrators thwart inmates from taking advantage of a
6 grievance process through machination, misrepresentation, or intimidation.” Ross, 578 U.S. at
7 644. However, Plaintiff has not submitted evidence that he was prevented from taking
8 advantage of the grievance procedure through machination, misrepresentation, or intimidation.
9 In fact, it is undisputed that Plaintiff exhausted administrative remedies shortly after filing the
10 operative complaint. Thus, this argument is not persuasive.

11 Plaintiff also argues that he never received a remedy in response to his grievance, and
12 that the grievance procedure operates as a dead end, with Wasco State Prison officials unable or
13 consistently unwilling to provide any relief. “[A]n administrative procedure is unavailable
14 when (despite what regulations or guidance materials may promise) it operates as a simple dead
15 end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates.”
16 Ross, 578 U.S. at 643.

17 The fact that Plaintiff did not receive a remedy in response to his grievance does not
18 change the analysis here. Exhaustion is required regardless of the relief sought by the prisoner
19 and regardless of the relief offered by the process, unless “the relevant administrative procedure
20 lacks authority to provide any relief or to take any action whatsoever in response to a
21 complaint.” Booth, 532 U.S. at 736, 741; see also Ross, 578 U.S. at 639-40, 642. “[P]roper
22 exhaustion improves the quality of those prisoner suits that are eventually filed because proper
23 exhaustion often results in the creation of an administrative record that is helpful to the court.
24 When a grievance is filed shortly after the event giving rise to the grievance, witnesses can be
25 identified and questioned while memories are still fresh, and evidence can be gathered and
26 preserved.” Woodford v. Ngo, 548 U.S. 81, 94-95 (2006). Thus, even if the grievance
27 procedure was not able to provide the remedy Plaintiff requested, he was still required to utilize
28 the procedure.

1 While Plaintiff also argues that the process operates as a dead end, with officers unable
2 or consistently unwilling to provide any relief, Plaintiff has not submitted evidence from which
3 a fair-minded fact finder could reasonably find for Plaintiff on this issue. Plaintiff’s only
4 evidence is that his grievance and another inmate’s grievances were not addressed on the
5 merits, as well as a log of grievances with three log numbers circled. However, the log does
6 not state what remedies, if any, were provided. Additionally, there is no evidence that officers
7 are unable to provide any relief through the grievance process, and a fair-minded fact finder
8 could not reasonably find that officers are *consistently* unwilling to provide any relief to
9 inmates based on the few examples provided by Plaintiff. Accordingly, this argument is not
10 persuasive.

11 Plaintiff also argues that exhaustion is not required. As discussed above, Plaintiff was
12 required to exhaust available administrative remedies. Thus, Plaintiff is incorrect as a matter of
13 law.

14 Plaintiff also argues that even if he was required to exhaust, he did not need to strictly
15 follow the grievance procedure, he only needed to provide prison officials the time and
16 opportunity to address complaints internally (which he did). Plaintiff is incorrect as a matter of
17 law. Even if Plaintiff provided prison officials with notice of the issue, and even if they had a
18 chance to respond, this does not exhaust available administrative remedies or excuse
19 compliance with an available administrative procedure. Instead, “proper exhaustion of
20 administrative remedies ... means using all steps that the agency holds out, and doing so
21 *properly* (so that the agency addresses the issues on the merits).” Woodford, 548 U.S. at 90, 93
22 (2006) (citation and internal quotation marks omitted).

23 Plaintiff also argues that prison officials failed to process his grievance as an emergency
24 grievance. However, there is no evidence before the Court that Plaintiff asked for his grievance
25 to be processed as an emergency grievance, or that prison officials were required under their
26 procedures to do so. And, Plaintiff has not cited to any authority, and the Court is not aware of
27 any, suggesting that the failure of prison officials to process a grievance as an emergency
28 means that the grievance procedure was unavailable to the inmate.

1 Based on the undisputed facts, the Court finds that Plaintiff exhausted his available
2 administrative remedies, but he did so after he filed the operative complaint. Accordingly, the
3 Court will recommend that Defendants' motion be granted.

4 The Court notes that it is not addressing the merits of Plaintiff's action, and that the
5 dismissal recommended by the Court is without prejudice, meaning that Plaintiff may refile this
6 action now that he has exhausted his claim.

7 **IV. CONCLUSION AND RECOMMENDATIONS**

8 Accordingly, based on the foregoing, IT IS HEREBY RECOMMENDED that:

- 9 1. Defendants' motion for summary judgment be granted; and
10 2. This action be dismissed without prejudice to Plaintiff refile the action given
11 that he exhausted his available administrative remedies, but he did so after he
12 filed the operative complaint.

13 These findings and recommendations are submitted to the United States district judge
14 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within twenty-
15 one (21) days after being served with these findings and recommendations, any party may file
16 written objections with the court. Such a document should be captioned "Objections to
17 Magistrate Judge's Findings and Recommendations." Any response to the objections shall be
18 served and filed within fourteen (14) days after service of the objections. The parties are
19 advised that failure to file objections within the specified time may result in the waiver of rights
20 on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v.
21 Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

22 IT IS SO ORDERED.

23 Dated: June 15, 2022

24 /s/ Eric P. Gray
25 UNITED STATES MAGISTRATE JUDGE
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