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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

WILLIAM THOMAS COATS¹,

No. CIV S-09-1300-CMK-P

Plaintiff,

vs.

ORDER

MICHAEL FOX,

Defendant.

_____ /

Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pursuant to the written consent of all parties, this case is before the undersigned as the presiding judge for all purposes, including entry of final judgment. See 28 U.S.C. § 636(c). Pending before the court is defendant’s motion to dismiss for plaintiff’s failure to exhaust administrative remedies (Doc. 20), and plaintiff’s opposition thereto (Doc. 22).

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¹ Defendant correctly points out the correct spelling of plaintiff’s name, which is corrected herein.

1 **I. BACKGROUND**

2 This action proceeds on Plaintiff’s complaint (Doc. 1), against defendant Dr. Fox.²
3 Plaintiff alleges his Eighth Amendment rights were violated by Dr. Fox when he cancelled the
4 treatment other doctors had prescribed for plaintiff’s hepatitis.

5 **II. DISCUSSION**

6 Defendants bring this motion on the basis that plaintiff failed to exhaust his
7 administrative remedies prior to filing this action.

8 A motion to dismiss based on a prisoner’s failure to exhaust administrative
9 remedies is properly the subject of an unenumerated motion under Federal Rule of Civil
10 Procedure 12(b). See Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). “In deciding a
11 motion to dismiss for failure to exhaust non-judicial remedies, the court may look beyond the
12 pleadings and decide disputed issues of fact.” Id. at 1119-20. Where the court looks beyond the
13 pleadings to a factual record in deciding the motion to dismiss, which is “a procedure closely
14 analogous to summary judgment,” the court must assure that the plaintiff has fair notice of his
15 opportunity to develop a record. Id. at 1120 n.14 (referencing the notice requirements outlined in
16 Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998) (en banc), and Klinge v. Eikenberry, 849 F.2d
17 409 (9th Cir. 1988). Defendants bear the burden of establishing that the plaintiff failed to
18 exhaust administrative remedies prior to filing suit. See Wyatt, 315 F.3d at 1120. If the court
19 concludes that administrative remedies have not been exhausted, the unexhausted claim should
20 be dismissed without prejudice. See id. at 1120; see also Jones v. Bock, 549 U.S. 199 (2007).

21 Prisoners seeking relief under § 1983 must exhaust all available administrative
22 remedies prior to bringing suit. See 42 U.S.C. § 1997e(a). This requirement is mandatory
23 regardless of the relief sought. See Booth v. Churner, 532 U.S. 731, 741 (2001) (overruling
24 Rumbles v. Hill, 182 F.3d 1064 (9th Cir. 1999)). Because exhaustion must precede the filing of

25 ² Five other defendants were named in the complaint, but have been dismissed for
26 failure to state a claim.

1 the complaint, compliance with § 1997e(a) is not achieved by exhausting administrative remedies
2 while the lawsuit is pending. See McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002). The
3 Supreme Court recently addressed the exhaustion requirement in Jones v. Bock, 549 U.S. 199
4 (2007), and held: (1) prisoners are not required to specially plead or demonstrate exhaustion in
5 the complaint because lack of exhaustion is an affirmative defense which must be pleaded and
6 proved by the defendants; (2) an individual named as a defendant does not necessarily need to be
7 named in the grievance process for exhaustion to be considered adequate because the applicable
8 procedural rules that a prisoner must follow are defined by the particular grievance process, not
9 by the PLRA; and (3) the PLRA does not require dismissal of the entire complaint if only some,
10 but not all, claims are unexhausted.

11 The Supreme Court also held in Woodford v. Ngo that, in order to exhaust
12 administrative remedies, the prisoner must comply with all of the prison system’s procedural
13 rules so that the agency addresses the issues on the merits. 548 U.S. 81, 89-96 (2006). Thus,
14 exhaustion requires compliance with “deadlines and other critical procedural rules.” Id. at 90.
15 Partial compliance is not enough. See id. Substantively, the prisoner must submit a grievance
16 which affords prison officials a full and fair opportunity to address the prisoner’s claims. See id.
17 at 90, 93. The Supreme Court noted that one of the results of proper exhaustion is to reduce the
18 quantity of prisoner suits “because some prisoners are successful in the administrative process,
19 and others are persuaded by the proceedings not to file an action in federal court.” Id. at 94.

20 A prison inmate in California satisfies the administrative exhaustion requirement
21 by following the procedures set forth in §§ 3084.1-3084.7 of Title 15 of the California Code of
22 Regulations. In California, inmates “may appeal any departmental decision, action, condition, or
23 policy which they can demonstrate as having an adverse effect upon their welfare.” Cal. Code
24 Regs. tit. 15, § 3084.1(a). These regulations require the prisoner to proceed through several
25 levels of appeal: (1) informal resolution; (2) formal appeal; (3) second level appeal to institution
26 head; (4) third level appeal to the director of the California Department of Corrections and

1 Rehabilitation. A decision at the third formal level, which is also referred to as the director's
2 level, is not appealable and concludes a prisoner's departmental administrative remedy. See Cal.
3 Code Regs. tit. 15, §§ 3084.1(a) and 3084.5(e)(2). Departmental appeals coordinators may
4 summarily reject a prisoner's untimely administrative appeal. See Cal. Code Regs. tit. 15, §§
5 3084.3(c)(6) and 3084.6(c). If a group of inmates intend to appeal the same decision or action,
6 one grievance form is used and a list of the participating inmates must be attached. The list must
7 be legible and state the inmates' names, departmental identification numbers, and housing
8 assignment. The form must also be signed by all participating inmates. Currently, California
9 regulations do not contain any provision specifying who must be named in the grievance.

10 In certain circumstances, the regulations make it impossible for the inmate to
11 pursue a grievance through the entire grievance process. See Brown v. Valoff, 422 F.3d 926, 939
12 n. 11 (9th Cir. 2005). Where a claim contained in an inmate's grievance is characterized by
13 prison officials as a "staff complaint" and processed through a separate confidential process,
14 prison officials lose any authority to act on the subject of the grievance. See id. at 937 (citing
15 Booth, 532 U.S. at 736 n. 4). Thus, the claim is exhausted when it is characterized as a "staff
16 complaint." See id. at 940. If there are separate claims in the same grievance for which further
17 administrative review could provide relief, prison regulations require that the prisoner be notified
18 that such claims must be appealed separately. See id. at 939. The court may presume that the
19 absence of such a notice indicates that the grievance did not present any claims which could be
20 appealed separate from the confidential "staff complaint" process. See id.

21 Here, defendant has provided information on four inmate grievances plaintiff filed
22 while at DVI. Plaintiff does not dispute these four grievances. Two of these grievances, Log.
23 No. 08-594 and Log. No. 08-17445, address the issues presented in this case, plaintiff's treatment
24 for hepatitis. The first, Log. No. 08-594, was filed on February 11, 2008. Plaintiff stated that he
25 needed to be started on his hepatitis treatment as soon as possible, and was requesting to be
26 transferred. This grievance was partially granted at the informal level, noting plaintiff had

1 appeared before the ICC on February 21, 2008, and it was recommended that he be transferred,
2 but that endorsement was contingent upon bed availability. (Def. Mot., Doc. 20, Exh. B, Attach.
3 2). Plaintiff then appealed this decision to the formal level, stating he was dissatisfied with the
4 time it will take for transfer. His appeal was granted at the formal level, indicating that plaintiff
5 was endorsed for transfer to Mule Creek Sate Prison on March 27, 2008, and he would transfer as
6 soon as possible.³ Plaintiff did not take this appeal any further. In his complaint, he claims that
7 he was prescribed treatment to start immediately on May 30, 2008, June 10, 2008, and October 3,
8 2008. His claim is that Dr. Fox vetoed the treatment each time. However, as defendant points
9 out, this first inmate grievance was filed prior to the alleged constitutional deprivation in the
10 complaint. Thus, it cannot have exhausted the claims raised herein.

11 The second inmate grievance, Log. No. 08-17445, was filed on November 18,
12 2008. This one was granted at the First Level. In the decision granting plaintiff's grievance, the
13 reviewer noted that plaintiff's claim was that he was approved for Interferon and Ribavirin
14 treatment for Hepatitis C, which was stopped abruptly without plaintiff understanding why.
15 Plaintiff was requesting treatment be started as soon as possible. In granting the grievance, the
16 reviewer stated "The Chief Physician and Surgeon wrote orders for you to be transferred to a
17 mainline facility as soon as possible so that you can start the appropriate treatment for your
18 condition." (Def. Mot., Doc. 20, Exh. B, Attach. 2). This decision specifically stated that if
19 plaintiff was dissatisfied, he may appeal to the Second Level. As the grievance was granted,
20 however, plaintiff did not appeal it to the next level.

21 Plaintiff filed the instant action based on his failure to actually receive the
22 treatment he was granted. However, he never grieved that issue, nor did he appeal the decision to
23 provide him treatment, within the time frame set forth by the prison officials. In the inmate
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25 ³ It is unclear to the undersigned why petitioner had not transferred by February
26 2009, or when petitioner did finally get transferred, but that is not an issue before the court at this
time.

1 grievance, plaintiff requested to be provided treatment immediately. The remedy he was granted
2 through his inmate grievance was treatment as soon as he could be transferred to another
3 institution. He was not granted immediate treatment. In addition, he was specifically informed
4 that he had more appeals available to him, which he did not take advantage of.

5 Plaintiff argues that he did exhaust his administrative remedies by obtaining a
6 grant on his inmate grievance. However, he has provided no authority, nor has the court found
7 any, which holds that once an inmate has obtained a grant on his inmate appeal, he has exhausted
8 his claims, regardless of additional levels of appeals available. Here, plaintiff had the option of
9 filing an appeal to the Second Level then the Director's Level, as set forth in the First Level
10 decision. He chose not to, and to be satisfied with the remedy provided, treatment as soon as he
11 could be transferred. If he then failed to obtain the remedy granted, treatment at a new facility,
12 he could have filed a new inmate grievance addressing that issue. However, as plaintiff did not
13 appeal the inmate grievance to the highest level, his claim is unexhausted. Thus, the motion to
14 dismiss will be granted, without prejudice.

15 Accordingly, IT IS HEREBY ORDERED that:

- 16 1. Defendant's motion to dismiss (Doc. 20) is granted, without prejudice; and
- 17 2. The Clerk of the Court is directed to enter judgment and close this case.

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19 DATED: March 23, 2011

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21 **CRAIG M. KELLISON**
22 UNITED STATES MAGISTRATE JUDGE
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