

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

JEFFREY E. WALKER,

NO. CIV. 2:09-642 WBS GGH

Plaintiff,

v.

ORDER RE: MAGISTRATE JUDGE'S  
FINDINGS AND RECOMMENDATIONS

A.H. WHITTEN, et al.,

Defendants.

\_\_\_\_\_ /

-----oo0oo-----

Plaintiff Jeffrey E. Walker, a state prison inmate proceeding pro se, initiated this action for claims pursuant to 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 302(c)(17).

On February 9, 2011, the magistrate judge filed findings and recommendations, which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty-

1 one days. (Docket No. 45.) Defendants<sup>1</sup> object to the  
2 magistrate judge's recommendation that their motion under Federal  
3 Rule of Civil Procedure 12(b) to dismiss for plaintiff's failure  
4 to exhaust administrative remedies be denied.<sup>2</sup> (Docket No. 49.)

5 In accordance with the provisions of 28 U.S.C. §  
6 636(b)(1)(C), this court has conducted a de novo review of this  
7 case. Having carefully reviewed the entire file, the court will  
8 adopt the findings and recommendations, except to the extent that  
9 they rely on section 3084.9(i) (providing for special procedures  
10 for staff complaints) of Title 15 of the California Code of  
11 Regulations, which was not in effect when plaintiff filed his  
12 administrative appeals, and will deny the moving defendants'  
13 motion to dismiss for plaintiff's failure to exhaust  
14 administrative remedies.

15 I. Factual and Procedural Background

16 As pertinent to the motion, plaintiff filed a grievance

17  
18 <sup>1</sup> Defendants Whitten, Greer, Protivinsky, and Brewer  
19 brought the motion to dismiss. The objections do not specify  
20 which of the moving defendants object to the magistrate judge's  
21 findings and recommendations, so the court assumes that all  
22 moving defendants object.

23 In their objections, defendants do not distinguish  
24 among themselves. In other words, defendants do not argue that  
25 plaintiff failed to exhaust administrative remedies as to a  
26 particular defendant for a reason different from the reason that  
27 plaintiff failed to exhaust for the other defendants. Thus, this  
28 court's Order does not distinguish among the defendants with  
respect to exhaustion.

<sup>2</sup> The magistrate judge also recommended dismissal as to  
defendant Moore because plaintiff did not comply with an order to  
return the USM-285 form and a copy of the Complaint in order to  
facilitate service on defendant Moore. (See Feb. 9, 2011,  
Findings & Recommendations at 13:3-6 (Docket No. 45).) Plaintiff  
did not file an objection to the findings and recommendations.  
Accordingly, the court will adopt the findings and  
recommendations with regard to dismissal of this action as  
against defendant Moore.

1 in November of 2008 for improper searches, retaliation, and  
2 deliberate indifference to plaintiff's psychiatric history in  
3 2007 and 2008. Plaintiff alleges that the alleged staff  
4 misconduct stemmed from the dismissal of a rules violation report  
5 in 2007. (See Lewis Decl. in Supp. of Defs.' Mot. to Dismiss  
6 ("Lewis Decl.") Ex. C at 28-29<sup>3</sup> (Docket No. 23-4).)

7           The grievance was categorized as a "staff complaint."  
8 At the second level of the inmate appeals process, plaintiff  
9 received a response informing him that his administrative appeal  
10 was partially granted and that an investigation was conducted,  
11 but the investigation found that the allegations were  
12 unsubstantiated. (Id. Ex. C at 32-33.) Plaintiff then filed an  
13 administrative appeal at the director's level. In March of 2009,  
14 before plaintiff received a response at the director's level,  
15 plaintiff filed the instant action in this court. Plaintiff  
16 received a response at the director's level denying his appeal in  
17 May of 2009. (Id. Ex. C at 26-27.)

## 18 II. Discussion

19           A prisoner may not bring a § 1983 claim "until such  
20 administrative remedies as are available are exhausted." 42  
21 U.S.C. § 1997e(a). The prisoner must satisfy the exhaustion  
22 requirement before filing the complaint. See McKinney v. Carey,  
23 311 F.3d 1198, 1199 (9th Cir. 2002) (per curiam). A plaintiff  
24 need not plead or prove exhaustion; a plaintiff's failure to  
25 exhaust is an affirmative defense that must be raised and proved  
26 by the defendant. See Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th

---

27  
28 <sup>3</sup> The page numbers are those assigned by the court's  
CM/ECF system.

1 Cir. 2003). A defendant may move to dismiss for a plaintiff's  
2 failure to exhaust pursuant to Federal Rule of Civil Procedure  
3 Rule 12(b). In deciding the motion, the court may look beyond  
4 the pleadings and decide disputed issues of fact. See id. at  
5 1119-20. Failure to exhaust requires dismissal without  
6 prejudice. Id. at 1120.

7 Exhaustion is mandatory regardless of the form of  
8 relief sought by the prisoner. See Booth v. Churner, 532 U.S.  
9 731, 739 (2001) (prisoners are obligated to navigate all of a  
10 prison's administrative process "regardless of the fit between a  
11 prisoner's prayer for relief and the administrative remedies  
12 possible"), overruling Rumbles v. Hill, 182 F.3d 1064 (9th Cir.  
13 1999). However, "a prisoner need not press on to exhaust further  
14 levels of review once he has either received all 'available'  
15 remedies at an intermediate level of review or been reliably  
16 informed by an administrator that no remedies are available."  
17 Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005).

18 Because "there can be no 'absence of exhaustion' unless  
19 some relief remains 'available,' a defendant must demonstrate  
20 that pertinent relief remained available." Id. at 936-37.  
21 Pertinent relief may remain available "at unexhausted levels of  
22 the grievance process or through awaiting the results of the  
23 relief already granted as a result of that process." Id. at 937.  
24 Evidence that the defendant may use to meet his burden includes  
25 "statutes, regulations, and other official directives that  
26 explain the scope of the administrative review process;  
27 documentary or testimonial evidence from prison officials who  
28 administer the review process; and information provided to the

1 prisoner concerning the operation of the grievance procedure.”

2 Id. The latter category of evidence is relevant because “it  
3 informs [the court’s] determination of whether relief was, as a  
4 practical matter, ‘available.’” Id. (emphasis added).

5 Here, when plaintiff filed his administrative appeals,  
6 an inmate in California could file administrative appeals  
7 following the procedures found in sections 3084.1 through 3084.7  
8 of Title 15 of the California Code of Regulations.<sup>4</sup> Under the  
9 regulations in effect at the time, a prisoner “[could] appeal any  
10 departmental decision, action, condition, or policy which they  
11 [could] demonstrate as having an adverse effect upon [his]  
12 welfare.” Cal. Code Regs. tit. 15, § 3084.1(a). The regulations  
13 set forth four levels of appeal: (1) informal level, in which the  
14 prisoner and the staff attempted to resolve the issue; (2) first  
15 formal level, usually conducted by the institution’s appeals  
16 coordinator; (3) second formal level, conducted by the  
17 institution’s head; (4) and third formal level, conducted by the  
18 director of the California Department of Corrections and  
19 Rehabilitation (“Department”).

20 Defendants have provided the Department’s

---

22 <sup>4</sup> Emergency regulations are currently in effect that  
23 amend and add sections to the regulations that were in effect  
24 when plaintiff filed his administrative appeals. The emergency  
25 regulations can be found at sections 3084.1 through 3084.9 of  
26 Title 15 of the California Code of Regulations. See Cal. Code  
27 Regs. tit. 15, §§ 3084.1-3084.9.

28 While the amended regulations provide additional  
support to deny defendants’ motion, the court will not adopt the  
magistrate judge’s findings and recommendations to the extent  
that they rely on regulations as amended because they were not in  
effect when plaintiff filed his administrative appeals. (See  
Feb. 9, 2011, Findings & Recommendations at 6:21-23, 7:19-21, 9  
n.5.)

1 Administrative Bulletin, issued on August 21, 1998, governing the  
2 processing of appeals that allege staff misconduct. (Defs.' Nunc  
3 Pro Tunc Req. for Extension of Time to File Ex. A  
4 ("Administrative Bulletin") (Docket No. 50).) The Ninth Circuit  
5 has described this Bulletin as reflecting a procedure in which  
6 the only remedy available for an appeal categorized as a "staff  
7 complaint" is an investigation into the alleged staff misconduct.  
8 Brown, 422 F.3d at 937-39. The Bulletin provides that "**ALL**  
9 complaints which allege any misconduct by a staff member shall be  
10 logged by the appeals coordinator as a Staff Complaint." (Id.  
11 (bold in original).)

12 The Bulletin states that if a staff complaint "warrants  
13 a formal . . . investigation," then the second level response  
14 "shall note that the appeal was granted or partially granted  
15 (depending upon the action requested by the appellant)." (Id. § 2  
16 (emphasis added).) The Bulletin's definition of partially  
17 granted suggests that an investigation is the only remedy  
18 available to a prisoner alleging staff misconduct: "Whether an  
19 appeal directed to the staff complaint procedure is given a  
20 'granted' or 'partially granted' response depends not on whether  
21 there remains some possibility of obtaining relief through the  
22 appeals process, but on 'the action requested by the appellant.'" Brown, 422 F.3d at 939.

24 The response at the second level that plaintiff  
25 received for his staff complaint is consistent with the Bulletin.  
26 (See Lewis Decl. Ex. C at 32.) The response stated that the  
27 appeal was partially granted at the second level and that an  
28

1 investigation into the allegations had been conducted. The  
2 response informed plaintiff that the investigation revealed no  
3 evidence to support his allegations.

4 The response noted that plaintiff sought additional  
5 remedies beyond an investigation into alleged staff misconduct,  
6 such as disciplinary action, a restraining order, and that the  
7 staff be professional in their interactions with plaintiff.  
8 Important to this motion, the response suggests that no further  
9 remedies were available: "Although you have the right to submit a  
10 staff complaint, a request for administrative action regarding  
11 staff or the placement of documentation in a staff member's  
12 personnel file is beyond the scope of the staff complaint  
13 process." (Id. Ex C at 33.) The response at the director's  
14 level, which defendants argue plaintiff was required to receive  
15 before filing the instant action, confirms that no further  
16 remedies remained available once an investigation was ordered and  
17 contained this same language quoted above. (Id. Ex. C at 26.).

18 Relying on Brown, a number of courts have found that an  
19 appeal of a complaint categorized as a "staff complaint" was  
20 exhausted once an investigation was ordered.<sup>5</sup> See, e.g., Lugo v.  
21 Williams, No. CIV S-09-0505 MCE CMK, 2010 WL 4880657, at \*6 (E.D.  
22 Cal. Nov. 23, 2010) (magistrate judge's findings and  
23 recommendations), adopted by No. 2:09-cv-00505 MCE CMK, 2011 WL  
24 346536 (E.D. Cal. Feb. 1, 2011); Cottrell v. Wright, No. CIV  
25 S-09-824 JAM KJM, 2010 WL 4806910, at \*5 (E.D. Cal. Nov. 18,

---

26  
27 <sup>5</sup> Inexplicably, despite the magistrate judge expressly  
28 relying on Brown, (see Feb. 9, 2011, Findings & Recommendations  
at 7:16-9:7), defendants have not even cited Brown in their  
objections.

1 2010) (magistrate judge's findings and recommendations), adopted  
2 by No. CIV S-09-0824 JAM DAD, 2011 WL 319080 (E.D. Cal. Jan. 28,  
3 2011); Aubert v. Elijah, No. 1:07-cv-01629 LJO GSA, 2010 WL  
4 3341915, at \*7 (E.D. Cal. Aug. 24, 2010) (magistrate judge's  
5 findings and recommendations), adopted by No. 1:07-cv-01629 LJO  
6 GSA, 2010 WL 3825609 (E.D. Cal. Sept. 28, 2010); Lees v. Felker,  
7 No. CIV S-08-196 KJM, 2010 WL 2353517, at \*4 (E.D. Cal. June 9,  
8 2010) (magistrate judge's order); Foster v. Verkouteren, Civil  
9 No. 08cv0554, 2009 WL 2485369, at \*5 (S.D. Cal. Aug. 12, 2009)  
10 (magistrate judge's order), aff'd on other grounds, No. 09-56396,  
11 2010 WL 4813674 (9th Cir. Nov. 23, 2010); Kidd v. Biggs, No. CV  
12 01:06-1098 BLW MHW, 2009 WL 2151836, at \*4 (E.D. Cal. July 16,  
13 2009) (magistrate judge's findings and recommendations), adopted  
14 by No. 1:06-CV-1098 BLW MHW, 2009 WL 3157536 (E.D. Cal. Sept. 28,  
15 2009); Ransom v. Rojas, No. 1:05-cv-00283 AWI GSA, 2008 WL  
16 4640619, at \*4 (E.D. Cal. Oct. 16, 2008) (declining to adopt  
17 magistrate judge's findings and recommendations); Harris v. Duc,  
18 No. CIV S-06-2138 JAM DAD, 2008 WL 3850214, at \*5 (E.D. Cal. Aug.  
19 15, 2008) (magistrate judge's findings and recommendations),  
20 adopted by No. CIV S-06-2138 JAM DAD, 2008 WL 4463604 (E.D. Cal.  
21 Oct. 02, 2008); Lay v. Marrow, No. CIV S-07-0711 JAM GGH, 2008 WL  
22 2954185, at \*7 (E.D. Cal. July 30, 2008) (magistrate judge's  
23 findings and recommendations).

24           In this case, unlike in Brown, plaintiff was informed  
25 in the response at the second level that allegations of staff  
26 misconduct "do not limit or restrict the availability of further  
27 relief via the inmate appeals process" and that he must submit  
28 the staff complaint appeal through the director's level to



1 exhaust his administrative remedies. (See Lewis Decl. Ex. C at  
2 33.) Many of the courts that have found exhaustion relying on  
3 Brown have dealt with this same language in a response and did  
4 not find that it was sufficient to meet the defendant's burden.  
5 See Cottrell, 2010 WL 4806910, at \*5; Aubert, 2010 WL 3341915, at  
6 \*7; Lees, 2010 WL 2353517, at \*4; Foster, 2009 WL 2485369, at \*5.

7 This court agrees that this language is insufficient to  
8 meet defendants' burden of "demonstrat[ing] that pertinent relief  
9 remained available."<sup>6</sup> Brown, 422 F.3d at 936-37. First,  
10 information provided to an inmate is relevant to the issue of  
11 whether the remedies were available as a practical matter, not  
12 whether remedies were in fact available. Cf. id. at 937  
13 (explaining the relevancy of information provided to an inmate).  
14 Second, even if this language were relevant to the issue of  
15 whether a remedy was in fact available, this language is not  
16 sufficient to meet defendants' burden in light of contradictory  
17 information provided in the same response at the second level and  
18 in the response at the director's level. Moreover, the Bulletin  
19 confirms that no additional remedies were available.

20 In seeming recognition that this language will not

---

21  
22 <sup>6</sup> The court recognizes that some courts have either  
23 expressly distinguished Brown based on this language or, while  
24 not citing Brown, relied on this language to find lack of  
25 exhaustion. See, e.g., McGinnis v. Elijah, Civil No. 1:08cv0793  
26 IEG, 2009 WL 2244188, at \*3 (E.D. Cal. July 27, 2009)  
27 (distinguishing Brown); Velasquez v. Elhendie, No. 2:07-cv-02419  
28 HDM RAM, 2009 WL 1357420, at \*2 (E.D. Cal. May 13, 2009) (same);  
Treglia v. Cal. Dep't of Corr. & Rehab., No. CIV S-07-0444 EFB,  
2009 WL 700242, at \*4 (E.D. Cal. Mar.13, 2009) (magistrate  
judge's order) (although not citing Brown, relying on this  
language); Robinson v. Heyward, No. CIV S-07-0729 JAM DAD, 2008  
WL 2875794, at \*3 (E.D. Cal. July 24, 2008) (magistrate judge's  
findings and recommendations) (although not citing Brown, relying  
on this language).

1 suffice, defendants have presented supplemental evidence to  
2 support their objections to the magistrate judge's findings and  
3 recommendations. The supplemental evidence attempts to show that  
4 additional remedies were in fact available to plaintiff beyond an  
5 investigation into his allegations of staff misconduct. This  
6 evidence would contradict the Bulletin and portions of the  
7 responses. See Brown, 422 F.3d at 939 ("While Valoff argues that  
8 an appeal to the Director's level might have netted additional  
9 relief to Brown, he produced no evidence--which would have had to  
10 contradict his own directives--that it could have.").

11 In a supplemental declaration, D. Foston, Chief of the  
12 Inmate Appeals Branch ("IAB") of the Department, states that a  
13 director's level response could have provided the following four  
14 forms of relief from IAB: (1) a recommendation that the inmate be  
15 transferred if not appropriately housed, (2) an order that the  
16 institution amend its strip search policy or holding cell policy  
17 to come into compliance with regulation or policy, (3) an order  
18 for another investigation to ensure all issues and allegations  
19 were appropriately addressed if the IAB found that the staff  
20 misconduct investigation was conducted improperly or was  
21 insufficient, and (4) a referral for a mental health evaluation  
22 if it had not already been completed. (Defs.' Objections to  
23 Findings & Recommendations on Defs.' MTD Attachment (Supplemental  
24 Foston Decl. on Defs.' MTD) ¶ 8 (Docket No. 49).)

25 With respect to transferring plaintiff if not  
26 appropriately housed, the Ninth Circuit's description of the  
27 evidence in Brown is instructive:

28 It is clear, for example, from the Department's general

1 directives and from its responses in this case, that only  
2 after the staff misconduct investigation, through which  
3 Brown's allegations were considered, would the Department  
4 of Corrections have determined whether Valoff's transfer  
5 to another institution was appropriate. Those documents  
6 emphasize that all investigations into staff misconduct  
7 are to take place through the staff complaint process;  
8 that the choice of relief in the event a complaint is  
9 sustained is up to the Department; and that the results  
10 of the staff complaint process are confidential. For  
11 similar reasons, any transfer of Brown because of  
12 Valoff's behavior would depend on sustaining the  
13 complaints about that behavior and thus could not come  
14 through the appeals process.

15 Brown, 422 F.3d at 939. Thus, despite Foster's supplemental  
16 declaration to the contrary, the evidence suggests that plaintiff  
17 could be transferred only through the staff complaint process,  
18 which plaintiff's staff complaint initiated, and not through the  
19 inmate appeals process.

20 That the Department's director could have changed the  
21 institution's policy on searches or holding cells or ordered a  
22 mental health evaluation does not prove that additional remedies  
23 were available because plaintiff's grievance did not pertain to  
24 these subjects. See id. at 940 ("Brown did not, however,  
25 complain about the pepper spray policy; rather, his complaint was  
26 that the policy had been violated. As Brown's grievance in no  
27 way challenged the pepper spray policy, we can conceive no reason  
28 the Director would reconsider that policy in response to Valoff's  
29 grievance.") (citing Booth, 532 U.S. at 736 n.4 ("Without the  
30 possibility of some relief, the administrative officers would  
31 presumably have no authority to act on the subject of the  
32 complaint, leaving the inmate with nothing to exhaust."  
33 (emphasis added))).

34 Lastly, Foster's statement that the director could have

1 ordered an additional investigation if it determined that the  
2 first investigation was insufficient or improperly conducted is  
3 contradicted by the response at the director's level that simply  
4 evaluated whether an investigation had been conducted.

5 Accordingly, the moving defendants have not met their burden of  
6 "demonstrat[ing] that pertinent relief remained available."

7 Brown, 422 F.3d at 936-37.

8 Accordingly, IT IS HEREBY ORDERED that:

9 1. The findings and recommendations filed February 9,  
10 2011, are adopted, except to the extent that they rely on section  
11 3084.9(i) of Title 15 of the California Code of Regulations;

12 2. The moving defendants' motion to dismiss for  
13 plaintiff's failure to exhaust administrative remedies is DENIED  
14 as to claims that defendants Whitten, Greer, Protivinsky, and  
15 Brewer conducted or allowed improper searches for the purposes of  
16 harassment, retaliation, and deliberate indifference to  
17 plaintiff's mental health in 2007 and 2008; and

18 3. This action is dismissed as against defendant Moore  
19 due to plaintiff's failure to prosecute.

20 DATED: April 14, 2011

21  
22 

23 WILLIAM B. SHUBB  
24 UNITED STATES DISTRICT JUDGE  
25  
26  
27  
28