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

IRA DON PARTHMORE,

Plaintiff,

No. 2:09-cv-2330-JFM (PC)

vs.

M. MARTEL, et al.,

Defendants.

ORDER AND

FINDINGS & RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action pursuant to 42 U.S.C. § 1983. This matter is before the court on defendants’ March 8, 2010 motion to dismiss this action for failure to exhaust administrative remedies prior to suit. On October 9, 2009, the court advised plaintiff of the requirements for opposing a motion to dismiss for failure to exhaust administrative remedies. See Wyatt v. Terhune, 305 F.3d 1033 (9th Cir. 2002).

ANALYSIS

The exhaustion of administrative remedies prior to bringing a prisoner civil rights action is required by 42 U.S.C. § 1997e(a). The statute provides:

No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner

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1 confined in any jail, prison, or other correctional facility until such
2 administrative remedies as are available are exhausted.

3 42 U.S.C. § 1997e(a). The exhaustion requirement that it imposes is mandatory. Booth v.
4 Churner, 532 U.S. 731, 741 (2001). Exhaustion must precede the filing of the complaint;
5 compliance with the statute is not achieved by satisfying the exhaustion requirement during the
6 course of an action. See McKinney v. Carey, 311 F.3d 1198 (9th Cir. 2002). Claims dismissed
7 for failure to exhaust administrative remedies should be dismissed without prejudice. Id. at
8 1200.

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

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

18 This action was filed on August 21, 2009. Plaintiff was granted leave to amend
19 his complaint, and this action is proceeding on claims raised against four of the five defendants
20 named in plaintiff’s amended complaint, which was filed December 9, 2009. See Order filed
21 February 2, 2010. Plaintiff claims that he was transferred from Mule Creek State Prison (Mule
22 Creek) to the California Substance Abuse Facility (SATF) in Corcoran, California in retaliation
23 for filing a request for accommodation under the Americans with Disabilities Act (ADA), asking
24 for cataract surgery.

25 The amended complaint contains the following allegations relevant to the motion
26 at bar. In late July 2009, plaintiff filed an ADA request seeking cataract surgery. On August 5,

1 2009, defendant Col agreed to request cataract surgery for plaintiff. Later the same day, plaintiff
2 was informed that Associate Warden Jackson had directed plaintiff to pick up a visually impaired
3 vest. On August 6, 2009, defendant Col completed a form stating that plaintiff was legally blind.
4 On August 10, 2009, defendant Kissel called plaintiff to her office and told plaintiff that she was
5 transferring him out of Mule Creek because he was wearing a visually impaired vest, which
6 meant he was legally blind, and Mule Creek did not have facilities for legally blind people. On
7 August 12, 2009, plaintiff was brought to a classification committee meeting led by defendant
8 Kaplan. As a result of the hearing, plaintiff was endorsed for transfer to SATF and placed on the
9 “speedy transfer” list. Plaintiff was transferred to SATF on September 22, 2009.

10 Exhibits appended to plaintiff’s amended complaint show that plaintiff filed an
11 administrative grievance complaining about the impending transfer on August 31, 2009, ten days
12 after the instant action was filed. See Ex. 5 to Amended Complaint. By letter dated September
13 4, 2009, the grievance was returned to plaintiff because it was incomplete and plaintiff was
14 advised that he had to provide supporting documentation. Id.

15 It is clear from the foregoing that plaintiff did not exhaust administrative remedies
16 with respect to his retaliation claim prior to suit. Moreover, any additional claims raised in the
17 amended complaint are based on events that occurred after this action was filed and plaintiff
18 could not, therefore, have exhausted administrative remedies with respect to the claims arising
19 from those allegations prior to suit.

20 The essence of plaintiff’s opposition to the motion at bar is that there was no
21 administrative remedy available to him. In the amended complaint, plaintiff alleges that he was
22 told by defendant Kissel that the “situation was unappealable and not to bother.” Amended
23 Complaint, filed December 9, 2009, at 2. As discussed above, plaintiff did, however, file a
24 grievance on August 31, 2009, and the response to the grievance demonstrated not that there was
25 no administrative remedy available but that plaintiff was required to provide more information to
26 support the grievance. In opposition to defendants’ motion, plaintiff contends that he did not

1 appeal to the Director's Level from the two grievances cited by defendants in support of their
2 motion because he received relief at the second level of review and was not therefore required to
3 proceed to a higher level of administrative review to complete the exhaustion process. The
4 record shows, however, that relief at the second level of administrative review on one of the
5 grievances filed by plaintiff came in December 2009, well after this action was filed and, as
6 noted above, plaintiff did not even start the administrative grievance process on his retaliation
7 claim until after he filed this action.

8 For all of the foregoing reasons, this court finds that plaintiff did not exhaust
9 available administrative remedies prior to filing this lawsuit. Accordingly, this action must be
10 dismissed without prejudice.

11 In accordance with the above, IT IS HEREBY ORDERED that the Clerk of the
12 Court is directed to assign this action to a United States District Judge; and

13 IT IS HEREBY RECOMMENDED that:

- 14 1. Defendants' March 8, 2010 motion to dismiss be granted; and
- 15 2. This action be dismissed without prejudice.

16 These findings and recommendations are submitted to the United States District
17 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
18 days after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. Such a document should be captioned
20 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
21 objections shall be filed and served within fourteen days after service of the objections. The

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1 parties are advised that failure to file objections within the specified time may waive the right to
2 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: August 24, 2010.

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6 UNITED STATES MAGISTRATE JUDGE

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