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

GARY FRANCIS O’LEARY,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND  
REHABILITATION, GOVERNOR  
ARNOLD SCHWARZENEGGER,  
ATTORNEY GENERAL JERRY  
BROWN,

Defendants.

) No. C 09-4712 JSW (PR)

) **ORDER OF DISMISSAL**

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Plaintiff, a California prisoner currently incarcerated at Salinas Valley State Prison, has filed a civil rights complaint complaining the conditions of his confinement while incarcerated at the prison. In the complaint, Plaintiff states that he did not exhaust his claims to the highest level of appeal through the inmate grievance procedure. Plaintiff states that he attempted to use the grievance process, but that the Appeals Coordinator at the prison returned the appeal requesting additional documentation and that he did not have the requested paperwork. Plaintiff apparently did not return the appeal or attempt to exhaust his appeal beyond the First Level of Review. Complaint at 1-2.

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify

1 any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a  
2 claim upon which relief may be granted or seek monetary relief from a defendant who is  
3 immune from such relief. *See id.* at § 1915A(b)(1),(2). Pro se pleadings, however, must  
4 be liberally construed. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th  
5 Cir. 1988).

6 The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321  
7 (1996) (“PLRA”) provides: “No action shall be brought with respect to prison conditions  
8 under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail,  
9 prison, or other correctional facility until such administrative remedies as are available  
10 are exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is mandatory and not left to the  
11 discretion of the district court. *Woodford v. Ngo*, 126 S. Ct. 2378, 2382 (2006).

12 Exhaustion is a prerequisite to all prisoner lawsuits concerning prison life, whether such  
13 actions involve general conditions or particular episodes, whether they allege excessive  
14 force or some other wrong, and even if they seek relief not available in grievance  
15 proceedings, such as money damages. *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The  
16 exhaustion requirement requires “proper exhaustion” of all available administrative  
17 remedies. *Woodford*, 126 S. Ct. at 2387.

18 The State of California provides its prisoners and parolees the right to appeal  
19 administratively “any departmental decision, action, condition or policy perceived by  
20 those individuals as adversely affecting their welfare.” Cal. Code Regs. tit. 15,  
21 § 3084.1(a). In order to exhaust available administrative remedies within this system, a  
22 prisoner must proceed through several levels of appeal: (1) informal review, (2) first  
23 formal written appeal on a CDC 602 inmate appeal form, (3) second formal level appeal  
24 to the institution head or designee, and (4) third formal level appeal to the Director of the  
25 California Department of Corrections and Rehabilitation. *See Barry v Ratelle*, 985 F.  
26 Supp 1235, 1237 (S.D. Cal. 1997) (citing Cal. Code Regs. tit. 15, § 3084.5). A final  
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1 decision from the Director's level of review satisfies the exhaustion requirement under §  
2 1997e(a). *See id.* at 1237-38.

3 Because exhaustion under § 1997e(a) is an affirmative defense, a complaint may  
4 be dismissed for failure to exhaust only if failure to exhaust is obvious from the face of  
5 the complaint and/or any attached exhibits. *See Wyatt v. Terhune*, 315 F.3d 1108,  
6 1119-20 (9th Cir. 2003). The court may dismiss a complaint for failure to exhaust where  
7 the prisoner "conce[des] to nonexhaustion" and "no exception to exhaustion applies." *Id.*  
8 at 1120. Here, Plaintiff concedes in his complaint that he has not exhausted his  
9 administrative remedies (Complaint at 1-2), and no exception to exhaustion is alleged or  
10 apparent in the complaint. Section 1997e(a) requires that Plaintiff present his claim to  
11 each level of administrative review set forth above, including the Director's level of  
12 review, before raising the claim in a § 1983 complaint in federal court. An action must  
13 be dismissed unless the prisoner exhausted his available administrative remedies before  
14 he or she filed suit, even if the prisoner fully exhausts while the suit is pending.  
15 *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002). As it is clear from the  
16 complaint that Plaintiff has not pursued all levels of administrative review available to  
17 him, and there is no applicable exception to the exhaustion requirement, dismissal  
18 without prejudice is appropriate.

19 Accordingly, the above-titled action is hereby DISMISSED, without prejudice to  
20 Plaintiff's refiling his claim after all available administrative remedies have been  
21 exhausted. The Clerk shall close the file and enter judgment in favor of Defendants.

22 IT IS SO ORDERED.

23 DATED: April 19, 2010

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JEFFREY S. WHITE  
26 United States District Judge  
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1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA  
4

5 GARY F. O'LEARY,  
6 Plaintiff,  
7

Case Number: CV09-04712 JSW

**CERTIFICATE OF SERVICE**

8 v.

9 SALINAS VALLEY STATE PRISON et al,  
10 Defendant.  
\_\_\_\_\_ /

11 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
12 Court, Northern District of California.

13 That on April 19, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said  
14 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing  
15 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery  
16 receptacle located in the Clerk's office.

17 Gary Francis O'Leary  
18 P.O. Box 1050  
19 T33173  
20 Soledad, CA 93960-1050

21 Dated: April 19, 2010



22 Richard W. Wieking, Clerk  
23 By: Jennifer Ottolini, Deputy Clerk  
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