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2
3 UNITED STATES DISTRICT COURT
4 NORTHERN DISTRICT OF CALIFORNIA
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7 RUSSELL DWAYNE RODGERS,

No. C 13-2116 MEJ (pr)

8 Plaintiff,

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

9 v.

Doc. No. 35

10 GREG MUNKS, San Mateo County Sheriff,
11 et al.,

12 Defendants.
13 _____/

14 On May 8, 2013, plaintiff Russell Dwayne Rodgers filed this pro se civil rights action
15 under 42 U.S.C. § 1983 complaining of conditions at the San Mateo County Maguire
16 Correctional Facility, where he is incarcerated. Plaintiff has paid the filing fee.

17 On June 7, 2012, the Court dismissed the complaint with leave to amend. On June 18,
18 2013, plaintiff filed an amended complaint ("FAC"). On June 28, 2013, the Court issued an
19 Order of Partial Service, finding that plaintiff's due process claim was not cognizable and
20 that his Eighth Amendment claim for the denial of hygiene supplies was cognizable.

21 Specifically, plaintiff alleges that defendants denied him basic hygiene supplies for a period
22 of 2 to 3 months, starting around February 23, 2013. (FAC at 2.) Plaintiff alleges this led to
23 bad health (bleeding gums, rashes, depression) and bad hygiene (bad breath, musty/bad odor)
24 as well as distancing, loss of companions, and embarrassment. (FAC at 2.) Plaintiff alleges
25 that he did not have a toothbrush, toothpaste, or soap for the entire month of May 2013.

26 (FAC at 3.) Plaintiff also alleges that he was denied clean laundry. (FAC at 2.) The Court
27 ordered service of the Eighth Amendment claim on defendants Sheriff Munks, Lt. Kankel,
28 Lt. Copeland, and Sgt. Justice.

1 Now before the Court is defendants’ motion to dismiss the complaint for failure to
2 exhaust administrative remedies, as required by 42 U.S.C. § 1997e(a). Plaintiff has filed an
3 opposition, and defendants have filed a reply.

4 For the reasons discussed below, the Court GRANTS defendants’ motion to dismiss.

5 DISCUSSION

6 A. Legal Standard

7 The Prison Litigation Reform Act of 1995 (“PLRA”) amended 42 U.S.C. § 1997e to
8 provide that “[n]o action shall be brought with respect to prison conditions under [42 U.S.C.
9 § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other
10 correctional facility until such administrative remedies as are available are exhausted.” 42
11 U.S.C. § 1997e(a). Although previously within the discretion of the district court, exhaustion
12 in prisoner cases covered by § 1997e(a) is now mandatory. Porter v. Nussle, 534 U.S. 516,
13 524 (2002). The PLRA exhaustion requirement requires “proper exhaustion” of all available
14 administrative remedies. Woodford v. Ngo, 548 U.S. 81, 93 (2006). Moreover, those
15 remedies “need not meet federal standards, nor must they be ‘plain, speedy, and effective.’”
16 Porter, 534 U.S. at 524 (citation omitted). Even where the prisoner seeks relief not available
17 in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit. Id.;
18 Booth v. Churner, 532 U.S. 731, 741 (2001). Exhaustion is a prerequisite to all inmate
19 lawsuits pertaining to prison life, whether they involve general circumstances or particular
20 episodes, and whether they allege excessive force or some other wrong. Porter, 534 U.S. at
21 532. The PLRA does not require exhaustion when circumstances render administrative
22 remedies “effectively unavailable.” Sapp v. Kimbrell, 623 F.3d 813, 822 (9th Cir. 2010).

23 Nonexhaustion under § 1997e(a) is an affirmative defense, and is properly brought in
24 an “unenumerated Rule 12(b) motion rather than [in] a motion for summary judgment.”
25 Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). In deciding a motion to dismiss for
26 failure to exhaust administrative remedies under § 1997e(a), the court may look beyond the
27 pleadings and decide disputed issues of fact. Id. at 1119-20. If the court concludes that the
28 prisoner has not exhausted the jail’s or prison’s administrative process, the proper remedy is

1 dismissal without prejudice. Id.

2 B. County Jail Procedures

3 Section 1073 of Title 15 of the California Code of Regulations provides county jail
4 inmates with a right to “appeal and have resolved grievances” relating to their confinement.
5 Cal. Code Regs. tit. 15, § 1073. Pursuant to Section 1073, the San Mateo County Maguire
6 Correctional Facility (“MCF”) has established a Prisoner Grievance System. (Hanlon Decl.
7 ¶ 5, Ex. 1.) It is undisputed that the administrative remedies available to plaintiff and at issue
8 here are those of the San Mateo County MCF.

9 The MCF Prisoner Grievance System requires an inmate to first attempt to resolve a
10 grievance informally with a line staff member. (Id.) If the problem cannot be resolved on
11 the staff level, the inmate must complete the top portion of the Inmate Grievance Form.
12 (Hanlon Decl. ¶¶ 7-8, Ex. 1.) The form is given to a staff member who responds at the staff
13 level in writing on the second portion of the form and signs it. (Id.) The form is then given
14 to the staff member’s supervisor, usually the Housing Sergeant on duty, who responds in
15 writing on the third portion of the form and signs it. (Id.) The form is then given to the
16 Watch Commander (a lieutenant), who reviews and responds on the last portion of the form
17 and signs it. (Id.) The completed form is then returned to the inmate and a hard copy is kept
18 by jail administration and filed in the facility administration’s grievances file. (Id.)

19 If an inmate desires to appeal the Watch Commander’s decision, he or she must write
20 an appeal letter on plain or ruled white paper (not a grievance form) to the Corrections
21 Division Captain, who will review the appeal letter and the grievance with the Watch
22 Commander’s response. (Id.) The appeal letter on plain or ruled white paper is sent in an
23 envelope to the Corrections Division Captain at 330 Bradford Street. Paper and envelope are
24 provided by staff upon an inmate’s request. (Id.) The Corrections Division Captain must
25 give a written response to the inmate within 15 business days of receipt of the letter. (Id.) A
26 hard copy of the appeal letter and the response to the appeal are kept in the facility
27 administration’s grievance and appeal files, and a record of each appeal letter is also entered
28 and maintained on an electronic list. (Id.) The appeal to the Corrections Division Captain is

1 the final level of appeal required by the MCF Prisoner Grievance System. (Id.)

2 Plaintiff had constructive knowledge of the grievance procedures because a copy is
3 posted in the center of each housing pod at MCF so that it is readily accessible to inmates.
4 (Hanlon Decl. ¶ 8, Ex. 2.) Furthermore, plaintiff had actual knowledge of the grievance
5 procedures and exhaustion requirement because he submitted numerous grievances during
6 his incarceration in 2013 as well as numerous grievances and appeals during prior
7 incarcerations at the San Mateo County Jail. (Hanlon Decl. ¶¶ 10, 14; Exs. 5, 6, 7.) Finally,
8 plaintiff had actual knowledge of the grievance procedures and exhaustion requirement due
9 to his experience in filing previous civil suits in this court against San Mateo County sheriff's
10 deputies. See Rodgers v. Horsley, Case No. C 00-00996 (SBA) (PR) and Rodgers v.
11 Horsley, Case No. C 07-00520 (SBA) (PR). In fact, in Case No. C 07-00520 (SBA) (PR),
12 this court informed plaintiff that he should present all claims he wished to bring in federal
13 court to the jail's appeal process through to the Facility Commander's level of review before
14 actually raising those claims in a Section 1983 action. (March 31, 2010 Order in Case No. C
15 07-00520 (SBA) (PR) at 6-7, 15.)¹

16 C. Plaintiff's Grievances

17 Defendants have submitted evidence that the Corrections Division Captain for MCF
18 never received an appeal of a grievance relating to plaintiff's Eighth Amendment claim
19 regarding the alleged deprivation of hygiene supplies or laundry. (See Hanlon Decl. ¶¶ 9, 13,
20 Ex. 5.) Plaintiff does not deny that he failed to submit an appeal to the Corrections Division
21 Captain as required to exhaust administrative remedies. He mounts two arguments in his
22 opposition.

23 First, plaintiff contends that he has properly exhausted because "he has been given
24 grievance forms and direction to use them for (1st and 2nd steps) final review grievances, and
25 it has been accepted practice (for years)." (Dkt. 45 at 4.) Plaintiff submits various grievance
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28 ¹ It appears that at the time of the claims alleged in Case No. C 07-00520 (SBA) (PR),
the San Mateo County Jail's Corrections Division Captain was referred to as "Facility
Commander." (See id.)

1 forms that pertained to hygiene supplies and that received a response from the Watch
2 Commander. (See e.g., Dkt. 45 at 13, 14, 15, 17.) Plaintiff provides no evidence, however,
3 that he was ever definitively informed by jail staff that the Watch Commander's level of
4 review was the final level of review for exhaustion purposes. Plaintiff points to a
5 memorandum he received from Lieutenant Facility Commander Bill Bonifacio on October 3,
6 2013 in response to a letter that plaintiff sent directly to Sheriff Munks regarding his housing
7 in administrative segregation. (Dkt. 42; Bonifacio Decl. ¶ 5, Exs. 1-2.) The letter states:

8 The Sheriff's Office is in receipt of your letter dated 9/22/13, in which you
9 write about your current housing assignment of Administrative Segregation.
10 Your letter follows a multitude of grievance forms you've submitted on this
11 topic, forms which have been routinely reviewed and properly addressed by
12 supervisory and management staff at the facility. The process of regular
13 reviews of Administrative Housings will continue, as they have been.

14 (Dkt. 42 at 2.) Contrary to plaintiff's assertion, nothing in the letter demonstrates that use of
15 a grievance form for final appeals is an "accepted practice." Furthermore, plaintiff's letter to
16 the Sheriff was not directed to the Corrections Division Captain nor did it relate to plaintiff's
17 grievances regarding alleged deprivation of hygiene supplies or laundry. (Bonifacio Decl.,
18 Ex. 1.) Consequently, it is not relevant to whether plaintiff exhausted his administrative
19 remedies concerning his claims in this action.

20 Moreover, such an argument is inconsistent with the plain language of the MCF
21 grievance procedure, which was posted in each pod at MCF. (Hanlon Decl ¶ 6, Ex. 2.) The
22 procedure clearly states, in relevant part:

23 Appeals:

24 If an inmate is dissatisfied, he/she may appeal the Watch Commander's
25 decision. The appeal must be made within 10 business days of the Watch
26 Commander's Response. Appeal procedure is as follows:

27 a) The appeal shall be a letter written on plain/ruled white paper. Reference
28 shall be made to which grievance is being appealed. This is done by including
the "written date" of the appealed grievance. Grievance appeals shall contain a
clear, concise statement explaining the basis for the appeal. If needed, staff
will provide paper and envelope for an appeal.

b) The inmate will complete the appeal, place the appeal in an envelope, and
forward it via jail staff / or U.S. mail to the Correction Division's Captain at
330 Bradford Street, Rwc. 94063. If asked, the pod officer will make a copy of
the appeal letter for the inmate to be returned prior to the end of shift.

1 c) The Correction Division’s Captain will give a written response or an
2 approved response to the inmate within 15 business days of receipt, including
the reasons if he/she denies the appeal.

3 (Id. (emphasis added).)

4 Plaintiff’s argument also conflicts with the fact that he had prior experience with the
5 grievance procedure, which he used to pursue many other claims at MCJ, including claims
6 pursued through the final level of appeal. (Hanlon Decl. ¶¶ 10, 14; Exs. 5, 6, 7.) Plaintiff
7 has previously demonstrated that he is familiar with the grievance and appeal procedure at
8 MCF, and that he knows how to submit a grievance as well as how to appeal responses to
9 grievances to the highest and final level. (See id.) Finally, plaintiff’s argument conflicts
10 with the fact that he is an experienced pro se litigant who, as mentioned above, had actual
11 knowledge of the exhaustion requirement due to his experience in filing previous civil suits,
12 in which this court directed him to present each and every claim he wished to bring in federal
13 court to the jail’s appeals process before filing his federal complaint. See Rodgers v.
14 Horsley, Case No. C 00-00996 (SBA) (PR) and Rodgers v. Horsley, Case No. C 07-00520
15 (SBA) (PR). Indeed, plaintiff acknowledged in his original complaint in this action that he
16 had proceeded only through the Lieutenant (Watch Commander) Level. (See Dkt. 1 at 2.)

17 Second, plaintiff contends that he properly exhausted because he “wrote/labeled ‘Final
18 Level’ grievances to ‘Facility Comndr.’ and they were processed, always.” (Dkt. 45 at 3.)
19 Plaintiff appears to be referring to various grievance forms, in which he wrote “Final
20 Response - to - Facility Cmndr.” next to the portion of the form indicating “To: (Watch
21 Commander).” (See e.g., Dkt. 45 at 13, 17.) However, the fact that plaintiff addressed his
22 grievance forms to the Facility Commander does not cure his abandonment of these
23 grievances at the Watch Commander’s level. It is clear from the lower portions of these
24 forms that they were processed as grievances, not appeals, and were responded to by the
25 Watch Commander, not the Corrections Division Captain. (See id.) Pursuant to the MCF
26 grievance procedure, the burden is on the inmate to appeal the Watch Commanders’s
27 decision to the Corrections Division Captain. (Hanlon Decl. Ex. 1 at 2; Ex. 2 at 1.) The
28 appeal must be “a letter written on plain/ruled white paper” not on a grievance form. (Id.)

1 The Court finds unavailing plaintiff's argument that addressing the grievance form to
2 "Facility Cmndr." should fully exhaust his claims.

3 The undisputed evidence clearly indicates that plaintiff did not properly exhaust his
4 available administrative remedies, and he has not established grounds for excusing the
5 PLRA's requirement that he do so. Accordingly, defendants are entitled to judgment based
6 on plaintiff's failure to exhaust.

7 **CONCLUSION**

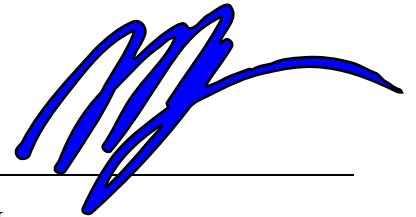
8 For the foregoing reasons, defendants' motion to dismiss for failure to properly
9 exhaust available administrative remedies before filing suit, as required by 42 U.S.C.
10 § 1997e(a) is GRANTED and the action is DISMISSED without prejudice.

11 The Clerk shall enter judgment for defendants and close the file.

12 This order terminates Docket No. 35.

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14 IT IS SO ORDERED.

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17 DATED: January 7, 2014



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Maria-Elena James

19 United States Magistrate Judge
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