UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY PENTON,

Plaintiff,

v.

SIMS,

Defendant.

No. 2:11-cv-3319 TLN KJN P

FINDINGS AND RECOMMENDATIONS

I. Introduction

Plaintiff is a state prisoner proceeding without counsel. Pursuant to the district court's order filed May 31, 2013, this action is proceeding solely as to plaintiff's claim in his first amended complaint that his due process rights were violated by defendant Sims because plaintiff was unable to call witnesses at the May 30, 2009 rules violation report ("RVR") hearing. (ECF No. 39.) Defendant's motion for summary judgment on the issue of exhaustion of administrative remedies is before the court. Plaintiff filed an opposition; defendant filed a reply. As set forth more fully below, the undersigned finds that defendant's motion for summary judgment on plaintiff's sole remaining claim should be granted.

II. Defendant's Motion for Summary Judgment

Defendant moves for summary judgment on the grounds that plaintiff failed to exhaust his administrative remedies prior to filing the instant action.

A. Exhaustion of Administrative Remedies

The Prison Litigation Reform Act ("PLRA") provides that "[n]o action shall be brought with respect to prison conditions under section 1983 . . . , or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). "[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002).

Proper exhaustion of available remedies is mandatory, Booth v. Churner, 532 U.S. 731, 741 (2001), and "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules[.]" Woodford v. Ngo, 548 U.S. 81, 90 (2006). The Supreme Court has also cautioned against reading futility or other exceptions into the statutory exhaustion requirement. See Booth, 532 U.S. at 741 n.6. Moreover, because proper exhaustion is necessary, a prisoner cannot satisfy the PLRA exhaustion requirement by filing an untimely or otherwise procedurally defective administrative grievance or appeal. See Woodford, 548 U.S. at 90-93. "[T]o properly exhaust administrative remedies prisoners 'must complete the administrative review process in accordance with the applicable procedural rules,' [] - rules that are defined not by the PLRA, but by the prison grievance process itself." Jones v. Bock, 549 U.S. 199, 218 (2007) (quoting Woodford, 548 U.S. at 88). See also Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009) ("The California prison system's requirements 'define the boundaries of proper exhaustion.'") (quoting Jones, 549 U.S. at 218).

In California, prisoners may appeal "any policy, decision, action, condition, or omission by the department or its staff that the inmate or parolee can demonstrate as having a material adverse effect upon his or her health, safety, or welfare." Cal. Code Regs. tit. 15, § 3084.1(a). Most appeals progress through three levels of review. See id. § 3084.7. The third level of review constitutes the decision of the Secretary of the California Department of Corrections and Rehabilitation and exhausts a prisoner's administrative remedies. See id. § 3084.7(d)(3). A California prisoner is required to submit an inmate appeal at the appropriate level and proceed to

the highest level of review available to him. Butler v. Adams, 397 F.3d 1181, 1183 (9th Cir. 2005); Bennett v. King, 293 F.3d 1096, 1098 (9th Cir. 2002).

Failure to exhaust is "an affirmative defense the defendant must plead and prove." Bock, 549 U.S. at 204, 216. In Albino, the Ninth Circuit agreed with the underlying panel's decision[1] "that the burdens outlined in Hilao [v. Estate of Marcos, 103 F.3d 767, 778 n.5 (9th Cir. 1996),] should provide the template for the burdens here." Albino v. Baca, 747 F.3d 1162, 1172 (9th Cir. 2014) (en banc). A defendant need only show "that there was an available administrative remedy, and that the prisoner did not exhaust that available remedy." Albino, 747 F.3d at 1172. Once the defense meets its burden, the burden shifts to the plaintiff to show that the administrative remedies were unavailable. See Albino, 697 F.3d at 1030-31.

A prisoner may be excused from complying with the PLRA's exhaustion requirement if he establishes that the existing administrative remedies were effectively unavailable to him. See Albino, 747 F.3d at 1172-73. The PLRA requires that an inmate exhaust only those administrative remedies "as are available." 42 U.S.C. § 1997e(a). For a remedy to be available, there must be the "possibility of some relief . . . ." Booth, 532 U.S. at 738. A remedy is available to inmates when it is "capable of use; at hand." Albino, 747 F.3d at 1171, quoting Brown v. Valoff, 422 F.3d 926, 937 (9th Cir. 2006). For example, where prison officials improperly screen out inmate grievances, they render administrative remedies effectively unavailable. Sapp v. Kimbrell, 623 F.3d 813, 823, 824 (9th Cir. 2010) (To demonstrate such an exception, "the inmate must establish (1) that he actually filed a grievance or grievances that, if pursued through all levels of administrative appeals, would have sufficed to exhaust the claim that he seeks to pursue in federal court, and (2) that prison officials screened his grievance or grievances for reasons inconsistent with or unsupported by applicable regulations."). See also Nunez v. Duncan, 591 F.3d 1217, 1226 (9th Cir. 2010) (excusing an inmate's failure to exhaust because he was precluded from exhausting administrative remedies by a warden's mistaken instruction to him

[1] See Albino v. Baca, 697 F.3d 1023, 1031 (9th Cir. 2012). The three judge panel noted that "[a] defendant's burden of establishing an inmate's failure to exhaust is very low." Id. at 1031. Relevant evidence includes statutes, regulations, and other official directives that explain the scope of the administrative review process. Id. at 1032.

that a particular unavailable document was needed for him to pursue his inmate appeal); Marella, 568 F.3d at 1024 (excusing an inmate's failure to exhaust because he did not have access to the necessary grievance forms to timely file his grievance). Plaintiff bears the burden of demonstrating that the administrative remedies were rendered unavailable to him through no fault of his own. Sapp, 623 F.3d at 822-23; Nunez, 592 F.3d at 1224; Brown, 422 F.3d at 939-40.

Where a prison system's grievance procedures do not specify the requisite level of detail for inmate appeals, Sapp, 623 F.3d at 824, a grievance satisfies the administrative exhaustion requirement if it "alerts the prison to the nature of the wrong for which redress is sought." Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009). In California, "regulations require only that an inmate 'describe the problem and the action requested.'" Sapp, 623 F.3d at 824, quoting Cal. Code Regs. tit. 15, § 3084.2(a).) "A grievance need not include legal terminology or legal theories unless they are in some way needed to provide notice of the harm being grieved. A grievance also need not contain every fact necessary to prove each element of an eventual legal claim. The primary purpose of a grievance is to alert the prison to a problem and facilitate its resolution, not to lay groundwork for litigation." Griffin, 557 F.3d at 1120.

If under the Rule 56 summary judgment standard, the court concludes that plaintiff has failed to exhaust administrative remedies, the proper remedy is dismissal without prejudice. Wyatt v. Terhune, 315 F.3d 1108, 1120, overruled on other grounds by Albino, 747 F.3d 1162.

B. Legal Standard for Summary Judgment

Summary judgment is appropriate when it is demonstrated that the standard set forth in Federal Rule of Civil procedure 56 is met. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).[2]

> Under summary judgment practice, the moving party always bears the initial responsibility of informing the district court of the

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[2] Federal Rule of Civil Procedure 56 was revised and rearranged effective December 10, 2010. However, as stated in the Advisory Committee Notes to the 2010 Amendments to Rule 56, "[t]he standard for granting summary judgment remains unchanged."

> basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting then-numbered Fed. R. Civ. P. 56(c)). "Where the nonmoving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case." Nursing Home Pension Fund, Local 144 v. Oracle Corp. (In re Oracle Corp. Sec. Litig.), 627 F.3d 376, 387 (9th Cir. 2010) (citing Celotex Corp., 477 U.S. at 325); see also Fed. R. Civ. P. 56 advisory committee's notes to 2010 amendments (recognizing that "a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact"). Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp., 477 U.S. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323.

Consequently, if the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the existence of such a factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material in support of its contention that such a dispute exists. See Fed. R. Civ. P. 56(c); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return

a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987), overruled in part on other grounds, Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1575 (9th Cir. 1990).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." T.W. Elec. Serv., 809 F.2d at 630. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments).

In resolving a summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 586 (citation omitted).

By contemporaneous notice provided on May 15, 2014, (ECF No. 59), plaintiff was advised of the requirements for opposing a motion brought pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (*en banc*); Klingele v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

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C. Facts[3]

1. Plaintiff is an inmate in the custody of the California Department of Corrections and Rehabilitation ("CDCR").

2. At times relevant to the lawsuit, plaintiff was incarcerated at California State Prison, Sacramento ("CSP-SAC") in Represa, California.

3. Plaintiff was issued a Rules Violation Report ("RVR"), Log No. SAC-C-07-08-082 on September 5, 2007, for battery on a peace officer that occurred on July 20, 2007. (ECF. No. 5 at ¶ 24.)

4. On May 30, 2009, defendant Sims conducted the hearing for plaintiff's RVR. (ECF No. 5 at ¶ 40.)

5. Plaintiff alleges that defendant Sims denied plaintiff's requests for witnesses at the RVR hearing and stated the witnesses were no longer available. (ECF No. 5 at ¶¶ 40-41.)

6. At the time plaintiff was incarcerated at CSP-Sac, CSP-Sac provided an administrative exhaustion procedure for inmates that included an informal level, first formal level, and second level. (ECF No. 59-4 at ¶¶ 7, 9.)

7. At the Office of Appeals, formerly the Inmate Appeals Branch, there was a third formal level (Director's level). (ECF No. 59-5 at ¶ 14.)

8. To properly exhaust administrative remedies through the CSP-Sac procedure, an inmate pursued their grievance issues through all levels of the administrative exhaustion procedure, unless the inmate was excused from one of the levels under CDCR's administrative exhaustion procedures. (ECF Nos. 59-4 at ¶¶ 6-7; 59-5 at ¶¶ 7-8.)

9. Plaintiff first raised his claim that defendant Sims denied him his witnesses in his January 9, 2012 amended complaint. (ECF No. 5.)

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[3] For purposes of the instant motion for summary judgment, the court finds the following facts undisputed. Documents submitted as exhibits are considered to the extent they are relevant, and despite the fact that they are not authenticated because such documents could be admissible at trial if authenticated.

10. Between May 29, 2009, and January 9, 2012, plaintiff did not submit any grievances through the institutional and third level alleging that the hearing officer for his RVR denied him the right to call witnesses at the RVR hearing. (ECF Nos. 59-4 at ¶¶ 9-10; 59-5 at ¶¶ 10-11.)

11. Plaintiff submitted SAC-C-09-01295 on June 26, 2009, which raised a number of issues related to his RVR hearing. (ECF Nos. 59-4 at 3, 5-30 (Ex. A); 59-5 at 3, 6-60 (Ex. D).)

12. In SAC-C-09-01295, plaintiff alleged that:

a. Defendant Sims failed to provide an impartial hearing when he did not secure all the officer's reports used as evidence, including a report determining that the reports of officers Quest, Bujanda, and Zamudio were not credible, as well as the reports of officers that did not indicate plaintiff was involved in the incident (ECF No. 59-5 at 6, 8);

b. The CDCR contacted the District Attorney's Office and asked them to postpone the decision not to prosecute the RVR which prevented plaintiff from getting his RVR hearing within 30 days of the date the DA declined to prosecute, depriving plaintiff of his due process rights (ECF No. 59-5 at 8);

c. The failure of the hearing officer to contact the District Attorney's office to determine whether plaintiff was properly notified of the subsequent postponement denied plaintiff a fair and impartial hearing on the RVR "because not only was the reports to this incident of certain staff members questionable, where other reports may have served to mitigate the preponderance of evidence standard, but the administrative processing of the D.A. referral had also been deemed questionable where this inmate's due process rights to call witnesses and present an adequate defense attached within 30 days of the original notification" (ECF No. 59-5 at 8); and

d. If plaintiff had "been afforded his procedural due process rights at the time of the original notification dated 10-9-07, he may have been able to not only contact and obtain statements from all of his witnesses who may have offered more information than that stipulated to by the senior hearing officer, but because of the proximity of the events, as it relates to the framing of time, he may have been able to obtain a more accurate recollection from his witnesses and therefore a more profound insight. (See interview of inmate witnesses at page (4) of the I-E

report.)" (ECF No. 59-5 at 9.)

13. In grievance SAC-C-09-01295, plaintiff did not expressly state that Sims or anyone else denied him his witnesses at the RVR hearing. (ECF Nos. 59-4 at 3, 5-30 (Ex. A); 59-5 at 3, 6-60 (Ex. D).)

14. The third level did receive one other grievance from plaintiff between May 29-30, 2009, and January 9, 2012, OOA log number 0815311 (SAC-09-00270), but that grievance was submitted for the first time at the institutional level on January 4, 2009, which was before the RVR hearing ever took place, and raised a staff complaint against K. Pool concerning the handling of plaintiff's appeals. (ECF No. 59-5 at 3, 65-66.)

15. SAC-C-09-01295 bypassed the informal and first level, and was reviewed and responded to at the second level of review. (ECF No. 59-4 at 3, 5-30, 32-34.)

16. The second level review of grievance SAC-C-09-01295 addressed the following claims: 1) the SHO was not impartial; 2) the RVR hearing should have been heard within 30 days of the DA's original decision not to prosecute the RVR; 3) plaintiff was not provided procedural due process rights prior to the subsequent postponement of the RVR; 4) "the administrative processing of the DA referral was deemed questionable regarding plaintiff's due process right to call witnesses and to present an adequate defense attached within 30 days of the original notification . . . in order to have been able to contact and obtain statements from all of [plaintiff's] witnesses, who may have offered more information than that stipulated by the SHO"; 5) plaintiff requested, through the IE, correctional officer reports that plaintiff alleged "were found to be less than credible by an Office of Internal Affairs (OIA) agent and for the SHO to review the assumed reports from OIA." (ECF No. 59-4 at 32.) As relief, plaintiff requested that the CDCR make available such reports, as well as dismissal of the charges based on "deliberate violations of [plaintiff's] rights to a fair CDC-115 hearing." (ECF No. 59-4 at 32.)

17. On October 22, 2009, the second level reviewer rejected the issues raised by the grievance and denied the grievance in its entirety. (ECF No. 59-4 at 32-34.)

18. When plaintiff appealed the grievance to the third level, Section H of the grievance required plaintiff to "add data or reasons for requesting a Director's Level Review." (ECF No.

59-5 at 7.)

19. Plaintiff appealed his grievance to the third level and included a statement in Section H and a two-page attachment. (ECF No. 59-5 at 6-7, 10-11.)

20. In Section H, plaintiff only appealed to the third level of review the second level reviewer's decision regarding the date the DA declined to prosecute the RVR and the date when the RVR hearing should have been held. Plaintiff did not include any issue regarding his inmate witnesses as part of his appeal to the third reviewer. (ECF No. 59-5 at 6-7, 10-11.)

21. The third level review decision did not address the inmate witness issue. It only addressed the DA issue and the date the RVR hearing should have been held. (ECF No. 59-5 at 62-63.)

22. In section B of grievance SAC-C-09-01295, under "Action Requested," plaintiff requested that the CDCR make available to plaintiff the additional correctional officer reports requested for plaintiff's use in defending the RVR, and that the charges be dismissed based on deliberately violating plaintiff's rights to a fair RVR hearing. (ECF No. 59-5 at 6.)

23. In the section H statement to the third level, plaintiff requests "that the actions requested in part (B) of the instant appeal be granted." (ECF No. 59-5 at 11.) There is no mention of inmate witnesses in part (B). (ECF No. 59-5 at 6.)

24. On June 26, 2009, plaintiff filed a second appeal claiming his due process rights were deliberately violated. (ECF No. 66 at 4-6.) The copy of the appeal plaintiff provided includes plaintiff's allegations that defendant Sims denied plaintiff's right to call witnesses and obtain witness statements at the RVR hearing.[4] (ECF No. 66 at 6.)

25. On July 20, 2009, plaintiff's second appeal was screened out. (ECF No. 66 at 7.) The appeals coordinator checked the "other" box and noted "incomplete documents attached." (ECF No. 66 at 7.) The appeals coordinator also informed plaintiff he could "only file 1 non-emergency appeal per 7 days," with the handwritten note: "6/24/09 disciplinary issue." (ECF

[4] Defendant objects, *inter alia*, that plaintiff's unlogged grievance is not authenticated, and argue that plaintiff's declaration is insufficient to authenticate it. (ECF No. 68 at 4.) It does not appear that CSP-Sac retains copies of grievances that have been screened out.

No. 66 at 7.) Plaintiff does not challenge this screening as improper.

26. Plaintiff resubmitted this second appeal, but on September 4, 2009, the appeals coordinator screened out the re-submission, noting that "this is a duplicate appeal issue that has been accepted for a 2nd level response for RVR Log #C-07-08-082." (ECF No. 66 at 8.)[5]

D. The Parties' Contentions

Defendant Sims argues that plaintiff failed to exhaust his claim that defendant denied his right to call witnesses at the RVR hearing because he did not submit any grievances between May 29, 2009, and January 9, 2012, specifically alleging that the hearing officer for the RVR hearing denied plaintiff the right to call witnesses. Defendant contends that grievance SAC-C-09-01295 tangentially addressed the issue of witnesses, but in a different context and addressing very different issues. Defendant argues that plaintiff's claim that he would have been able to obtain written statements from his witnesses if the hearing had been held sooner, is not the same claim as stating he was denied a request to have his witnesses testify at the hearing. Moreover, plaintiff failed to mention the issue of inmate witnesses in the third level appeal in SAC-C-09-01295. Thus, defendant argues that the Director's level review did not address the issue of inmate witnesses. Defendant contends this case is similar to Brown v. Valoff, 422 F.3d at 941-42, wherein an inmate pursued both excessive force and medical claims, the court found the inmate failed to exhaust because he failed to appeal his medical issues to the third level. Defendant contends that plaintiff failed to raise at the third level of appeal his claims that the hearing officer was not impartial and that he was unable to get statements from his witnesses because of the untimely hearing, thus rendering plaintiff's witness claims unexhausted.

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[5] Plaintiff claims he re-submitted the same appeal on September 21, 2009, along with a letter challenging the September 4, 2009 screening, but the appeals form provided only bears two received stamps from the appeals office, not three. (ECF No. 66 at 4.)

In opposition, plaintiff contends[6] that he raised his witness claims in an administrative appeal signed the same day as SAC-C-09-01295, but that after plaintiff provided the appropriate documents to this second appeal, appeals coordinator K. Pool improperly screened the second appeal out as a duplicate of SAC-C-09-01295. (ECF No. 62 at 3.) Plaintiff contends that Pool failed to discern the distinctions between the two appeals. (Id.) On September 21, 2009, plaintiff states he wrote a letter to the appeals coordinator informing Pool that the issues were different, and the requested relief was not the same. (ECF No. 62 at 7.) Plaintiff contends this improper screening rendered further appeals unavailable, and left him no alternative but to "rely on the conclusion of the 602 in log no. SAC-C-09-01295." (ECF No. 62 at 8.)

In addition, plaintiff contends that in appeal SAC-C-09-01295, the appeals reviewer at both the second and third levels "failed to give any weight" to the information concerning witnesses in the documents appended to his appeal. (ECF No. 62 at 5.) Plaintiff argues that the reviewer chose to believe the statement that plaintiff "did not request the presence of witnesses at the hearing," as set forth in the RVR decision. (ECF No. 62 at 6.) Plaintiff claims he sought relief concerning the availability of witnesses in multiple exhausted (602) appeals filed prior to and after the disciplinary hearing in appeal log no. SAC-C-09-01295, SAC-08-01731,[7] and the unlogged (602) dated 6-26-09." (ECF No. 62 at 8.) Plaintiff contends that his claims concerning witnesses were considered during the appeals process in SAC-C-09-01295. (ECF No. 62 at 8.)

Finally, plaintiff alleges that his appeal rights were chilled by K. Pool's improper screening out of plaintiff's June 26, 2009 appeal, the removal of a document from appeal 08-01858 dated August 7, 2008, and improperly reviewed appeal SAC-09-00270, dated January 4, 2009, against K. Pool. (ECF No. 62 at 10.)

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[6] Plaintiff makes numerous arguments concerning the merits of his witness claims. However, the merits of plaintiff's claims are not at issue here. Rather, the undersigned must determine whether plaintiff exhausted his administrative remedies by applying the legal standards set forth above. Thus, the undersigned does not include such arguments as they are not relevant.

[7] Appeal log no. SAC-08-01731, signed on July 19, 2008, was a group appeal alleging that plaintiff and other similarly situated inmates were placed into Ad Seg on July 20, 2008, without receiving a CDC 115 RVR in accordance with prison regulations. (ECF No. 66 at 32-50.) The appeal did not raise allegations concerning witnesses, and therefore is not relevant.

In reply, defendant argues that plaintiff's evidence shows that his appeal rights were not chilled, because plaintiff continued to pursue his claims through the third level of review; plaintiff's grievance SAC-C-09-1295 did not properly exhaust his witness claims; and his other appeal dated June 26, 2009, was properly screened out. (ECF No. 68.)

E. Discussion

Liberally construed, plaintiff's appeal SAC-C-09-01295 included a challenge concerning plaintiff's ability to present witnesses at the RVR hearing. As indicated above, the purpose of a grievance "is to alert the prison to a problem and facilitate its resolution, not to lay groundwork for litigation." Griffin, 557 F.3d at 1120. Plaintiff was not required to allege every fact later set forth in his pleading, and he was not required to identify individual legal theories or defendants. See Jones, 549 U.S. at 218-19. While generally alleging a deprivation of due process would not be sufficient to put prison officials on notice of plaintiff's claim concerning witnesses, plaintiff's use of the terms "procedural due process rights," in connection with his claim that such rights were denied by his inability to obtain statements from all of his witnesses, or that their recollection had faded due to the delay in holding the RVR hearing, was sufficient to exhaust a claim based on the denial of witnesses in violation of due process. Often prison officials use witness statements rather than having the witness appear in person to save time and money. If plaintiff was unable to obtain statements from his witnesses, arguably he was denied benefit of such witnesses. Thus, the court cannot find that the appeals coordinator K. Pool improperly screened out the additional appeal by finding it was a "duplicate" of appeal SAC-C-09-01295, because plaintiff's claim concerning witnesses was included in appeal SAC-C-09-01295.

That the second level appeals reviewer chose not to interpret plaintiff's appeal in the same manner is of no consequence. Plaintiff concedes that the second level reviewer in SAC-C-09-01295 specifically addressed plaintiff's allegations that he was denied access to inmate witnesses during the RVR hearing, but denied plaintiff relief on "the disputed fact that plaintiff did not request the presence of witnesses at the RVR hearing." (ECF No. 62 at 17.) The second level review decision sets forth the regulations governing witnesses at RVR hearings, and the reviewer stated that "the SHO noted you did not request any witnesses to be present at the hearing." (ECF

No. 66 at 23.) The inclusion of the information concerning witnesses in the second level decision raises an inference that plaintiff did, indeed, discuss the screened out appeal and the issue of witnesses during the second level review, and, liberally construed, would also demonstrate exhaustion of plaintiff's witness claim at the second level.

Plaintiff argues that his second appeal was improperly screened out. But even assuming, arguendo, the appeals coordinator improperly screened out the appeal as a "duplicate," plaintiff concedes he was left with an ability to pursue this claim in SAC-C-09-01295. (ECF No. 62 at 8, 16.) In addition, plaintiff's subsequent actions so demonstrate. During the second level interview, plaintiff claims in his verified opposition that he "expressed his concerns about the overall denial of inmate witnesses including the fact that Defendant Lt. Sims denied [plaintiff] access to his requested witnesses who were not made available during the RVR hearing." (ECF No. 62 at 16.) Plaintiff claims that the reviewer attempted to restrict plaintiff's claim to only one issue, but that plaintiff showed the reviewer a copy of the screened out appeal and the September 4, 2009 screening form. Plaintiff alleges that "the interviewer made a few notations on a separate piece of paper and said to plaintiff that he would take all of plaintiff's concerns under submission." (ECF No. 62 at 16.)

Defendant is correct that plaintiff failed to present a declaration from the second level reviewer and therefore plaintiff's account of what the reviewer said in the interview is hearsay.

However, the undersigned does not need to resolve whether such a discussion took place, or the details of such conversation, because resolution of the instant motion turns on plaintiff's failure to appeal the witness issue to the third level.

Proper exhaustion of available remedies is mandatory, Booth, 532 U.S. at 741, and "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules[.]" Woodford, 548 U.S. at 90. "The obligation to exhaust 'available' remedies persists as long as some remedy remains 'available.'" Brown, 422 F.3d at 935, citing Booth, 532 U.S. 731 (a prisoner must "press on to exhaust further levels of review" until he has either received all "available" remedies at an intermediate level of review "or been reliably informed by an administrator that no remedies are available").

Here, plaintiff generically states that he exhausted appeal SAC-C-09-01295 to the third level. (ECF No. 62 at 8.) Despite plaintiff's very specific discussion about his verbal efforts with the second level reviewer (ECF No. 62 at 16), plaintiff did not address his failure to present this issue at the third level of appeal. (ECF Nos. 62 & 63, passim.)

As set forth above, in Section H, plaintiff only appealed to the third level of review the second level reviewer's decision regarding the date the DA declined to prosecute the RVR and the date when the RVR hearing should have been held. (ECF No. 59-5 at 6-7, 10-11.) Plaintiff did not include any issue regarding his inmate witnesses as part of his appeal to the third level. (ECF No. 59-5 at 6-7, 10-11.) Moreover, as defendant points out, plaintiff also failed to raise his claim that the senior hearing officer was not impartial, and referred the third level reviewer back to section (B) which sought relief that did not address the issue of witnesses.

The third level appeal form made clear that if plaintiff was dissatisfied with the second level decision, he must provide the reasons for requesting a Director's Level Review. (ECF No. 59-5 at 7.) Because plaintiff appealed numerous issues, he was required to identify which issues he sought to appeal to the third level. See Brown, 422 F.3d at 941-42 (where excessive force claim was being investigated, inmate was required to pursue his medical claim to the third level of review). Plaintiff provided a detailed description of the issues he was dissatisfied in a two page single-spaced attachment, none of which included his claim concerning witnesses. Finally, the third level decision did not address plaintiff's witness claims.

Defendant provided evidence that plaintiff could have included his witness and impartiality claims in his third level appeal, but failed to do so, thus meeting defendant's initial burden. Plaintiff has failed to rebut this evidence. Accordingly, defendant is entitled to summary judgment on plaintiff's sole remaining claim.

Finally, plaintiff failed to demonstrate that the improper screening of plaintiff's separate appeal dated June 26, 2009, chilled his appeal rights. First, plaintiff failed to demonstrate how his allegations concerning events that took place in 2008 (SAC-S-08-01858) and January of 2009 (SAC-S-09-00270) are relevant to plaintiff's appeals filed in late June and thereafter. Second, plaintiff provided exhibits demonstrating that such events did not chill his appeal rights because

he went on to pursue such appeals through the third level of review. (ECF No. 66 at 64-97.) Third, none of the appeal reviews in these earlier appeals (ECF No. 66 at 63-64; 84-85), or in SAC-C-09-1295 (ECF No. 59-5 at 7, 62; 66 at 22), were conducted by K. Pool. Fourth, plaintiff continued to pursue some of the issues in SAC-C-09-1295 through the third level of review. Thus, plaintiff failed to show his appeal rights were chilled.

III. Recommendations

Accordingly, IT IS HEREBY RECOMMENDED that defendant's motion for summary judgment on plaintiff's sole remaining claim (ECF No. 59) be granted.

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

Dated: November 25, 2014

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE