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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LOFONZO R. TURNER,
Plaintiff,
v.
S. BYERS,¹
Defendant.

Case No. 2:17-cv-01869-WBS-JDP (PC)
FINDINGS AND RECOMMENDATIONS
THAT DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT BE GRANTED
ECF No. 69

On September 14, 2013, plaintiff was involved in an altercation with officers at the Sacramento County Main Jail, in which he alleges that defendant Byers handcuffed and then assaulted him. Defendant has moved for summary judgment on plaintiff’s Eighth Amendment excessive force claim—the sole remaining claim—arguing that plaintiff failed to exhaust his administrative remedies.² I recommend granting defendant’s motion.

¹ In his complaint, plaintiff identified defendant as “S. Byer,” ECF No. 1 at 1, but defendant’s last name is “Byers,” *see* ECF No. 69-4 at 1. Accordingly, the Clerk of Court is directed to amend the case name to *Turner v. Byers*, 2:17-cv-01869-WBS-JDP.

² Plaintiff also alleged that Byers violated his Eighth Amendment rights by using excessive force prior to placing him in handcuffs. ECF No. 1. The court previously dismissed this claim, finding it barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). ECF Nos. 56 & 59.

Legal Standards

A. Summary Judgment

A motion for summary judgment will be granted only when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see* Fed. R. Civ. P. 56. The moving party bears the burden of establishing that there is no genuine issue of material fact. *See Celotex*, 477 U.S. at 322-23. If the moving party meets that burden by “presenting evidence which, if uncontradicted, would entitle it to a directed verdict at trial, [Fed. R. Civ. P. 56(e)(2)] shifts to [the nonmoving party] the burden of presenting specific facts showing that such contradiction is possible.” *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 950-52 (9th Cir. 1978).

Each party’s position must be supported by (1) citations to particular portions of materials in the record, including but not limited to depositions, documents, declarations, or discovery; or (2) argument showing that the materials cited do not establish the presence or absence of a genuine factual dispute or that the opposing party cannot produce admissible evidence to support its position. *See* Fed. R. Civ. P. 56(c)(1). The court can consider other materials in the record not cited by the parties, but it is not required to do so. *See* Fed. R. Civ. P. 56(c)(3); *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001); *see also Simmons v. Navajo Cnty., Ariz.*, 609 F.3d 1011, 1017 (9th Cir. 2010).

The court must apply standards consistent with Rule 56 to determine whether the moving party has demonstrated there to be no genuine issue of material fact and that judgment is appropriate as a matter of law. *See Henry v. Gill Indus., Inc.*, 983 F.2d 943, 950 (9th Cir. 1993). “[A] court ruling on a motion for summary judgment may not engage in credibility determinations or the weighing of evidence.” *Manley v. Rowley*, 847 F.3d 705, 711 (9th Cir. 2017) (citation omitted). The evidence must be viewed “in the light most favorable to the nonmoving party” and “all justifiable inferences” must be drawn in favor of the nonmoving party.

1 *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 772 (9th Cir. 2002); *Addisu v. Fred Meyer, Inc.*,
2 198 F.3d 1130, 1134 (9th Cir. 2000).

3 **B. PLRA Exhaustion**

4 Under the Prison Litigation Reform Act (“PLRA”) of 1995, “[n]o action shall be brought
5 with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a
6 prisoner confined in any jail, prison, or other correctional facility until such administrative
7 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). This statutory exhaustion
8 requirement “applies to all inmate suits about prison life,” *Porter v. Nussle*, 534 U.S. 516, 532
9 (2002), regardless of the relief sought by the prisoner or the relief offered by the process, *Booth v.*
10 *Churner*, 532 U.S. 731, 741 (2001).

11 To satisfy the PLRA’s exhaustion requirement, a plaintiff’s administrative appeals must
12 “provide enough information . . . to allow [jail] officials to take appropriate responsive
13 measures.” *Griffin v. Arpaio*, 557 F.3d 1117, 1121 (9th Cir. 2009) (quoting *Johnson v. Testman*,
14 380 F.3d 691, 697 (2nd Cir. 2004)); *see also Sapp v. Kimbrell*, 623 F.3d 813, 824 (9th Cir. 2010)
15 (“A grievance suffices to exhaust a claim if it puts the prison on adequate notice of the problem
16 for which the prisoner seeks redress.”). The Sacramento County Jail’s grievance regulations
17 “define the boundaries of proper exhaustion.” *Marella v. Terhune*, 568 F.3d 1024, 1027 (9th Cir.
18 2009).

19 The PLRA recognizes no exception to the exhaustion requirement, and the court may not
20 recognize a new exception, even in “special circumstances.” *Ross v. Blake*, 578 U.S. 632, 648
21 (2016). The one significant qualifier is that “the remedies must indeed be ‘available’ to the
22 prisoner.” *Id.* at 639. The Supreme Court has explained when an administrative procedure is
23 unavailable:

24 [A]n administrative procedure is unavailable when (despite what
25 regulations or guidance materials may promise) it operates as a
26 simple dead end—with officers unable or consistently unwilling to
27 provide any relief to aggrieved inmates Next, an
28 administrative scheme might be so opaque that it becomes,
practically speaking, incapable of use And finally, the same is
true when prison administrators thwart inmates from taking
advantage of a grievance process through machination,

1 misrepresentation, or intimidation [S]uch interference with an
2 inmate’s pursuit of relief renders the administrative process
unavailable. And then, once again, § 1997e(a) poses no bar.

3 *Id.* at 643-44 (citations omitted); *see also Andres v. Marshall*, 867 F.3d 1076, 1079 (9th Cir.
4 2017) (“When prison officials improperly fail to process a prisoner’s grievance, the prisoner is
5 deemed to have exhausted available administrative remedies.”). If the court concludes that
6 plaintiff has failed to exhaust available remedies, the proper remedy is dismissal without
7 prejudice of the portions of the complaint barred by section 1997e(a). *See Jones v. Bock*, 549
8 U.S. 199, 223-24 (2007); *Lira v. Herrera*, 427 F.3d 1164, 1175-76 (9th Cir. 2005).

9 **Analysis**

10 Plaintiff filed one grievance related to the altercation with defendant, SAC-P-13-2475.
11 ECF No. 69-5 at 14-16. On the initial grievance form, plaintiff checked a box indicating that he
12 wanted to waive an interview but requested a “use of force interview” and “all other actions in
13 accordance with the law.” *See* ECF No. 69-5 at 27. Both the first- and second-level reviewers
14 granted plaintiff’s grievance in part; they authorized plaintiff’s request for an interview but denied
15 his request for “all other actions in accordance with the law.” ECF No. 69-5 at 13, 18. Both
16 decisions noted that on October 13, 2013, two correctional officers had attempted to conduct a
17 use-of-force interview, but plaintiff had refused to participate in the interview. *Id.*

18 At the third level, plaintiff’s appeal was canceled because he refused to be interviewed.
19 ECF No. 69-5 at 27 (“While [plaintiff] clearly indicated his intent to waive his right to be
20 interviewed, [he] thereafter refused to be interviewed by the reviewer at the First Level of Review
21 and the Second Level of Review which is in violation of the California Code of Regulations.”).
22 The third-level reviewer notified plaintiff that he could not resubmit the canceled appeal, but he
23 could file a separate appeal challenging the cancellation decision. *Id.* Plaintiff did not do so.

24 Plaintiff first argues that he exhausted his administrative remedies because his appeal was
25 reviewed at the third level. An appeal is exhausted when it results in a third-level grant or
26 denial—but not a cancellation. *Vaughn v. Hood*, No. 2:14-CV-2235-MCE-KJN, 2015 WL
27 5020691, at *10 (E.D. Cal. Aug. 21, 2015) (“Because plaintiff is required to receive a third level
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1 decision, not a cancellation, the cancellation of plaintiff's third level appeal cannot serve to
2 exhaust plaintiff's claims."); 15 Cal. Code Regs. § 3084.1(b) ("[A] cancellation or rejection
3 decision does not exhaust administrative remedies."). Thus, he failed to exhaust his
4 administrative remedies.

5 Plaintiff also argues that he should be excused from exhausting his administrative
6 remedies. He argues that administrative remedies were unavailable to him, since the grievance
7 system acted as a "dead end" and the prison canceled his appeal after seven or eight months. ECF
8 No. 76. While an administrative remedy may be unavailable if a grievance system "operates as a
9 simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved
10 inmates," *Ross*, 578 U.S. at 643—that is not the case here. There is no indication that officers
11 were unwilling or unable to provide plaintiff with his requested relief (an interview). Indeed, the
12 record shows that officers tried to set up an interview, but plaintiff refused to participate.
13 Furthermore, plaintiff's assertion that the system was unworkable because the grievance process
14 consumed seven or eight months is meritless; the prison acted in each case within the allotted
15 timeframe.³

16 Finally, plaintiff argues that his appeal was erroneously canceled. The Ninth Circuit has
17 explained that "[t]he obligation to exhaust 'available' remedies persists as long as some remedy
18 remains 'available.'" *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005). Here, plaintiff had an
19 available remedy: challenge the cancellation decision. *See* Cal. Code Regs. tit. 15,
20 § 3084.6(a)(3). Thus, even assuming that his appeal was improperly canceled, his failure to file a
21 separate grievance challenging the cancellation forecloses his argument administrative remedies
22 were available. *See Cortinas v. Portillo*, 754 F. App'x 525, 527 (9th Cir. 2018) ("[B]ecause
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25 ³ Plaintiff submitted grievance SAC-P-13-2475 on September 26, 2013, and the first-level
26 decision was issued October 20, 2013, within the prison's thirty-day deadline. Cal. Code Regs.
27 tit. 15, §§ 3084.8(c)(1), (2). Plaintiff submitted his appeal to the second level of review on
28 October 28, 2013, and the second-level decision was issued on November 12, 2013, within the
thirty-day deadline. *Id.* Plaintiff submitted a response to the third level of review on December
12, 2013, and the third-level reviewer issued a decision on February 10, 2014, within the
applicable sixty-day deadline. *Id.* at § 3084.8(c)(3).

1 [plaintiff] could have appealed his cancellation decision the improper cancellation of his
2 appeal did not render administrative remedies effectively unavailable to him.”).

3 Accordingly, the Clerk of Court is directed to amend the case name to *Turner v. Byers*,
4 2:17-cv-01869-WBS-JDP.

5 Further, it is RECOMMENDED that:

6 1. Defendant’s motion for summary judgment, ECF No. 69, be granted.

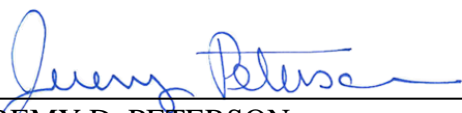
7 2. Plaintiff’s claims be dismissed without prejudice for failure to exhaust administrative
8 remedies.

9 3. The Clerk of Court be directed to close the case.

10 I submit these findings and recommendations to the district judge under 28 U.S.C.
11 § 636(b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court,
12 Eastern District of California. The parties may, within 14 days of the service of the findings and
13 recommendations, file written objections to the findings and recommendations with the court.
14 Such objections should be captioned “Objections to Magistrate Judge’s Findings and
15 Recommendations.” The district judge will review the findings and recommendations under 28
16 U.S.C. § 636(b)(1)(C).

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18 IT IS SO ORDERED.

19 Dated: May 24, 2022

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21 JEREMY D. PETERSON
22 UNITED STATES MAGISTRATE JUDGE
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