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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE EASTERN DISTRICT OF CALIFORNIA

8 ROBERT CALDERON,

9 Plaintiff,

No. 2:07-cv-2774 JAM JFM (PC)

10 vs.

11 S. BABICH, et al.,

12 Defendants.

FINDINGS & RECOMMENDATIONS

13 _____/
14 Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to
15 42 U.S.C. § 1983. This action is proceeding on plaintiff's December 26, 2007 complaint, in
16 which he claims that his rights under the Eighth Amendment were violated by defendants'
17 deliberate indifference to his safety needs during a period of incarceration at High Desert State
18 Prison (High Desert). Specifically, plaintiff claims that defendants failed to place him in an
19 appropriate facility following his debriefing from a prison gang and that as a result on April 23,
20 2007 he was stabbed twenty-seven times. This matter is before the court on defendants' motion
21 to dismiss this action pursuant to the unenumerated provisions of Fed. R. Civ. P. 12(b) for failure
22 to exhaust administrative remedies prior to filing this action. On March 17, 2008, the court
23 advised plaintiff of the requirements for opposing a motion to dismiss for failure to exhaust
24 administrative remedies pursuant to the unenumerated provisions of Fed. R. Civ. P. 12(b). See
25 Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003).

26 "Section 1997e(a) of Title 42 of the United States Code provides:

1 No action shall be brought with respect to prison conditions under
2 [42 U.S.C. § 1983], or any other Federal law, by a prisoner
3 confined in any jail, prison, or other correctional facility until such
4 administrative remedies as are available are exhausted.

5 This exhaustion requirement is mandatory. Booth v. Churner, 532 U.S. 731, 741 (2001).”
6 McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. Dec. 5, 2002). Exhaustion must precede the
7 filing of the complaint; compliance with the statute is not achieved by satisfying the exhaustion
8 requirement during the course of an action. Id. at 1200. Defendants have the burden of proving
9 that plaintiff failed to exhaust available administrative remedies. See Wyatt, 315 F.3d at 1120.

10 California’s Department of Corrections provides a four-step
11 grievance process for prisoners who seek review of an
12 administrative decision or perceived mistreatment. Within fifteen
13 working days of “the event or decision being appealed,” the inmate
14 must ordinarily file an “informal” appeal, through which “the
15 appellant and staff involved in the action or decision attempt to
16 resolve the grievance informally.” Cal.Code Regs., tit. 15, §§
17 3084.5(a), 3084.6(c). [Footnote omitted.] If the issue is not
18 resolved during the informal appeal, the grievant next proceeds to
19 the first formal appeal level, usually conducted by the prison’s
20 Appeals Coordinator. Id. §§ 3084.5(b), 3084.6(c). Next are the
21 second level, providing review by the institution’s head or a
22 regional parole administrator, and the third level, in which review
23 is conducted by a designee of the Director of the Department of
24 Corrections. [Footnote omitted.] Id. § 3084.5(e)(1)-(2).

25 Brown v. Valoff, 422 F.3d 926, 929-30 (9th Cir. 2005.)

26 In support of their motion to dismiss, defendants have presented evidence that
between the time of plaintiff’s initial classification hearing at High Desert and the date this
lawsuit was filed, plaintiff filed three grievances. See Declaration of M. Dangler in Support of
Defendants’ Motion to Dismiss (Dangler Declaration), filed May 16, 2008, at ¶¶7 and 10. Two
of those grievances concerned issues unrelated to the matters at bar. See id. at ¶ 7. On or about
August 23, 2007, plaintiff filed a grievance concerning his classification status. See Dangler
Declaration, at ¶ 10. A copy of the grievance is attached to plaintiff’s complaint and to plaintiff’s
opposition to defendants’ motion to dismiss. Review of the grievance shows that it arose from
the April 23, 2007 stabbing and his allegations that he had not been appropriately housed in light

1 of his safety needs. Plaintiff's grievance was rejected as untimely at the first formal level of
2 review at High Desert State Prison. See Dangler Declaration, at ¶ 10 and Ex. C. It was rejected
3 at the Director's Level, the final level of administrative review, "because it was previously
4 rejected, withdrawn, or canceled." Declaration of N. Grannis in Support of Defendants' Motion
5 to Dismiss, filed May 16, 2008, at ¶ 7 and Ex. D.

6 Defendants contend that the fact that plaintiff's administrative grievance was
7 rejected as untimely demonstrates that plaintiff did not properly exhaust his administrative
8 remedies. In opposition, plaintiff contends that (1) between August 24, 2004 and April 23, 2007
9 he had no reason to appeal the classification decision at issue because he was told that he would
10 be transferred to an appropriate bed when one became available; (2) that following the stabbing
11 incident on April 23, 2007 he was hospitalized in Reno, Nevada from April 23, 2007 until May
12 8, 2007; and (3) that following his return to High Desert he tried unsuccessfully to obtain
13 documents in support of his grievance, which caused him to delay filing the grievance until
14 August 23, 2007.

15 The United States Supreme Court has held that 42 U.S.C. § 1997e(a) "requires
16 'proper exhaustion of administrative remedies,' . . . so 'a prisoner must complete the
17 administrative review process in accordance with the applicable procedural rules, including
18 deadlines, as a precondition to bringing suit in federal court.'" Ngo v. Woodford, 539 F.3d 1108,
19 1109 (9th Cir. 2008) (quoting Woodford v. Ngo, 548 U.S. 81, 126 S.Ct. 2378, 2382, 2384
20 (2006). As a general rule, the time for filing a grievance runs from the date on which "a prisoner
21 'had notice of all the wrongful acts she wished to challenge. . . ." Ngo, at 1109 (quoting Knox
22 v. Davis, 260 F.3d 1009, 1014 (9th Cir. 2001)).

23 Under applicable regulations, plaintiff had fifteen days from "the event or decision
24 being appealed" in which to file his inmate grievance. Cal. Code Regs. tit. 15, § 3084.6(c). The
25 record shows that plaintiff was hospitalized for approximately two weeks following the April 23,
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1 2007 assault and had no opportunity during that period in which to file an administrative
2 grievance.

3 However, the record also shows that plaintiff waited for over three months after
4 he returned to High Desert to file his grievance. For the latter period, plaintiff asserts that he was
5 attempting unsuccessfully to obtain documentation from prison officials to support his grievance.
6 This asserted reason for the delay is unavailing. The regulations governing inmate appeals
7 provide in relevant part that a grievance shall be submitted on a CDC Form 602, that “a limit of
8 one continuation page, front and back, may be attached to the appeal to describe the problem and
9 action requested in sections A and B of the form,” and that “[o]nly supporting documentation
10 necessary to clarify the appeal shall be attached to the appeal.” Cal. Code Regs. tit. 15, §
11 3084.2(a)(1), (2). In a letter submitted to the appeals coordinator at High Desert on August 23,
12 2007, the date on which he submitted his grievance, plaintiff stated that he had requested “legal
13 documents and chronos” as well as a copy of the April 23, 2007 incident report to attach to his
14 grievance, that he had not received the documents, and that all of them could be found in his
15 central file. See Ex. G to Plaintiff’s Opposition to Defendants’ Motion to Dismiss, filed June 9,
16 2008. Plaintiff’s grievance is well described on the Form 602. See id. It does not appear that
17 any of the documents plaintiff had requested were needed to “clarify” his grievance and, in any
18 event, that any documents required by prison officials to review the grievance were available to
19 them in plaintiff’s central file.¹

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21 ¹ The United States Court of Appeals for the Ninth Circuit has held that “it is unclear”
22 whether exceptions can be read into the exhaustion requirement. See Ngo, at 1110. The failure
23 to respond to plaintiff’s requests for supporting documentation would not appear to fall into any
24 of the categories that the Court of Appeals indicated might support an exception to the
25 exhaustion requirement. Cf. Ngo, at 1110 (“ Ngo hasn’t shown that administrative procedures
26 were unavailable, that prison officials obstructed his attempt to exhaust or that he was prevented
from exhausting because procedures for processing grievances weren’t followed.”) At least one
judge on the Court of Appeals has suggested that there are serious due process concerns with the
“draconian timeline” of fifteen days contained in the applicable California regulations. See Ngo,
at 1111 (Pregerson, J., concurring.) Those concerns are manifest in the instant action, where
plaintiff was attempting first to recover from twenty-seven stab wounds which caused injuries
that required him to be life-flighted to an outside hospital, and then to assemble all relevant

1 For the foregoing reasons, this court finds that plaintiff failed to comply with the
2 fifteen-day time limit for submitting his administrative grievance and, therefore, that plaintiff
3 failed to properly exhaust administrative remedies prior to filing this action.² For that reason,
4 defendants' motion to dismiss should be granted.

5 In accordance with the above, IT IS HEREBY RECOMMENDED that:

- 6 1. Defendants' May 16, 2008 motion to dismiss be granted; and
7 2. This action be dismissed for failure to properly exhaust administrative
8 remedies prior to suit.

9 These findings and recommendations are submitted to the United States District
10 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
11 days after being served with these findings and recommendations, any party may file written
12 objections with the court and serve a copy on all parties. Such a document should be captioned
13 "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that
14 failure to file objections within the specified time may waive the right to appeal the District
15 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

16 DATED: January 22, 2009.

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19 UNITED STATES MAGISTRATE JUDGE

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24 documents before presenting his grievance. Nonetheless, this court is bound by applicable
25 decisions of the United States Supreme Court and the United States Court of Appeals for the
26 Ninth Circuit. Under existing precedent, defendants' motion to dismiss must be granted.

² But see footnote 1, supra.