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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MARK A. BROWN,  
Plaintiff,

v.

J. ABOYTES, et al.,  
Defendants.

Case No. [17-cv-03120-JCS](#) (PR)

**ORDER DENYING DEFENDANTS’  
MOTION FOR SUMMARY  
JUDGMENT;**

**ORDER REFERRING THIS ACTION  
TO JUDGE ILLMAN FOR  
SETTLEMENT**

Dkt. Nos. 16 and 32

**INTRODUCTION**

Plaintiff claims that Salinas Valley prison guards Aboytes and Magana used excessive force against him.<sup>1</sup> He also claims that defendant Judy, a nurse, was deliberately indifferent to his serious medical needs after the attack.

Defendants Aboytes and Magana move for summary judgment on grounds that plaintiff failed to exhaust his claims before filing suit.<sup>2</sup> (Dkt. No. 16.) Summary judgment will be denied because there is a dispute of material fact whether plaintiff complied with exhaustion requirements.

Defendant Judy moves for summary judgment on grounds that plaintiff’s grievance did not contain sufficient information to place the prison on notice about the nature of the grievance and the relief sought. Summary judgment will be denied because

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<sup>1</sup> All parties have consented to magistrate judge jurisdiction. (Dkt. Nos. 4 and 11.)

<sup>2</sup> Defendants provided plaintiff with the required warnings under *Rand v. Rowland*, 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc). (Dkt. No. 14.)

1 the notice was sufficiently detailed.

2 This action will be referred for settlement.

3 **FACTUAL BACKGROUND**

4 Plaintiff alleges that on September 26, 2015 defendants Aboytes and Magana  
5 pepper-sprayed him through the food-tray port in his cell; Aboytes and Magana pepper-  
6 sprayed him again when he was on the floor of his cell even though he was in a non-  
7 threatening position; Aboytes, while handcuffing plaintiff through the tray port, slammed  
8 his right index finger into the port latch; he was placed in a holding cell for 30 minutes  
9 while still covered in pepper spray; defendant Jeudy refused to decontaminate him and  
10 treat his lacerations, abrasions, and other wounds; and that Aboytes and Magana denied his  
11 request for cleaning supplies, new clothing, and cleaning assistance. (Compl., Dkt. No. 1  
12 at 6-8.)

13 For purposes of this order, however, the factual circumstances that matter are those  
14 surrounding plaintiff's exhaustion of his grievances. Six grievances are relevant here.

15 **No. 15-04747**

16 In this grievance, plaintiff alleged that after the pepper-spray attack he was not  
17 given fresh laundry or assistance in decontaminating his cell and person. (MSJ, Voong  
18 Decl., Dkt. No. 16-3 ¶ 11.) He also alleged that he was rehoused in the same still-  
19 contaminated cell and did not receive medical care. (*Id.*) His grievance was granted in  
20 part at the second level of review. (*Id.*, Lomeli Decl., Dkt. No. 16-5 ¶ 17.) His request for  
21 fresh clothing, bedding, and laundry exchange was granted, but his request for monetary  
22 compensation was denied. (*Id.*) He was told that his complaints against staff were being  
23 addressed in a separate grievance (No. 15-04691). (*Id.*) Plaintiff appealed.

24  
25 His appeal was denied because he had been provided with clean linen and cleaning  
26 materials. (*Id.*, Voong Decl., Dkt. No. 16-3 ¶ 11.) He was advised to file a separate  
27 grievance regarding his medical complaints. (*Id.*)

28 **No. 15-04691**

1 In this grievance, plaintiff alleged that Aboytes and Magana pepper-sprayed him  
2 excessively and for no valid reason; and that his finger was slammed in the food-tray port.  
3 He asked for money; polygraph testing of all staff involved in the September 26th incident;  
4 suspension, salary reduction, and retraining of Aboytes; and counseling for his emotional  
5 distress. (MSJ, Lomeli Decl., Dkt. No. 16-5 ¶ 16.)

6 His grievance was partially granted at the second level. (*Id.*) There was an  
7 investigation into the allegation of staff misconduct. (*Id.*) It was determined that staff did  
8 not violate CDCR policy with respect to the issues appealed. (*Id.*)

9 On March 16, 2016, plaintiff was notified of the second level decision. (*Id.*) His  
10 appeal of this decision was received on April 26, 2016. (*Id.*) A proof of service attached  
11 by plaintiff states that he mailed his appeal on April 15, 2016. (*Id.*, Voong Decl., Dkt. No.  
12 16-3 ¶ 15.) The envelope was signed on April 18, 2016 by A. Lopez, a prison guard, and  
13 postmarked April 19, 2016. (*Id.*)

14 On July 11, 2016, the appeal was cancelled at the third level of review because it  
15 was not submitted within the 30-day time constraint after the second-level review decision.  
16 (*Id.*)

17 **No. 15-08668**

18 In this grievance, plaintiff challenged the cancellation of grievance No. 15-04691.  
19 (*Id.* ¶ 12.) On October 10, 2016, this grievance was rejected because plaintiff failed to  
20 submit supporting documents. (*Id.*) He was directed to submit a copy of the envelope he  
21 used to mail the cancelled grievance (No. 15-04691) to the third level. (*Id.*)

22 On February 13, 2017, plaintiff resubmitted the grievance with the requested  
23 documents. (*Id.*) The envelope containing his resubmission was accepted and signed by  
24 prison guard Lopez on April 18, 2016, that is, outside of the 30-day time constraint  
25 established by 15 California Code of Regulations §§ 3084.8 and 3084.6(c)(4). (*Id.*) This  
26 grievance was therefore cancelled at the third level of review. Plaintiff's underlying  
27 grievance (No. 15-04691) was therefore not reinstated and was never exhausted. (*Id.*)

28 **No. 15001623**

1 In this grievance, plaintiff alleged that after the attack, Jeudy denied him access to  
2 cold water, failed to follow decontamination protocols, and erroneously documented that  
3 he had been decontaminated. (MSJ, Gates Decl., Dkt. No. 16-1 ¶ 10.) He also alleged that  
4 he had been placed in a holding cell while still contaminated. (*Id.*)

5 His grievance was partially granted at the second level. (*Id.*) The allegations of  
6 staff misconduct were investigated. It was determined that staff did not violate CDCR  
7 policy. (*Id.*)

8 Plaintiff filed an appeal to the third level on December 18, 2016. (*Id.* ¶ 11.) It was  
9 denied on March 1, 2017. (*Id.*)

10 According to defendants, in his grievance, plaintiff did not raise any claim that  
11 Jeudy failed to treat his lacerations, abrasions or other wounds. (*Id.*)

12 **Nos. 15-05231 and 15-05274**

13 These grievances, which were submitted on October 28, 2015 and October 30,  
14 2015, were cancelled as duplicates of No. 15-04691. (*Id.*, Lomeli Decl., Dkt. No. 16-5  
15 ¶¶ 18-19.) Plaintiff did not challenge these cancellations or seek to have them overturned.  
16 (*Id.*)

17 **Mail Collection at Salinas Valley**

18 Defendants contend that plaintiff cannot have mailed his appeal of grievance No.  
19 15-04691 on Friday, April 15, 2016 because mail is not collected on Fridays. In support of  
20 this assertion, defendants have presented undisputed evidence that outgoing prisoner mail  
21 is collected in the following way.

22 Outgoing prison mail is collected during the third watch each day from Sunday to  
23 Thursday. (MSJ, Lopez Decl., Dkt. No. 16-10 ¶ 4.) Mail is not collected on Friday and  
24 Saturday because the post office is closed the following days. (*Id.*)

25 On the days of collection, a control booth officer announces to all prisoners that  
26 outgoing mail is being collected. (*Id.* ¶ 5.) To send mail, a prisoner hands off his mail to a  
27 floor officer, who then places it in the building's mailbag. (*Id.*) If the prisoner labels his  
28 mail "confidential" and wants it treated as such, he presents the unsealed envelope to the

1 collecting officer for inspection for prohibited materials. (*Id.*) After inspection, the officer  
2 seals the envelope, signs and dates it in front of the prisoner and places it in the mailbag  
3 with the other mail. (*Id.*)

4 Plaintiff's proof of service, which he attached to his grievance (No. 15-04691),  
5 states that his mail was sent on April 15, 2016, which was a Friday. However, mail is not  
6 collected on Fridays, according to the undisputed evidence submitted by defendants.  
7 Lopez signed the envelope on April 18, which was a Monday, a day on which mail is  
8 collected.

9 During discovery, in a response to an interrogatory question, plaintiff asserted that  
10 he mailed his grievance on April 13. (MSJ, Desta Decl., Dkt. No. 16-12 at 3.) Defendants  
11 assert that it was impossible for Lopez to have collected mail from plaintiff on that day.  
12 They have presented evidence that Lopez was not assigned to plaintiff's floor on April 13.  
13 (*Id.*, Lopez Decl., Dkt. No. 16-10 ¶ 10.)

#### 14 **STANDARD OF REVIEW**

15 Summary judgment is proper where the pleadings, discovery and affidavits  
16 demonstrate that there is "no genuine dispute as to any material fact and [that] the movant  
17 is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those  
18 which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
19 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a  
20 reasonable jury to return a verdict for the nonmoving party. *Id.*

21 The party moving for summary judgment bears the initial burden of identifying  
22 those portions of the pleadings, discovery and affidavits which demonstrate the absence of  
23 a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).  
24 Where the moving party will have the burden of proof on an issue at trial, it must  
25 affirmatively demonstrate that no reasonable trier of fact could find other than for the  
26 moving party. On an issue for which the opposing party by contrast will have the burden  
27 of proof at trial, as is the case here, the moving party need only point out "that there is an  
28 absence of evidence to support the nonmoving party's case." *Id.* at 325.

1           Once the moving party meets its initial burden, the nonmoving party must go  
2 beyond the pleadings and, by its own affidavits or discovery, set forth specific facts  
3 showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(c). The Court is  
4 concerned only with disputes over material facts and “[f]actual disputes that are irrelevant  
5 or unnecessary will not be counted.” *Anderson*, 477 U.S. at 248. It is not the task of the  
6 court to scour the record in search of a genuine issue of triable fact. *Keenan v. Allan*, 91  
7 F.3d 1275, 1279 (9th Cir. 1996). The nonmoving party has the burden of identifying, with  
8 reasonable particularity, the evidence that precludes summary judgment. *Id.* If the  
9 nonmoving party fails to make this showing, “the moving party is entitled to a judgment as  
10 a matter of law.” *Celotex*, 477 U.S. at 323 (internal quotation marks omitted).

11   **DISCUSSION**

12       **i.           Aboytes and Magana**

13           Defendants Aboytes and Magana move for summary judgment on grounds that  
14 plaintiff failed to exhaust his administrative remedies prior to filing suit.

15           Prisoners must properly exhaust their administrative remedies properly before filing  
16 suit in federal court, as mandated by the Prison Litigation Reform Act (“PLRA”).  
17 *Woodford v. Ngo*, 548 U.S. 81, 93 (2006). “No action shall be brought with respect to  
18 prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner  
19 confined in any jail, prison, or other correctional facility until such administrative remedies  
20 as are available are exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is mandatory and a  
21 prisoner’s failure to comply with this requirement cannot be excused by the courts. *Ross v.*  
22 *Blake*, 136 S. Ct. 1850, 1856-58 (2016).

23           Proper exhaustion requires using all steps of an administrative process and  
24 complying with “deadlines and other critical procedural rules.” *Woodford*, 548 U.S. at 90.  
25 The State of California provides its prisoners the right to appeal administratively “any  
26 policy, decision, action, condition or omission by the [CDCR] or its staff that the inmate . . .  
27 can demonstrate as having a material adverse effect upon his or her health, safety, or  
28 welfare.” 15 CCR § 3084.1(a). In order to exhaust available administrative remedies

1 within this system, a prisoner must proceed through several levels of appeal: (i) informal  
2 review, submitted on a CDC 602 inmate appeal form; (ii) first formal-level appeal, to an  
3 institution appeals coordinator; (iii) second formal-level appeal, to the institution’s warden;  
4 and (iv) third formal level appeal, to the Director of the CDCR. *See id.* § 3084.7; *Brodheim*  
5 *v. Cry*, 584 F.3d 1262, 1264-65 (9th Cir. 2009). A prisoner exhausts the appeal process  
6 when he completes the third level of review. 15 CCR § 3084.1(b); *Harvey v. Jordan*, 605  
7 F.3d 681, 683 (9th Cir. 2010).

8 The regulations require that an inmate’s grievance must be sufficiently detailed to  
9 alert the prison as to “the nature of the wrong for which redress is sought.” *Griffin v.*  
10 *Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009) (citing *Strong v. David*, 297 F.3d 646, 650  
11 (7th Cir. 2002)). For example, in a grievance the prisoner must “describe the specific issue  
12 under appeal and the relief requested.” 15 CCR § 3084.2(a). He or she “shall state all  
13 facts known and available to him/her regarding the issue being appealed at the time of  
14 submitting the Inmate/Parolee Appeal form.” *Id.* § 3084.2(a)(4). Furthermore, the appeal  
15 must name “all staff member(s) involved” and “describe their involvement in the issue.”  
16 *Id.* § 3084.2(a)(3).

17 The appeal from a decision must be submitted within 30 calendar days of “(1) [t]he  
18 occurrence of the event or decision being appealed, or; (2) [u]pon first having knowledge  
19 of the action or decision being appealed, or; (3) [u]pon receiving an unsatisfactory  
20 departmental response to an appeal filed.” *Id.* § 3084.8(b). An appeal may be cancelled if  
21 “[t]ime limits for submitting the appeal are exceeded.” *Id.* § 3084.6(c)(4).

22 Summary judgment will be denied because there is a dispute of material fact whether  
23 plaintiff exhausted his claims prior to filing suit. He asserts that he filed his appeal on  
24 April 13 or 15, that is, by the deadline. Defendants dispute this. He dated his proof of  
25 service April 15, 2016, a Friday, a day on which the prison does not collect mail and a day  
26 Lopez was not working; Lopez signed the outgoing mail on April 18; the envelope was  
27 postmarked April 18, 2016; and Lopez was not working on plaintiff’s floor on April 13,  
28 the other date plaintiff asserts was the day he put his appeal in the mail. They contend that

1 plaintiff could not have filed his appeal on either of those dates because Lopez, who signed  
2 the outgoing mail, was not on duty then. Furthermore, plaintiff cannot have mailed his  
3 appeal on April 15 because that day was a Friday, a day the prison does not collect mail.

4 The Court is consequently presented with two diametrically opposed sets of facts,  
5 the differences between which directly relate to whether plaintiff exhausted his claims  
6 against defendants. Plaintiff has shown a genuine dispute of material fact. Defendants'  
7 motion for summary judgment is DENIED.

8 **ii. Jeudy**

9 Defendant Jeudy moves for summary judgment on grounds that plaintiff's  
10 grievance was insufficiently detailed to place the prison on notice that Jeudy failed to  
11 provide adequate medical care for plaintiff's abrasions and other injuries.

12 The motion is DENIED. A review of the grievance shows that plaintiff's  
13 description of his injuries and Jeudy's actions would have placed the prison on notice that  
14 he was grieving Jeudy's failure to provide appropriate medical care. The claims against  
15 Jeudy will be referred for settlement.

16 **CONCLUSION**

17 Defendants' motion for summary judgment is DENIED. (Dkt. No. 16.) Plaintiff's  
18 request that the Court rule on the motion for summary judgment is DENIED as moot.  
19 (Dkt. No. 32.)

20 This matter, which consists of the claims against Aboytes, Magana, and Jeudy, is  
21 REFERRED to the Hon. Robert Illman for purposes of settlement pursuant to the Pro Se  
22 Prisoner Mediation Program. The proceedings will consist of one or more conferences as  
23 determined by Judge Illman. They shall take place within 180 days of the date this order is  
24 filed. Judge Illman shall coordinate a time and date for the conferences with all interested  
25 parties and/or their representatives and, within 180 days after the conclusion of the  
26 conference(s), file a report regarding the settlement proceedings.

27 **Plaintiff must attend all conferences scheduled by Judge Illman and comply**  
28 **with his instructions in all respects. Failure to attend even one conference or adhere**



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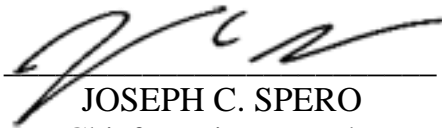
**to Judge Illman’s instructions will result in the dismissal of this action with prejudice pursuant to Federal Rule of Civil Procedure 41(b) for failure to prosecute.**

The Clerk shall forward a copy of this order to all parties and to Judge Illman’s chambers and terminate all pending motions.

The Clerk shall terminate Dkt. Nos. 16 and 32.

**IT IS SO ORDERED.**

**Dated:** September 24, 2018

  
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JOSEPH C. SPERO  
Chief Magistrate Judge

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MARK A. BROWN,  
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v.

J. ABOYTES, et al.,  
Defendants.

Case No. [17-cv-03120-JCS](#)

**CERTIFICATE OF SERVICE**

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

That on September 24, 2018, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Mark A. Brown ID: #AP-0910  
Pelican Bay State Prison  
P.O. Box 7500  
Crescent City, CA 95532

Dated: September 24, 2018

Susan Y. Soong  
Clerk, United States District Court

By: Karen L. Hom  
Karen Hom, Deputy Clerk to the  
Honorable JOSEPH C. SPERO