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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSE GONZALEZ, JR.,  
Plaintiff,  
v.  
R. GAMBERG, et al.,  
Defendants.

No. 2:14-cv-0737 KJM CKD P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a California prisoner proceeding pro se with an action for violation of civil rights under 42 U.S.C. § 1983. The remaining defendants, Lively and Wheeler, are employees of the California Department of Corrections and Rehabilitation (CDCR) at High Desert State Prison (High Desert). Defendant Lively has filed a motion for summary judgment arguing that plaintiff failed to exhaust available administrative remedies before bringing this action as plaintiff is required to do under 42 U.S.C. § 1997(e)(a).

The following claims remain with respect to defendant Lively:

1. Defendant Lively used excessive force against plaintiff in violation of the Eighth Amendment on December 6, 2010 when he applied handcuffs too tightly. ECF No. 1 at 11-12.
2. Between December 6, 2010 and April 15, 2011, defendant Lively retaliated against plaintiff for his utilization of the inmate grievance process at High Desert in violation of the First

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1 Amendment. The retaliation resulted in adverse action against plaintiff including the excessive  
2 force described above. ECF No. 1 at 11-13.

3 Section 1997(e)(a) of Title 42 of the United States Code provides that “[n]o action shall be  
4 brought with respect to prison conditions under section 1983 of this title, . . . until such  
5 administrative remedies as are available are exhausted.” 42 U.S.C. § 1997(e)(a). Administrative  
6 procedures generally are exhausted with respect to the California prisoner grievance process once  
7 the third level of review is complete. The third level of review constitutes the decision of the  
8 Secretary of the California Department of Corrections and Rehabilitation (CDCR). Cal. Code  
9 Regs. tit. 15, § 3084.7.

10 The exhaustion requirement demands “proper” exhaustion. Woodford v. Ngo, 548 U.S.  
11 81, 90-91 (2006). In order to “properly exhaust” administrative remedies the prisoner must  
12 generally comply with the prison’s procedural rules throughout the administrative process. Jones  
13 v. Bock, 218 U.S. 199, 218 (2006).

14 If undisputed evidence viewed in the light most favorable to the prisoner / plaintiff shows  
15 a failure to exhaust, a defendant is entitled to summary judgment under Rule 56 of the Federal  
16 Rules of Civil Procedure. Albino v. Baca, 747 F.3d 1162, 1166 (9th Cir. 2014). If there is at  
17 least a genuine issue of material fact as to whether there was exhaustion, the motion for summary  
18 judgment must be denied. See Fed R. Civ. P. 56(a).

19 The parties agree that plaintiff filed a grievance, High Desert #11-01447, concerning the  
20 events which form the basis of plaintiff’s remaining claims against defendant Lively. The initial  
21 grievance was filed August 30, 2011. ECF No. 33-4 at 12. After proceeding through the first and  
22 second levels of the grievance process, plaintiff submitted the grievance to the third level on  
23 January 29, 2012. ECF No. 33-4 at 13. On April 27, 2012, the grievance was cancelled at the  
24 third level as untimely. ECF No 33-4 at 24. Plaintiff then appealed that decision back to the third  
25 level as he is permitted to do under Cal. Code Regs. tit. 15 § 3084.6(e). The third level  
26 reaffirmed its earlier finding, specifically noting that plaintiff’s original grievance was not filed  
27 within 30 days of the events grieved as required by Cal. Code Regs. tit. 15 § 3084.8(b). ECF No.  
28 33-4 at 26-27.

1 In his opposition to defendant's motion, plaintiff admits all of the foregoing. He argues,  
2 however, that the prisoner grievance process was not "available" to plaintiff because of the threat  
3 of retaliation from defendant Lively and other correctional officers. In McBride v. Lopez, 807  
4 F.3d 982, 987 (9th Cir. 2015), the Ninth Circuit held that a threat of retaliatory action by a prison  
5 official would render a prison grievance system unavailable so as to excuse a prisoner's failure to  
6 exhaust administrative remedies if the following conditions are met:

7 1. The threat of retaliation actually did deter the plaintiff inmate  
8 from lodging a grievance or pursuing a particular part of the  
9 process; and

10 2. The threat is one that would deter a reasonable inmate of  
11 ordinary firmness and fortitude from lodging a grievance or  
12 pursuing the part of the grievance process that the inmate failed to  
13 exhaust.

14 In his complaint, plaintiff asserts that he delayed filing his initial grievance until his  
15 arrival at the California Correctional Institution in Tehachapi, California (CCI) because he feared  
16 retaliation from defendant Lively while still at High Desert. ECF No. 1 at 13-14. However,  
17 evidence provided by defendant shows that plaintiff arrived at CCI on June 30, 2011,  
18 approximately 60 days before he submitted his grievance. ECF No. 43. Plaintiff fails to explain  
19 his delay once he arrived at CCI and there is nothing before the court suggesting plaintiff had  
20 reason to or actually did fear retaliation at CCI.<sup>1</sup>

21 As indicated above, in order to properly exhaust administrative remedies, a prisoner must  
22 generally comply with all procedural rules during the grievance process including deadlines.  
23 Woodford, 548 U.S. at 90-91. Plaintiff did not file his grievance concerning his remaining claims  
24 against defendant Lively until well after the CDCR-created deadline had passed. Because  
25 plaintiff's grievance was cancelled for failure to file a timely grievance, and because there is not a  
26 genuine issue of material fact as to whether plaintiff's failure to file a timely grievance was due to  
27 unavailability of the grievance process, defendant's motion for summary judgment should be

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28 <sup>1</sup> In his opposition, plaintiff attempts to explain his delay in filing at the third level of review following the denial of his grievance at the second level. However, his grievance was cancelled at the third level because of his late initiation of the grievance process, not because he also filed late at the third level.

1 granted, and plaintiff's remaining claims against defendant Lively should be dismissed.

2 The court notes that at the end of his opposition, plaintiff requests that the court order  
3 CDCR to process grievance No. #11-01447 at the third level rather than granting summary  
4 judgment in favor of defendant Lively. Again, in Woodford, the Supreme Court made clear that  
5 departments of corrections are free to demand compliance with deadlines "because no  
6 adjudicative system can function effectively without imposing some orderly structure on the  
7 course of its proceedings." Id. Woodford precludes the court from ordering CDCR to ignore  
8 their deadline for the filing of grievances.

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

- 10 1. Defendant Lively's motion for summary judgment (ECF No. 33) be granted; and  
11 2. Plaintiff's remaining claims against defendant Lively be dismissed for failure to  
12 exhaust available administrative remedies prior to bringing suit.

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

21 Dated: December 14, 2016

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23 CAROLYN K. DELANEY  
24 UNITED STATES MAGISTRATE JUDGE

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