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\*E-FILED - 10/13/09\*

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

|                        |   |                            |
|------------------------|---|----------------------------|
| RAMON PEREZ,           | ) | No. C 06-7231 RMW (PR)     |
|                        | ) |                            |
| Plaintiff,             | ) | ORDER GRANTING DEFENDANT’S |
|                        | ) | MOTION TO DISMISS          |
| vs.                    | ) |                            |
|                        | ) | (Docket No. 20)            |
| CORRECTIONAL TREATMENT | ) |                            |
| CENTER, et al.,        | ) |                            |
|                        | ) |                            |
| Defendants.            | ) |                            |
| _____                  | ) |                            |

Plaintiff, a California prisoner at Corcoran State Prison (“COR”), filed this pro se civil rights action under 42 U.S.C. § 1983. Defendant Birkholm filed a motion to dismiss the complaint based on plaintiff’s failure to exhaust administrative remedies. Plaintiff has not filed an opposition. Having reviewed the pleadings, the court GRANTS defendant’s motion to dismiss the complaint for failure to exhaust.

**DISCUSSION**

A. Standard of Review

Nonexhaustion under 42 U.S.C. § 1997e(a) is an affirmative defense; defendants have the burden of raising and proving the absence of exhaustion. Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). A nonexhaustion claim should be raised in an unenumerated Rule 12(b) motion rather than in a motion for summary judgment. Id. A complaint may be dismissed by

1 the court for failure to exhaust if a prisoner “conce[des] to nonexhaustion” and “no exception to  
2 exhaustion applies.” Id. at 1120. In deciding a motion to dismiss for failure to exhaust  
3 nonjudicial remedies, the court may look beyond the pleadings and decide disputed issues of  
4 fact. Id. at 1119-20.<sup>1</sup> If the court concludes that the prisoner has not exhausted nonjudicial  
5 remedies, the proper remedy is dismissal without prejudice. Id. at 1120.

6 B. Analysis

7 The Prison Litigation Reform Act (“PLRA”) of 1995 was 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 correctional  
10 facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).  
11 Exhaustion is mandatory and not left to the discretion of the district court. Woodford v. Ngo,  
12 548 U.S. 81, 85 (2006) (citing Booth v. Churner, 532 U.S. 731, 739 (2001)). Exhaustion is a  
13 prerequisite to all prisoner lawsuits concerning prison life, whether such actions involve general  
14 conditions or particular episodes, whether they allege excessive force or some other wrong, and  
15 even if they seek relief not available in grievance proceedings, such as money damages. Porter  
16 v. Nussle, 534 U.S. 516, 524, 532 (2002).

17 The PLRA exhaustion requirement requires “proper exhaustion” of available  
18 administrative remedies. Woodford, 548 U.S. at 85. The plain language of the PLRA requires  
19 that prior to filing suit, all “administrative remedies available [must be] exhausted.” 42 U.S.C. §  
20 1997e(a). The Ninth Circuit has interpreted section 1997e(a) to mean that an action *must* be  
21 dismissed unless the prisoner exhausted his available administrative remedies *before* he or she  
22 filed suit, even if the prisoner fully exhausts while the suit is pending. McKinney v. Carey, 311  
23 F.3d 1198, 1199 (9th Cir. 2002) (per curiam); see also Vaden v. Summerhill, 449 F.3d 1047,  
24 1051 (9th Cir. 2006) (where administrative remedies are not exhausted before the prisoner sends

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26 <sup>1</sup> If the court looks beyond the pleadings in deciding an unenumerated motion to dismiss for  
27 failure to exhaust -- a procedure closely analogous to summary judgment -- the court must give  
28 the prisoner fair notice of his opportunity to develop a record. Wyatt, 315 F.3d at 1120 n.14.  
Plaintiff was given such notice in the order of service.

1 his complaint to the court it will be dismissed even if exhaustion is completed by the time the  
2 complaint is actually filed).

3         The State of California provides its inmates and parolees the right to appeal  
4 administratively “any departmental decision, action, condition, or policy which they can  
5 demonstrate as having an adverse effect upon their welfare.” Cal. Code Regs. Title 15,  
6 § 3084.1(a). It also provides its inmates the right to file administrative appeals alleging  
7 misconduct by correctional officers. See id. § 3084.1(e). In order to exhaust available  
8 administrative remedies within this system, a prisoner must proceed through several levels of  
9 appeal: (1) informal resolution, (2) formal written appeal on a CDC 602 inmate appeal form, (3)  
10 second level appeal to the institution head or designee, and (4) third level appeal to the Director  
11 of the California Department of Corrections. Id. § 3084.5; Barry v. Ratelle, 985 F. Supp. 1235,  
12 1237 (S.D. Cal. 1997). This satisfies the administrative remedies exhaustion requirement under  
13 § 1997e(a). Barry, 985 F. Supp. at 1237-38.

14         In his motion to dismiss, defendant states that the grievance plaintiff refers to in his  
15 complaint, SVSP-D-06-02456, was screened out at the director’s level of review as improper,  
16 and therefore, unexhausted. (Mot., p. 3.) Defendant also states that prison records demonstrate  
17 that plaintiff’s only exhausted grievance was not filed before he initiated this federal action.  
18 (Id.) Plaintiff does not dispute defendant’s assertions.

19         The PLRA’s exhaustion requirement cannot be satisfied “by filing an untimely or  
20 otherwise procedurally defective administrative grievance or appeal.” Woodford, 548 U.S. at 84.  
21 “The text of 42 U.S.C. § 1997e(a) strongly suggests that the PLRA uses the term ‘exhausted’ to  
22 mean what the term means in administrative law, where exhaustion means proper exhaustion.”  
23 Id. at 92.

24         “Proper exhaustion demands compliance with an agency’s deadlines and other critical  
25 procedural rules because no adjudicative system can function effectively without imposing some  
26 orderly structure on the course of its proceedings.” Id. at 90-91 (footnote omitted). The filing of  
27 an untimely grievance or appeal is not proper exhaustion. See id. at 83-84. A prisoner must  
28 complete the administrative review process in accordance with the applicable procedural rules,

1 including deadlines, as a precondition to bringing suit in federal court. Id.

2 On September 5, 2006, plaintiff's first formal appeal in SVSP-D-06-02456 regarding the  
3 underlying claim was partially granted. (Complaint, p. 2.) Although plaintiff alleges that he  
4 never received a second level review response, which was due on September 25, 2006 (id. and  
5 Ex. A.), defendant responds that the records at the Inmate Appeals Branch indicate that the  
6 second level review was completed on September 22, 2006. (Decl. Medina, ¶ 1, 6, Ex. A.)  
7 Further, E. Medina, an Appeals Coordinator at Salinas Valley State Prison declared under  
8 penalty of perjury that on September 27, 2006, he screened out another of plaintiff's appeal at  
9 the second level because "it was a redundant second-level submission of the Level II appeal  
10 decision already rendered on September 22, 2006, and even included the Level II decision in the  
11 resubmission." (Id., ¶ 8.) Medina stated that the submission was improper because plaintiff  
12 should have submitted his appeal to the Director's level of review. (Id.) Based on Medina's  
13 declaration, the court concludes that plaintiff did receive a second level review response.

14 In addition, while plaintiff did submit a grievance to the Director's level of review with  
15 the same log number, SVSP-D-06-02456, it was received on September 14, 2007, and  
16 subsequently screened out because it was untimely. (Decl. Grannis, ¶ 1, 7, Ex. A.) Plaintiff's  
17 submission to the Director's level of review was screened out because it was filed more than 15  
18 working days from September 22, 2006, the date of the appealed decision. See 15 Cal. Code  
19 Regs. § 3084.6(c). Even if plaintiff's untimely grievance were accepted, it could not constitute  
20 exhaustion because plaintiff did not complete his administrative remedies before he filed the  
21 complaint in this case. See McKinney, 311 F.3d at 1199.

22 The Inmate Appeal Branch records also demonstrate that since 1993, plaintiff has only  
23 exhausted one claim at the Director's level of review, and while it relates to this same underlying  
24 claim, it was not exhausted until after the complaint was filed. (Decl. Grannis, ¶ 6, Ex. A.)  
25 Again, because plaintiff did not exhaust this prior to filing the instant complaint, it is not proper  
26 exhaustion. See McKinney, 311 at 1199.

27 Accordingly, in light of defendant's undisputed evidence that plaintiff did not properly  
28 exhaust, see Woodford, 548 U.S. at 83-84, the court concludes that plaintiff failed to exhaust his

1 claim and dismisses this action.

2

**CONCLUSION**

3 Based on the foregoing reasons, the court GRANTS defendant's motion to dismiss.  
4 Plaintiff's complaint is hereby DISMISSED without prejudice for failure to exhaust  
5 administrative remedies. The clerk shall terminate any remaining motions and close the file.

6 This order terminates docket no. 20.

7 IT IS SO ORDERED.

8 DATED: 10/13/09

  
RONALD M. WHYTE  
United States District Judge

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