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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

JOSE JUAN ESPINOZA,
Plaintiff,
v.
D. ASUNCION, et al.,
Defendants.

Case No. [16-cv-01263-LB](#)

**ORDER GRANTING SUMMARY
JUDGMENT FOR LACK OF
EXHAUSTION**

INTRODUCTION

In this prisoner’s civil-rights case, Jose Espinoza claims that Salinas Valley State Prison officials violated his Eighth Amendment rights when a guard shot him to end a prison-yard fight.¹ At the parties’ request, the court staged the case to address first whether Mr. Espinoza exhausted his administrative remedies under the Prison Litigation Reform Act (“PLRA”) (and deferred addressing the merits of the claims pending that inquiry).² The case is in the first stage — PLRA exhaustion.

The defendants moved for summary judgment on the ground that Mr. Espinoza failed to

¹ First Amended Complaint (“FAC”) – ECF No. 40. Record citations refer to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of documents. The parties consented to magistrate-judge jurisdiction. (Consent Forms – ECF Nos. 3, 14, 23–24.)

² Case-Management Order – ECF No. 32.

1 exhaust his administrative remedies by not filing a grievance within 30 days after he returned from
2 an outside hospital to the prison infirmary.³ Mr. Espinoza spent three weeks in the outside
3 hospital, thereafter recuperated for about three months in the prison infirmary under administrative
4 segregation, then returned to administrative-segregation general housing, and filed his grievance
5 two weeks later, on July 6, 2014.⁴ (The prison excluded from the 30-day period the three weeks
6 that Mr. Espinoza spent at the outside hospital but did not exclude the three months in the
7 infirmary; it thus denied the grievance as untimely.⁵)

8 The court denied the defendants' summary-judgment motion because the evidence, viewed in
9 the light most favorable to Mr. Espinoza, raised a genuine dispute about whether the prison's
10 administrative procedures were available to Mr. Espinoza while he was in the prison's infirmary.⁶
11 Because an inmate need exhaust only *available* remedies, *see Albino v. Baca*, 747 F.3d 1162, 1171
12 (9th Cir. 2014), the court held that the defendants did not carry their burden of showing that Mr.
13 Espinoza failed to exhaust.⁷

14 The defendants then requested an evidentiary hearing on the question of exhaustion.⁸ The court
15 granted the request because exhaustion is a threshold issue that "should be decided, if feasible,
16 before reaching the merits of a prisoner's claim." *Id.* at 1170. The court noted that the overarching
17 issue was whether Mr. Espinoza took reasonable and appropriate steps to exhaust his remedies in
18 the infirmary by asking two officers for grievance forms, and whether the officers' failure to
19 provide those forms rendered the grievance procedure effectively unavailable.⁹

20 The court identified the following issues of disputed fact from the parties' summary-judgment
21 evidence:

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23 _____
24 ³ Summary-Judgment Motion – ECF No. 45.

25 ⁴ Medina Decl. – ECF No. 48, Exs. B & C.

26 ⁵ *Id.* ¶ 7.

27 ⁶ Summary-Judgment Order – ECF No. 78.

28 ⁷ *Id.* at 20.

⁸ Case-Management Statement – ECF No. 79 at 3–5.

⁹ Order Granting Request – ECF No. 81 at 2.

1 (1) Did Mr. Espinoza ask the two correctional officers for a form and did they tell
2 him that someone would have to come help him?

3 (2) When did Mr. Espinoza ask for the form?

4 (3) How many officers did he encounter on a daily basis?

5 (4) Did he have immediate access to forms when he left the infirmary and entered
6 an administrative-segregation housing unit?¹⁰

7 The court also noted that the summary-judgment evidence did not create a dispute about the
8 general availability of the grievance process at the prison.¹¹

9 Based on that framework, the parties submitted additional exhaustion-related evidence at an
10 evidentiary hearing on July 13, 2017. The court now concludes that Mr. Espinoza did not take
11 “reasonable and appropriate steps” to exhaust his administrative remedies by requesting a
12 grievance form four times. The court grants the defendants summary judgment.

13 **FINDINGS OF FACT**

14
15 The main dispute is whether the Salinas Valley State Prison administrative-grievance
16 procedures were available to Mr. Espinoza in the infirmary — *i.e.* whether he had the ability and
17 opportunity to exhaust his administrative remedies. The court thus sets forth the facts regarding
18 the grievance procedures at the prison and Mr. Espinoza’s access to them. To the extent that facts
19 are undisputed and contextual, the court cites facts that it found previously at summary judgment,
20 and it finds additional facts to resolve the exhaustion issue.¹² For ease of reference, the fact
21 sections in this order have the same titles as those in the earlier summary-judgment order.

22 At the hearing, the parties submitted, and the court admitted, documentary and testimonial
23 evidence about (1) the grievance process at the prison generally, (2) access to grievance forms in
24 Mr. Espinoza’s two housing placements (in administrative segregation in the infirmary for his
25

26 _____
27 ¹⁰ *Id.* at 2–3.

28 ¹¹ *Id.*

¹² *See* Summary-Judgment Order – ECF No. 78 at 3–4.

1 three-month recovery and thereafter in general administrative-segregation housing), and (3) Mr.
2 Espinoza’s efforts to exhaust his administrative remedies. The court admitted Exhibits 1–2, 11
3 (under seal because it implicates prison security), 101–07, 111, 113, 120–21, 124, 127–30, 132,
4 and 139.¹³ The parties jointly identified witnesses.¹⁴ The defendants called the following
5 correctional officers: Eloy Medina, Thomas Atkins, Lucas Cuevas, B. Sanchez, Joshua Mensing,
6 Alexander Meden, Edward Cary, Mark Parra, and Gregorio Salazar (with the last two by
7 videotaped testimony).¹⁵ Mr. Espinoza then testified.¹⁶

8
9 **1. Salinas Valley State Prison Grievance Procedures**

10 The parties do not contest, and the court held at summary judgment, that the defendants
11 showed that a grievance process existed and was generally available at the prison.¹⁷

12 Salinas Valley State Prison’s administrative-grievance process is set forth in 15 Cal. Code.
13 Regs. § 3084 *et seq.*¹⁸ That administrative-grievance process consists of three levels of review and
14 must be initiated with a Form 602 within thirty days of the challenged event.¹⁹ *See* 15 Cal. Code
15 Regs. §§ 3084.2(a), 3084.8(b). Using this process, an inmate “may appeal any policy, decision,
16 action, condition, or omission by the department or its staff that the inmate . . . can demonstrate as
17 having a material adverse effect upon his or her health, safety, or welfare.” *Id.* § 3084.1(a). The
18 process consists of three levels of review, *id.* § 3084.7; and, generally, only a third-level decision
19 fully exhausts an inmate’s administrative remedies. *Id.* § 3084.1(b); *Woodford v. Ngo*, 548 U.S.
20 81, 85–86, 93–94 (2006).

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22
23 _____
24 ¹³ Trial Worksheet – ECF No. 119-1; Final Joint Exhibit List – ECF No. 121.

25 ¹⁴ ECF Nos. 108, 110, and 117.

26 ¹⁵ 7/13/17 Reporter’s Transcript (“RT”) 253–54.

27 ¹⁶ RT 253.

28 ¹⁷ Summary-Judgment Order – ECF No. 78 at 2–3 (citing Voong Decl. – ECF No. 53, ¶¶ 3–8, Ex. A).

¹⁸ *Id.* (citing Voong Decl ¶¶ 3–8, Ex. A (attaching the 2014 regulations)).

¹⁹ *Id.*

1 The court turns to Mr. Espinoza’s efforts to exhaust his administrative remedies, first in the
2 infirmary and then in the D-9 unit.

3
4 **2. Mr. Espinoza Is Shot, Taken to the Hospital, and Placed in the Prison Infirmary**

5 On March 7, 2014, Mr. Espinoza was in a fight with two fellow inmates on the prison yard.²⁰
6 In response to the fight, Correctional Officer Aboytes fired his mini-14 rifle twice and hit Mr.
7 Espinoza in the hand and neck.²¹ His hand was “destroyed,” his “wrist was shattered[,] and [his]
8 fingers were broken.”²²

9 Mr. Espinoza was taken to an outside hospital for medical treatment, where he stayed for three
10 weeks.²³ He had multiple surgeries to repair his injuries,²⁴ including a bone graft.²⁵ Pins were
11 inserted into three of his fingers and his wrist, and his arm was put in a hard cast.²⁶ Mr. Espinoza
12 suffered “screaming pain” while at the hospital and was “real medicated.”²⁷ He did not think to
13 ask for a Form 602 because he was in too much pain.²⁸ (As described below, because he did not
14 have access to the forms in the outside hospital, prison officials did not count the three weeks
15 there in calculating the 30-day period to file a grievance form.)

16 On March 28, 2014, Mr. Espinoza returned to the prison, and prison officials housed him in
17 the Correctional Treatment Center (the prison infirmary) because he “required a higher level of
18 medical care than could be provided in a regular housing unit.”²⁹ When Mr. Espinoza arrived in
19

20 ²⁰ FAC ¶¶ 1–2; Answer to FAC – ECF No. 43, ¶¶ 1–2.

21 ²¹ FAC ¶ 6; Answer to FAC ¶ 6.

22 ²² Espinoza Dep. – ECF No. 63-6 at 23 (p. 22). Where this order cites depositions, the first pinpoint
23 citation is to the ECF-generated page number; the additional, parenthetical “p.” citation is to the
24 deposition transcript’s original pagination.

25 ²³ FAC ¶ 39; Answer to FAC ¶ 39; Meyer Decl., Ex. 9 – ECF No. 63-9 at 3.

26 ²⁴ FAC ¶ 9; Answer to FAC ¶ 9; Espinoza Test. – RT 165–66.

27 ²⁵ Espinoza Test. – RT 165:21–166:10.

28 ²⁶ Espinoza Dep. – ECF No. 63-6 at 29, 69 (pp. 28, 68); Parra Decl. – ECF No. 50, ¶ 11 (noting that
29 Mr. Espinoza had a pin in his hand); FAC ¶ 9.

30 ²⁷ Espinoza Dep. – ECF No. 63-6 at 45 (p. 44).

31 ²⁸ Espinoza Test. – RT 166:11–18.

32 ²⁹ O’Brien Decl., Ex. A – ECF No. 49 at 14; Parra Decl. – ECF No. 40, ¶ 10.

1 the infirmary, he had pins in his hand, 50 staples in his arm, and staples in his leg.³⁰ Mr. Espinoza
2 testified that he was in significant pain along his entire right side, slept a lot, and received
3 medication roughly every four hours during his first ten days in the infirmary; he could not even
4 get out of bed to use the restroom.³¹ He was taking a lot of medications, and he still takes
5 Neurontin/Gabapin.³²

6 The infirmary “is like a hospital within the prison” where inmates with medical conditions are
7 treated.³³ The front of the infirmary has an emergency room, a clinic, and doctors’ offices.³⁴ The
8 back consists of housing cells for inmates receiving inpatient medical care.³⁵ There are twenty-
9 four cells in the infirmary: twelve for mental-health patients and twelve for medical patients.³⁶
10 Each cell houses one inmate; no patient has a cellmate.³⁷ During his stay from March 28, 2014
11 until June 22, 2014, the prison housed Mr. Espinoza in cell 24, which had its own shower and
12 restroom.³⁸ The cells have an intercom, which, “[w]hen pressed, . . . lights up an indicator at the
13 [infirmary] officers’ station.”³⁹ The cells use a two-door, anteroom, access system.⁴⁰

14 15 **3. Mr. Espinoza Is Placed on Administrative Segregation Status**

16 On April 3, 2017, in the infirmary, prison officials placed Mr. Espinoza on “administrative
17 segregation status” (“Ad-Seg Status”).⁴¹ Generally, inmates involved in a fight will be housed “in

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19 ³⁰ Espinoza Test. – RT 170:2–16.

20 ³¹ Espinoza Test. – RT 171:2–172:3.

21 ³² Espinoza Test. – RT 167:2–3.

22 ³³ Atkins Decl. – ECF No. 46, ¶ 9.

23 ³⁴ Atkins Test. – RT 29:2–10, 42:2–14; Chavez Test. – RT 74:11–17; Cary Test. – RT 151:19–152:5.

24 ³⁵ *Id.*

25 ³⁶ Atkins Decl. – ECF No. 46, ¶ 8.

26 ³⁷ *Id.*

27 ³⁸ Atkins Test. – RT 29:14–25; Chavez Test. – RT 67:16–24; Espinoza Test. – RT 167:17–19; Exs. 2
(inmate location log), 130 (infirmary photo), 132 (infirmary cell photo).

28 ³⁹ Atkins Decl. – ECF No. 46, ¶ 7.

⁴⁰ Atkins Decl. – ECF No. 46, ¶ 9; Parra Dep. – ECF No. 63-12 at 8–9 (pp. 36–37).

⁴¹ Atkins Decl. – ECF No. 46, ¶ 14; Parra Decl. – ECF No. 50, ¶¶ 13–14; Meden Test. – RT 138:22–
140:2, 141:21–23; Ex. 120.

1 [the] administrative segregation[] [unit] to ensure no more violence occurs.”⁴² But inmates in the
 2 infirmary, who would otherwise “be housed in administrative segregation” if not for their
 3 healthcare needs, are placed on Ad-Seg Status.⁴³ And so Mr. Espinoza, who “was being charged
 4 with a rules violation report for his involvement in the attack on the yard that led to his being
 5 shot,” was placed on Ad-Seg Status in the infirmary.⁴⁴

6 Mr. Espinoza’s Ad-Seg Status limited his movement in the prison. Inmates so classified are
 7 not allowed out of their cells, for example, to go to the yard.⁴⁵ They can leave their cells only to
 8 see the infirmary doctor; in that case, the inmate will be handcuffed, taken to the doctor, and then
 9 back to his cell.⁴⁶

10 Mr. Espinoza’s Ad-Seg Status also affected his daily contacts with prison staff. Officers in the
 11 infirmary work three watches: first watch (10:00 p.m. to 6:00 a.m.), second watch (6:00 a.m. to
 12 2:00 p.m.), and third watch (2:00 pm to 10:00 p.m.).⁴⁷ Officers escort medical staff into these
 13 inmates’ cells at least three times per day for food and twice for medication.⁴⁸ The evidence
 14 supports the conclusion that the rule was that two officers acted as escorts for medical staff
 15 providing food and medicine to Ad-Seg prisoners.⁴⁹ But officers and Mr. Espinoza also testified
 16 that sometimes only one officer was an escort.⁵⁰ Possibly this is because — as officers testified —
 17 the infirmary was a calmer and more relaxed environment than the general population, and
 18 inmates (including Mr. Espinoza) left their “politics” at the door.⁵¹ Officer Atkins, for example,
 19

20 ⁴² Parra Decl. – ECF No. 50, ¶ 13.

21 ⁴³ Atkins Decl. – ECF No. 46, ¶ 10.

22 ⁴⁴ *Id.*, ¶ 14; Parra Decl. – ECF No. 50, ¶¶ 13–14.

23 ⁴⁵ Atkins Dep. – ECF No. 63-8 at 15–17 (pp. 44–46).

24 ⁴⁶ *Id.* at 17–19 (pp. 46–48).

25 ⁴⁷ Atkins Test. – RT 40:13–41:5; Cuevas Test. – RT 48:18; Sanchez Test. – RT 94:21–22, 96:7–8.

26 ⁴⁸ Atkins Decl. – ECF No. 46, ¶¶ 23–24.

27 ⁴⁹ Atkins Test. – RT 38:15; Cary Test. – RT 154:11–155:16; Espinoza Test. – RT 191:12–18.

28 ⁵⁰ Atkins Decl. – ECF No. 46, ¶ 10; Atkins Test. – RT 38:12–39:4; Chavez Test. – RT 79:5–10;
 Espinoza Decl. – ECF No. 62, ¶ 5.

⁵¹ Atkins Test. – RT 38:15–18, 41:8–19; Cuevas Test. – RT 53:24–54:6; Chavez Test. – RT 76:15–25,
 79:11–12.

1 “regularly asked [Mr.] Espinoza how he was doing and if he needed anything,” and “told him if he
2 needed anything, to let [him] or the other officers know.”⁵² The court finds that Ad-Seg prisoners
3 have regular access to officers in the infirmary and that Mr. Espinoza specifically encountered
4 correctional officers at least five times on any given day.

5
6 **4. Mr. Espinoza’s Access to Grievance Forms While in the Infirmary**

7 The parties do not contest, and the court held at summary judgment, that the Form 602
8 grievance forms are generally available in the infirmary — including for Ad-Seg inmates. Inmates
9 can request grievance forms (1) from officers and medical staff during cell visits, (2) by flagging
10 down an officer during rounds, (3) by using the intercom system, or (4) through the law library.⁵³
11 At the hearing, officers testified uniformly that Form 602s were always at the officers’ station in
12 the infirmary,⁵⁴ more were available at the neighboring mental-health unit,⁵⁵ and more could be
13 printed if they ran low.⁵⁶ The court finds that Form 602s were available at the officers’ station in
14 the infirmary.

15 Officers testified that they gave out many grievance forms to inmates housed in the
16 infirmary.⁵⁷ They testified that inmates could ask them for forms, including in person during the
17 officers’ rounds.⁵⁸ The court finds that inmates in the infirmary generally could ask officers in
18 person for grievance forms, and if they asked, the officers generally would provide them.

19 Inmates could access the law library by sending a Form 22 (which is a form that inmates use
20 for general requests).⁵⁹ The court finds that a Form 22 was a means of asking for a Form 602 but

21
22 ⁵² Atkins Decl. – ECF No. 46, ¶ 16; Meden Test. – RT 142:6–17.

23 ⁵³ *Id.* ¶¶ 25–28.

24 ⁵⁴ Atkins Test. – RT 39:18–40:8; Chavez Test. – RT 72:21–25; Cary Test. – 149:9–18.

25 ⁵⁵ Chavez Test. – RT 73:2–4.

26 ⁵⁶ Atkins Test. – RT 40:9–12; Chavez Test. – RT 73:4–5.

27 ⁵⁷ Atkins Test. – RT 39:25–40:1; Cuevas Test. – RT 57:7–11; Chavez Test. – RT 73:6–74:3; Cary
28 Test. – RT 151:13–14.

⁵⁸ Atkins Test. – RT 34:18–23; Cuevas Test. – RT 55:13–18; Chavez Test. – RT 71:23–72:9; Meden
Test. – RT 140:20–141:15; Cary Test. – RT 149:21–150:3.

⁵⁹ Atkins Test. – RT 38:21–25, 39:14–18; Ex. 107 (Form 22).

1 was not an ordinary or obvious means. Officers testified that theoretically, an inmate could use a
2 Form 22, but inmates do not typically use Form 22s to ask for Form 602s because it is easier to
3 ask for a Form 602.⁶⁰ Officers said they had never heard of an inmate’s using a Form 22 to request
4 a Form 602.⁶¹ The court concludes that the ordinary means for an Ad-Seg inmate to obtain a Form
5 602 in the infirmary was to ask an officer, who would get it from the officers’ station. (By
6 contrast, as discussed below, inmates in general Ad-Seg housing have access to a weekly supply
7 cart with Form 602s.⁶²)

8 Officers testified that nurses had access to the forms at the officers’ station and could give
9 them out if they wanted to.⁶³ There was no testimony about whether nurses gave out forms.
10 Indeed, the officers testified that they acted as security to the medical staff performing their
11 medical treatment.⁶⁴ Based on the record, the court concludes that while it is possible for medical
12 staff to provide Form 602s from the officers’ station, as a practical matter, nothing supports the
13 conclusion that they gave out Form 602s. Instead, correctional officers gave out forms.

14 The court also finds that the intercoms in the infirmary cells were not an ordinary means of
15 getting a Form 602. Officers testified that the intercoms could be used for non-emergency events
16 (such as asking for a form).⁶⁵ But there was no testimony that anyone ever used them for non-
17 emergency requests (such as asking for a Form 602).⁶⁶ The photograph shows a red button next to
18 a speaker with the words “push for help.”⁶⁷ Mr. Espinoza used it once for a medical emergency,
19 for example.⁶⁸

20
21 _____
22 ⁶⁰ Chavez Test. – RT 72:15–20; Cary Test. – RT 158:3–8.

23 ⁶¹ Cuevas Test. – RT 64:21–23; Cary Test. – RT 157:24–158:8.

24 ⁶² Atkins Test. – RT 46:13–15; Cary Test. – RT 157:21–23.

25 ⁶³ Atkins Test. – RT 39:18–24; Meden Test. – RT 142:16–17.

26 ⁶⁴ Sanchez Test. – RT 92:1–19; Cary Test. – RT 149:19–150:9.

27 ⁶⁵ Atkins Test. – RT 33:17–23; Cuevas Test. – RT 56.

28 ⁶⁶ Cuevas Test. – RT 64:16–20.

⁶⁷ Ex. 139.

⁶⁸ Espinoza Test. – RT 192:19–193:14; Atkins Test. – RT 32:8–16 (could use intercom in the event of a fall or injury).

1 In sum, the infirmary officers testified consistently — and the court finds — that the ordinary
2 way to obtain a Form 602 was to ask an officer directly so that the officer could bring one from the
3 officers’ station. The court concludes too that Mr. Espinoza could ask officers for a Form 602 and
4 that officers generally brought forms to inmates who asked for them.

5

6 **5. Mr. Espinoza Submits Request Forms and Asks for a Grievance Form**

7 **5.1 Forms That Mr. Espinoza Submitted In the Infirmary**

8 The defendants identify forms that Mr. Espinoza submitted while he was in the infirmary.

9 First, Officer Parra identifies a request form (Form 22) that Mr. Espinoza submitted on May
10 27, 2014.⁶⁹ Mr. Espinoza asked for “forms for case law along with forms for supplies.”⁷⁰ Mr.
11 Espinoza testified that (through this form) he intended to ask the library for legal documents,
12 including a general grievance form (Form 602).⁷¹ Officer Parra signed it and directed it to the law
13 library.⁷² There is no evidence that the library responded.⁷³

14 Second, Mr. Espinoza submitted a Form 22 on June 2, 2014.⁷⁴ In it, he asked whether a
15 physical therapist was going to visit him, noting that he had “seen [the] therapist only twice []
16 when [he] was told [the therapist] would be [there] often.”⁷⁵ Mr. Espinoza also noted that someone
17 (presumably a correctional officer) “made your rounds today . . . but didn’t stop by my room,” and
18 noted that he was still having a lot of pain in his hand.⁷⁶ Officer Atkins signed the form.⁷⁷

19 The court finds that these forms support the officers’ testimony that if an inmate asked for
20 forms, they would bring them.

21

22 ⁶⁹ Parra Decl. – ECF No. 50, ¶ 25, Ex. A.

23 ⁷⁰ *Id.*

24 ⁷¹ Espinoza Dep. – ECF No. 63-6 at 34–35 (pp. 33–34).

25 ⁷² Parra Decl. – ECF No. 50, ¶ 25, Ex. A.

26 ⁷³ *See* Parra Dep. – ECF No. 63-12 at 41 (p. 96).

27 ⁷⁴ Atkins Decl. – ECF No. 46, ¶ 29, Ex. A.

28 ⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

1 **5.2 Mr. Espinoza Requests a Form 602**

2 As described above, Mr. Espinoza arrived at the infirmary on March 28, 2014, and prison
3 officials placed him on Ad-Seg Status on April 3, 2014. Mr. Espinoza testified that the meeting
4 lasted for three or four minutes and happened when he was in bed.⁷⁸ The Correctional
5 Classification Committee read him the “lock-up order” and “115” and gave him the incident
6 report.⁷⁹

7 Mr. Espinoza did not read the incident report during his first week in the infirmary because he
8 did not have the energy.⁸⁰ But because there was no riot, danger to a correctional officer, or
9 weapon, Mr. Espinoza wondered why the officer shot him.⁸¹ He pushed through his pain and read
10 the report.⁸² At this point, he had been in the infirmary for about a week to ten days.⁸³ He
11 disagreed with the report and decided to get a Form 602 to file a grievance.⁸⁴ He filed Form 602s
12 before, knew he needed to get a form, and needed help writing it due to his wrist injury.⁸⁵ He also
13 knew that he had to turn the form in before the 30-day deadline expired at the end of April.⁸⁶

14 Mr. Espinoza testified that he asked for a Form 602 four times while he was in the infirmary:
15 three times from Officer Parra and once from an unnamed officer.⁸⁷

17 **5.3 Mr. Espinoza’s Interactions With Officer Parra**

18 Mr. Espinoza slept during first watch (10:00 p.m. to 6:00 a.m.) and saw different officers
19 during second watch.⁸⁸ Officer Parra generally worked third watch (2:00 p.m. to 10:00 p.m.) and

20 _____
21 ⁷⁸ Espinoza Test. – RT 172:23–173:2.

22 ⁷⁹ *Id.*

23 ⁸⁰ Espinoza Test. – RT 172:4–18, 173:3–6.

24 ⁸¹ Espinoza Test. – RT 173:7–19.

25 ⁸² *Id.*

26 ⁸³ Espinoza Test. – RT 173:23–25.

27 ⁸⁴ Espinoza Test. – RT 173:20–174:5.

28 ⁸⁵ Espinoza Test. – RT 174:18–175:15.

⁸⁶ *Id.*

⁸⁷ Espinoza Dep. – ECF No. 63-6 at 29–32 (pp. 28–31).

⁸⁸ Espinoza Test. – RT 188:23–189:5.

1 took a dinner break at the officers' station (where the Form 602s were kept) during his shift.⁸⁹
2 Officer Parra described himself as a "workaholic" who loved his job and worked double shifts,
3 lasting 16 hours, two to four times in a five-day work week.⁹⁰ Mr. Espinoza testified that because
4 he saw Officer Parra regularly and saw the good rapport he had with the nursing staff, he decided
5 to ask him for a Form 602.⁹¹ He asked him for a Form 602 and for help filling it out three times,
6 but he never received a Form 602.

7 First, after he read the incident report around his tenth day in the infirmary, Mr. Espinoza
8 asked Officer Parra for a Form 602 and for help filling it out when Officer Parra came by with
9 medical staff for a vitals check in the afternoon.⁹² He explained to Officer Parra that he could not
10 write and needed help to file the grievance.⁹³ But, according to Mr. Espinoza, Officer Parra
11 responded that "somebody from up front would have to come and help [you]."⁹⁴ Mr. Espinoza did
12 not know exactly what "up front" meant (and thought it might mean other buildings).⁹⁵ Mr.
13 Espinoza did not receive a Form 602 and thought Officer Parra forgot.⁹⁶

14 Second, a few days later, Mr. Espinoza again asked Officer Parra for a Form 602 and for help
15 filling it out.⁹⁷ Again, Officer Parra responded that someone from "up front" would need to come
16 help him.⁹⁸ This time, Mr. Espinoza thought Officer Parra did not want to help.⁹⁹

17 Third, Mr. Espinoza waited another day, asked again for a form and help, received the same
18 response, and figured that Officer Parra was not going to help him.¹⁰⁰

19 _____
20 ⁸⁹ Parra Dep. – ECF No. 63-12 at 16 (p. 48).

21 ⁹⁰ *Id.* at 16–17 (pp. 48–49).

22 ⁹¹ Espinoza Test. – RT 177:18–178:12.

23 ⁹² Espinoza Test. – RT 179; *see also* Espinoza Dep. – ECF No. 63-6 at 30 (p. 29).

24 ⁹³ Espinoza Test. – RT 179–80.

25 ⁹⁴ *Id.*

26 ⁹⁵ *Id.*

27 ⁹⁶ Espinoza Test. – RT 180–81.

28 ⁹⁷ *Id.* (a "few" days or "two" days).

⁹⁸ *Id.*

⁹⁹ Espinoza Test. – RT 182–83.

¹⁰⁰ *Id.*

1 Officer Parra testified that if an inmate asked him for a Form 602, he would give the form, and
2 he has given out Form 602s as an officer in the infirmary.¹⁰¹ He helped other inmates fill out
3 medical Form 602s: mental-health patients who could not use pens or pencils because of their
4 status; an inmate who was blind; and an inmate who could not spell.¹⁰² He would help an inmate
5 fill out a form who needed it, but not always right away.¹⁰³ But officers would help inmates who
6 needed help.¹⁰⁴

7 Officer Parra remembered Mr. Espinoza — from bringing him meals and conducting medical
8 escorts — but he would not recognize him on the streets.¹⁰⁵ He vaguely remembers that Mr.
9 Espinoza asked him for a healthcare grievance Form 602 (or “medical 602”), and that he left it on
10 his bed.¹⁰⁶ (Mr. Espinoza denies this.¹⁰⁷) He authenticated the Form 22 that Mr. Espinoza
11 submitted May 27, 2014.¹⁰⁸ Mr. Espinoza did not ask for help filling out the form (and never
12 asked for assistance for the bathroom or shower or otherwise).¹⁰⁹

13 Officers do not work in the back and front of the clinic on the same shift.¹¹⁰

14 15 **5.4 Mr. Espinoza Asks Another Officer For a Form 602 and Submits a Form 22**

16 After Officer Parra (on third watch) failed to bring him a Form 602, Mr. Espinoza asked
17 another officer on second watch for a Form 602 and help filling it out; he did not know the
18 officer’s name and described him as 5’7” or 5’8”, with short blond hair, white, and in his 40s.¹¹¹

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21 ¹⁰¹ Parra Dep. – ECF No. 63-12 at 4 (p. 32).

22 ¹⁰² *Id.* at 23–24, 26 (pp. 63–64, 66).

23 ¹⁰³ *Id.* at 26 (p. 66).

24 ¹⁰⁴ *Id.* at 23–25 (pp. 63–65).

25 ¹⁰⁵ *Id.* at 31, 37 (pp. 71, 89).

26 ¹⁰⁶ Parra Decl. – ECF No. 50, ¶ 23; Parra Dep. – ECF No. 63-12 at 4 (p. 32), 43–47 (pp. 98–102).

27 ¹⁰⁷ Espinoza Decl. – ECF No. 62, ¶ 6; Espinoza Test. – RT 184:3–8.

28 ¹⁰⁸ Parra Dep. at 40–41 (pp. 92, 96).

¹⁰⁹ *Id.* at 47–48 (pp. 102–03).

¹¹⁰ Atkins Test. – RT 42; Cary Test. – RT 152.

¹¹¹ Espinoza Test. – RT 186.

1 The officer responded “we’ll see” but never brought a form.¹¹² Mr. Espinoza knew that his time in
2 the infirmary was coming to an end and submitted a Form 22 that he had in his property to get a
3 Form 602.¹¹³ Officer Parra signed the form.¹¹⁴ (This is the Form 22 described above, signed on
4 June 2, 2014, asking for “forms for case law” and “forms for supplies.”) Mr. Espinoza used a
5 Form 22 because he thought Officer Parra would not respond if he asked for a Form 602 and
6 thought that his request for “supplies” included a Form 602 without drawing attention to his
7 request.¹¹⁵ By this time, Mr. Espinoza was writing again somewhat but with pain.¹¹⁶

8 Mr. Espinoza did not ask any other officer in the infirmary for a Form 602.¹¹⁷ Officers who
9 worked in the clinic also testified that he did not ask them for a Form 602 and otherwise did not
10 ask for help with showering, bathing, and the like.¹¹⁸

11 It is undisputed that Mr. Espinoza never received a Form 602 when he was in the infirmary.¹¹⁹

12
13 **6. Mr. Espinoza Leaves the Infirmary, Is Placed in the Administrative-Segregation Unit,
and Submits a Grievance**

14 After nearly three months in the infirmary, on Sunday, June 22, 2014, Mr. Espinoza moved to
15 the general administrative-segregation unit, called D-9 (and also Delta 9 or Z-9).¹²⁰ Inmates
16 receive a Form 602 (and other supplies) in their bedroll when they arrive.¹²¹ There is a weekly
17 supply cart on Sundays with the forms.¹²² Weekly audit forms show that Mr. Espinoza received

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21 ¹¹² *Id.*

22 ¹¹³ Espinoza Test. – RT 194–95; Ex. 106.

23 ¹¹⁴ *Id.*

24 ¹¹⁵ Espinoza Test. – RT 197.

25 ¹¹⁶ Espinoza Test. – RT 196.

26 ¹¹⁷ Espinoza Test. – RT 186:20–21.

27 ¹¹⁸ Atkins Test. – RT 34; Cuevas Test. – RT 52–55; Chavez Test. – RT 71; Cary Test. – RT 149–51.

28 ¹¹⁹ Summary-Judgment Order – ECF No. 78 at 8.

¹²⁰ Espinoza Dep. – ECF No. 63-6 at 37– 38 (pp. 36–37).

¹²¹ Sanchez Test. – RT 93–94.

¹²² Sanchez Test. – RT 94–95.

1 his supplies for the weeks ending June 29, 2014 and July 6, 2014.¹²³ An officer walks around daily
2 with a library cart with Form 602s, among other forms.¹²⁴

3 The prison was on lockdown on June 27 and 28, 2014 and then moved to a modified program
4 from June 29 to July 22, 2014.¹²⁵ The only thing that changed during lockdown was yard
5 access.¹²⁶ Officer Sanchez did security checks three times an hour; this was an opportunity to
6 obtain Form 602s.¹²⁷

7 Mr. Espinoza testified that he made it to his cell at the end of second watch, did not receive a
8 Form 602 in the initial bedroll, missed the weekly supply cart, never heard of the daily library cart,
9 could get a Form 602 only from the weekly supply cart, could not get them from guards
10 (especially during the lock-down) because they were too busy, and obtained the form the second
11 Sunday, after the three-day lockdown.¹²⁸ (Mr. Espinoza’s counsel said on the second day of the
12 hearing that they first heard of the library cart from Officer Sanchez’s testimony at the hearing.¹²⁹)

13 After he obtained the Form 602, Mr. Espinoza asked Lieutenant Salazar for assistance writing
14 it, and Lieutenant Salazar sent Officer White to help.¹³⁰ Mr. Espinoza ultimately declined Officer
15 White’s help.¹³¹ He had a soft cast, and his injuries made it “very difficult for [him] to write,” but
16 he completed the form on his own.¹³² It took him “hours”: he started in the morning, took breaks
17 for lunch, dinner, and when his hand hurt, and “finished it right after dinner[;] like 7:00 o’clock
18 maybe.”¹³³ In it, Mr. Espinoza challenged the March 7 shooting as unnecessary, excessive force.¹³⁴

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20 ¹²³ Sanchez Test. – RT 102–04; Ex. 124.

21 ¹²⁴ Sanchez Test. – RT 92–93, 108–09; Mensing Test. – RT 35.

22 ¹²⁵ Sanchez Test. – RT 97–99; Ex. 128.

23 ¹²⁶ Sanchez Test. – RT 99:12–100:7.

24 ¹²⁷ Sanchez Test. – RT 82–84.

25 ¹²⁸ Espinoza Test. – RT 198–209.

26 ¹²⁹ Closing Statement by Attorney Chen – RT 287–88.

27 ¹³⁰ Salazar Decl. – ECF No. 51, ¶¶ 3–5; Salazar Dep. – ECF No. 63-16 at 21–23 (pp. 38–40).

28 ¹³¹ Espinoza Test. – RT 210–11.

¹³² Espinoza Dep. – ECF No. 63-6 at 51–53, 68–69 (pp. 50–52, 67–68).

¹³³ *Id.* at 53, 67–68 (pp. 52, 66–67).

¹³⁴ Medina Decl. – ECF No. 48, Ex. B (Mr. Espinoza’s Form 602).

1 Mr. Espinoza submitted the Form 602 grievance on July 6 — fourteen days after he left the
2 infirmary — and the appeals coordinator received it the next day.¹³⁵ Mr. Espinoza sent the Form
3 602 with a Form 22 “to provide myself proof that my 602 appeal was sent on the date below.”¹³⁶
4 He testified that he included a cover letter explaining that he was shot in the hand and could not
5 get help at the infirmary getting the Form 602 or writing it.¹³⁷ The idea for sending the Form 22
6 came from another inmate in D-9 named Cody.¹³⁸

7
8 **7. The Appeals Coordinator Cancels Mr. Espinoza’s Grievance as Untimely**

9 Appeals Coordinator Medina processed Mr. Espinoza’s grievance.¹³⁹ When he received it, he
10 “first noted that it concerned an allegation of unnecessary excessive force occurring on March 7,
11 2014, four months before the grievance had been submitted.”¹⁴⁰ The grievance was therefore
12 untimely, but Coordinator Medina reviewed Mr. Espinoza’s case for “exceptional circumstances”
13 justifying the delay.¹⁴¹ He did not penalize Mr. Espinoza for the three weeks spent at an outside
14 hospital, but concluded “there was nothing in his records or in his grievance that justified his
15 failure to submit his appeal within thirty days of his return to [the prison].”¹⁴² He accordingly
16 cancelled the grievance as untimely and informed Mr. Espinoza of this conclusion in writing.¹⁴³
17 He also returned the “enclosed documents” as part of the cancellation; Mr. Espinoza testified that
18 his cover letter was not enclosed.¹⁴⁴

19 The written notice informed Mr. Espinoza that he could not resubmit his cancelled appeal, but
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¹³⁵ Medina Decl. – ECF No. 48, Exs. B & C.

22 ¹³⁶ Ex. 103 (Mr. Espinoza’s Form 22).

23 ¹³⁷ Espinoza Test. – RT 214–15.

24 ¹³⁸ Espinoza Test. – RT 217.

25 ¹³⁹ Medina Decl. – ECF No. 48, ¶ 6.

26 ¹⁴⁰ *Id.*

27 ¹⁴¹ *Id.* ¶¶ 6–7.

28 ¹⁴² *Id.* ¶ 7.

¹⁴³ *Id.* ¶¶ 7, 9.

¹⁴⁴ Ex. 104 (cancellation notice); Espinoza Test. – RT 220.

1 that he could appeal the cancellation itself.¹⁴⁵ Mr. Espinoza did¹⁴⁶ and argued that he could not
2 timely file a grievance because, without success, he “repeatedly asked staff for assistance” to write
3 his grievance and did not have access to the law library while in the infirmary; he also explained
4 that he had enclosed a cover letter with his initial Form 602 explaining the reason for delay but the
5 cover letter was not returned.¹⁴⁷ In full, Mr. Espinoza stated:

6 On 7-21-2014 I received a “Cancellation Notice for Appeal Log # S.V.S.P-14-
7 02865 Exceeding Time Limits[.]” A cover letter explaining the circumstances for
8 the delay was enclosed and did not return. I was shot in my hand and was not able
9 to write an appeal in a timely fashion. I repeatedly asked staff for assistance and
10 accommodate my new disability which went unattended. I was housed at C.T.C.[;]
no law library is available and no law clerks are available to assist me in writing an
appeal. I am being denied access to the courts, being discriminated against for
being disabled, and not being accommodated for said disability.¹⁴⁸

11 At the second-level review, Mr. Espinoza did not name anyone to interview; the prison upheld
12 the cancellation at the second-level review because Mr. Espinoza “provided no documentation that
13 [he] was totally incapacitated and/or unable to write an appeal within the prescribed time limits,”
14 his claim concerning law-library access was moot, and the staff refuted his claims that they
15 refused to assist him.¹⁴⁹ (There was testimony at trial that prisoners knew guards’ names because
16 they wear name tags.¹⁵⁰) Mr. Espinoza testified that he obtained Officer Parra’s name later, when
17 he was back in D-9.¹⁵¹

18 The prison upheld the cancellation at the third level of review.¹⁵²

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¹⁴⁵ Medina Decl. – ECF No. 48, ¶ 9, Ex. D.

23 ¹⁴⁶ *Id.* ¶ 10; Meyer Decl., Ex. 19 – ECF No. 63-19 (Form 602 contesting cancellation); *see also*
24 Ex. 105 at Bates Nos. ESP002739–40 (same).

25 ¹⁴⁷ *Id.*

26 ¹⁴⁸ *Id.*

27 ¹⁴⁹ *Id.*

28 ¹⁵⁰ Atkins Test. – RT 42:23–43:4; Cuevas Test. – RT 57:20–58:9; Cary Test. – RT 153.

¹⁵¹ Espinoza Test. – RT 224:14–225:6.

¹⁵² Ex. 1; *see also* Meyer Decl., Ex. 30 – ECF No. 63-30 (same).

1 **8. Other Findings**

2 Based on the medical evidence, Mr. Espinoza’s testimony, and his request for help from
3 Lieutenant Salazar, the court finds that Mr. Espinoza’s injury impeded his ability to write a Form
4 602 on his own through at least May 2014 and probably up to the time he transferred from the
5 infirmary to general Ad-Seg housing.¹⁵³ His short letters home to do not change this conclusion.¹⁵⁴

6
7

GOVERNING LAW

8 “The Prison Litigation Reform Act [PLRA] requires that a prisoner exhaust available
9 administrative remedies before bringing a federal action concerning prison conditions.” *Griffin v.*
10 *Arpaio*, 557 F.3d 1117, 1119 (9th Cir. 2009) (citing 42 U.S.C. § 1997e(a)). The PLRA more fully
11 provides that “[n]o action shall be brought with respect to prison conditions under [42 U.S.C.
12 § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional
13 facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a);
14 *Reyes v. Smith*, 810 F.3d 654, 657 (9th Cir. 2016). It requires an inmate to pursue every available
15 step of the prison grievance process. *See Woodford*, 548 U.S. at 90; *Harvey v. Jordan*, 605 F.3d
16 681, 683 (9th Cir. 2010) (“a [California state] prisoner exhausts the grievance process when he
17 completes the third level” of review). The prisoner must fully exhaust administrative remedies
18 before filing suit. *See, e.g., McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002).

19 But “[a]n inmate is required to exhaust only *available* remedies.” *Albino*, 747 F.3d at 1171
20 (citing *Booth v. Churner*, 532 U.S. 731, 736 (2001)). In other words, an inmate “must exhaust
21 available remedies, but need not exhaust unavailable ones.” *Ross v. Blake*, 136 S. Ct. 1850, 1858
22 (2016). “To be available, a remedy must be available ‘as a practical matter’; it must be ‘capable of
23 use; at hand.’” *Albino*, 747 F.3d at 1171 (quoting *Brown v. Valoff*, 422 F.3d 926, 937 (9th Cir.
24 2005)). In *Ross v. Blake*, the Court “note[d] as relevant here three kinds of circumstances in which
25 an administrative remedy, although officially on the books, is not capable of use to obtain relief.”

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¹⁵³ Espinoza Test. – RT 196.

¹⁵⁴ *Id.*

1 136 S. Ct. at 1859. An administrative remedy is unavailable if: (1) “it operates as a simple dead
2 end — with officers unable or consistently unwilling to provide any relief to aggrieved inmates”;
3 (2) the “administrative scheme [is] so opaque that it becomes, practically speaking, incapable of
4 use”; or (3) “when prison administrators thwart inmates from taking advantage of a grievance
5 process through machination, misrepresentation, or intimidation.” *Id.* The Court gave these
6 examples but stressed that “courts in this and other cases must apply [the legal standard] to the
7 real-world working of prison grievance systems.” *Id.*

8 If the prisoner has failed to exhaust, it is proper to dismiss without prejudice those parts of the
9 complaint that are barred by § 1997e(a). *Jones v. Bock*, 549 U.S. 199, 223–24 (2007); *Lira v.*
10 *Herrera*, 427 F.3d 1164, 1175–76 (9th Cir. 2005). Indeed, exhaustion is mandatory — it is no
11 longer left to the district court’s discretion, *see Woodford*, 548 U.S. at 85 (citing *Booth*, 532 U.S.
12 at 739) — and it “should be decided, if feasible, before reaching the merits of a prisoner’s claim.”
13 *Albino*, 747 F.3d at 1170. So, the case may proceed to the merits only “[i]f the district judge holds
14 [(1)] that the prisoner has exhausted available administrative remedies, [(2)] that administrative
15 remedies are not available, or [(3)] that a prisoner’s failure to exhaust available remedies should be
16 excused.” *Id.* at 1171 (“We reiterate that, if feasible, disputed factual questions relevant to
17 exhaustion should be decided at the very beginning of the litigation.”).

18 The proper device for raising failure to exhaust is normally by motion for summary judgment
19 under Rule 56. *Id.* at 1166 (noting that, in the rare case “that a failure to exhaust is clear on the
20 face of the complaint,” a Rule 12(b)(6) motion is appropriate). And where, as here,¹⁵⁵ an
21 exhaustion-based summary-judgment motion is denied, “disputed factual questions relevant to
22 exhaustion should be decided by the judge, in the same manner a judge rather than a jury decides
23 factual questions relevant to jurisdiction and venue.” *Id.* at 1170–71 (citing *McNutt v. Gen. Motors*
24 *Acceptance Corp.*, 298 U.S. 178, 188–90 (1936) (subject-matter jurisdiction); *Murphy v.*
25 *Schneider Nat’l, Inc.*, 362 F.3d 133, 139–40 (9th Cir. 2004) (venue); *Lake v. Lake*, 817 F.2d 1416,
26 1420 (9th Cir. 1987) (personal jurisdiction)). “[T]he district judge may decide disputed question of
27

28 ¹⁵⁵ See Summary-Judgment Order – ECF No. 78.

1 fact in a preliminary proceeding.” *Id.* at 1168; *see also Jones v. Cal. Dep’t of Corr.*, 584 F. App’x
 2 496, 497 (9th Cir. 2014) (holding that it was an abuse of discretion where a district court did not
 3 hold an evidentiary hearing where ““factual questions [were] not readily ascertainable from the
 4 declarations of witnesses or questions of credibility predominate[d]”). In doing so, the court may
 5 “inquire into the facts as they really exist,” *see McNutt*, 298 U.S. at 184; and may “resolve any
 6 questions of credibility or fact,” *see Lake*, 817 F.2d at 1420.

7 Failure to exhaust PLRA administrative remedies “is an affirmative defense the defendant
 8 must plead and prove.” *Jones*, 549 U.S. at 204, 216. Prisoner complaints are not required to plead
 9 exhaustion. *Id.* at 215–17. The Ninth Circuit applies a burden-shifting framework, under which “a
 10 defendant must first prove that there was an available administrative remedy and that the prisoner
 11 did not exhaust that available remedy.” *Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015)
 12 (citing *Albino*, 747 F.3d at 1172). The burden then shifts to the plaintiff, “who must show that
 13 there is something in his particular case that made the existing and generally available
 14 administrative remedies effectively unavailable to him” because they were “ineffective,
 15 unobtainable, unduly prolonged, inadequate, or obviously futile.” *Id.* (internal quotation marks
 16 omitted). “The ultimate burden of proof, however, remains with the defendants.” *Id.*; *see also*
 17 *Jones*, 549 U.S. at 216. If the undisputed evidence, viewed in the light most favorable to the
 18 prisoner, shows a failure to exhaust, then the defendant is entitled to summary judgment. *Albino*,
 19 747 F.3d at 1166.

20 **ANALYSIS**

21 Because Mr. Espinoza testified that he knew that he had 30 days after he returned from the
 22 outside hospital to file a Form 602, the main issue is whether the prison’s grievance procedures
 23 were available to Mr. Espinoza during his first 30 days in the infirmary.

24 There is no evidence that the prison’s grievance process is so confusing that “no ordinary
 25 prisoner can discern or navigate it.” *Ross*, 136 S. Ct. at 1859. And there is no evidence that prison
 26 administrators thwarted Mr. Espinoza through machination, misrepresentation, or intimidation, or
 27 threatened to retaliate against him. *See, e.g., McBride v. Lopez*, 807 F.3d 982, 987 (9th Cir. 2015)
 28 (discussing standard for unavailability based on threats); *Draper v. Rosario*, 836 F.3d 1072, 1080

1 (9th Cir. 2016). The inquiry thus is whether the administrative procedure was unavailable because
2 officers were unwilling to provide relief to Mr. Espinoza. The court concludes that the procedure
3 was not unavailable and holds that Mr. Espinoza failed to exhaust his administrative remedies.

4 Mr. Espinoza could not reasonably conclude — based only on his three attempts to obtain a
5 Form 602 from Officer Parra and one attempt with an unnamed officer — that no administrative
6 remedies were available to him. *See Draper*, 836 F.3d at 1079–80. Officers did not tell him, for
7 example, that they would not deliver his grievance to the grievance office. *Cf. Camp v. Brennan*,
8 219 F.3d 279, 280 (3d Cir. 2000). Indeed, he could have asked any officer for a Form 602. He had
9 the ability to ask for a Form 602 from the many officers he encountered on a daily basis. The
10 forms were always at the officers’ station (their lunch room in the infirmary). Officers regularly
11 gave out forms to inmates who asked for them. And while Mr. Espinoza needed help filling out
12 the Form 602 for some substantial period of time until at least May and probably until his transfer
13 to general housing, the court credits the officers’ testimony that they would help inmates fill out
14 Form 602s if they needed help. Lieutenant Salazar’s efforts to help Mr. Espinoza confirm this. Mr.
15 Espinoza knew the rules: he previously submitted Form 602s, he knew about the 30-day
16 requirement, and he knew he had to submit his Form 602 by the end of April. *Cf. Benson v.*
17 *Peters*, No. 14-CV-00132-CL, 2016 WL 259701, at *4 (D. Or. Jan. 20, 2016) (remedy unavailable
18 to confused inmate when prison misinterpreted request for clarification as notice of tort claim and
19 terminated his ability to pursue internal appeal).

20 In sum, if an inmate had the ability and opportunity “to file a grievance timely, but failed to do
21 so, he has not properly exhausted administrative remedies.” *Marella v. Terhune*, 568 F.3d 1024,
22 1028 (9th Cir. 2009). And here, existing and generally available administrative remedies were not
23 effectively unavailable to Mr. Espinoza. *See Draper*, 836 F.3d at 1079–80.

24 In reaching this conclusion, the court credits both Mr. Espinoza and Officer Parra. Both
25 testified convincingly. *See, e.g., Sansone v. Thomas*, No. 13-CV-01842-DAD, 2016 WL 7159285,
26 at *6 (E.D. Cal. Dec. 7, 2016). Indeed, given the vagaries of recollection, the court can reconcile
27 their testimony. Officer Parra vaguely remembers a Form 602 (albeit a medical 602). Mr. Espinoza
28 asked for a Form 602, and he did not receive it. Perhaps there was a misunderstanding or a

1 mistake. But while the court can credit Mr. Espinoza’s testimony — that he perceived that Officer
2 Parra was not willing to help him — it cannot conclude that his efforts were sufficient.

3 The decision in *Andres v. Marshall* does not change this conclusion. *See* No. 15-56057,
4 2017 WL 3432609 (9th Cir. Aug. 8, 2017) (*per curiam*). In *Andres*, an excessive-force case, the
5 prisoner submitted a Form 602 two days after the alleged incident but never received a response.
6 *Id.* at *1. The Ninth Circuit concluded the prisoner “exhausted his available administrative
7 remedies” because the prison rendered the grievance process effectively unavailable when it
8 “improperly failed to process Andres’ timely filed grievance.” *Id.* at *2. Here, by contrast, Mr.
9 Espinoza never submitted a Form 602; he asked for one three times from Officer Parra and one
10 time from an unidentified guard.

11 And unlike *Sapp*, a medical-conditions case where the prisoner filed multiple grievances that
12 the prison screened out repeatedly (and improperly) for incompleteness, Mr. Espinoza asked for
13 forms only four times from two officers and then concluded that it was futile to ask again. 621
14 F.3d at 819 (prisoner took reasonable and appropriate steps by filing six grievance forms; also
15 took additional steps to obtain his records and grieve the denials). Mr. Espinoza’s several inquiries
16 are not the “reasonable and appropriate steps” that the prisoner took in *Sapp*. They are not
17 equivalent to the several grievances that the prisoner made in *Nunez v. Duncan*. *See* 591 F.3d
18 1217, 1220–21 (9th Cir. 2010) (the prisoner filed a grievance and appeal regarding a strip search
19 and asked for the applicable regulation; the prison construed the appeal as request only for the
20 regulation; the prisoner filed subsequent grievances, a FOIA request, and letters appealing the
21 FOIA denial). And Mr. Espinoza’s subjective conclusion of futility is not reasonable either, given
22 that he asked an identified person only three times and an unidentified officer only once. Because
23 he did not take “reasonable and appropriate steps to exhaust his . . . claim,” he was “precluded
24 from exhausting,” not “by the Warden’s mistake,” but “through his own fault.” *Id.* at 1224.

25 If Mr. Espinoza asked for a Form 602, and the prison officials refused him overtly, the court
26 might conclude that he had exhausted his administrative remedies. *See Sapp v. Kimbrell*, 623 F.3d
27 813, 822 (9th Cir. 2010) (citing *Dale v. Lapin*, 376 F.3d 652, 656 (7th Cir. 2004); *Miller v. Norris*,
28 247 F.3d 736, 738, 740 (8th Cir. 2001). In *Miller*, for example, the prisoner alleged that he made a

1 written request for a grievance form, the prison did not respond, and his mother attempted
2 unsuccessfully to obtain the forms for him. 247 F.3d at 738. The Eighth Circuit remanded for
3 consideration of whether the facts established exhaustion. *Id.* at 740. And the court might find
4 exhaustion if Mr. Espinoza’s efforts were more robust. In *Dale v. Lapin*, the prisoner “identifie[d]
5 the prison employees from whom he requested forms: his counselor, his case manager, the on-duty
6 floor officer, and members of his unit team.” 376 F.3d at 655–56. He also identified the specific
7 forms he requested, the on-duty floor officer’s provision of only blank sheets of paper, his
8 counselor’s and case manager’s explanation that they did not have the forms and he must ask the
9 unit team, and his several unanswered notifications to the unit team about the denial of forms. *Id.*
10 at 656. Mr. Espinoza’s efforts do not approximate these, even by half.

11 This conclusion does not mean that Mr. Espinoza needed to ask every officer he encountered
12 for a Form 602. The court’s conclusion is only that that his modest efforts here were not the
13 reasonable and appropriate steps to exhaust his claim, especially given Mr. Espinoza’s knowledge
14 about the 30-day rule. *Nunez*, 591 F.3d at 1224. In sum, the undisputed evidence, viewed in the
15 light most favorable to Mr. Espinoza, shows that he failed to exhaust his administrative remedies.
16 The defendants thus are entitled to summary judgment. *Albino*, 747 F.3d at 1166.

17 If the court had reached the opposite conclusion — that the four requests were sufficient and
18 established futility —then the court would conclude that the appeal is otherwise timely because
19 Mr. Espinoza submitted the Form 602 within 30 days after his transfer to general Ad-Seg housing.
20

21 **CONCLUSION**

22 The court grants the defendants summary judgment on the ground that Mr. Espinoza did not
23 exhaust his available administrative remedies.

24 **IT IS SO ORDERED.**

25 Dated: August 25, 2017



26 LAUREL BEELER
27 United States Magistrate Judge
28