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

RANDOLPH M. DIAZ,)	No. C 09-00078 JW (PR)
)	
Plaintiff,)	ORDER OF DISMISSAL; GRANTING
)	MOTION FOR LEAVE TO PROCEED
vs.)	<i>IN FORMA PAUPERIS</i>
)	
M. MARTEL, et al.,)	
)	
Defendants.)	
_____)	(Docket No. 2)

Plaintiff, a prisoner at Mule Creek State Prison in Ione, California, has filed a pro se civil rights action under 42 U.S.C. § 1983 alleging claims against prison officials. Plaintiff’ has filed a motion for leave to proceed in forma pauperis (Docket No. 2).

DISCUSSION

A. Exhaustion

The Prison Litigation Reform Act (“PLRA”) of 1995 amended 42 U.S.C. § 1997e to provide that “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are

1 available are exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is mandatory and no
2 longer left to the discretion of the district court. Woodford v. Ngo, 548 U.S. 81, 84
3 (2006) (citing Booth v. Churner, 532 U.S. 731, 739 (2001)). “Prisoners must now
4 exhaust all ‘available’ remedies, not just those that meet federal standards.” Id.
5 Even when the relief sought cannot be granted by the administrative process, i.e.,
6 monetary damages, a prisoner must still exhaust administrative remedies. Id. at 85-
7 86 (citing Booth, 532 U.S. at 734). The mandatory exhaustion of available
8 administrative remedies is not limited to suits under § 1983, but to any suit
9 challenging prison conditions. Id. at 85 (citing Porter v. Nussle, 534 U.S. 516, 524
10 (2002)).

11 The PLRA’s exhaustion requirement requires “proper exhaustion” of
12 available administrative remedies. Id. at 93. This requirement cannot be satisfied
13 “by filing an untimely or otherwise procedurally defective administrative grievance
14 or appeal.” Ngo, 548 U.S. at 84. “The text of 42 U.S.C. § 1997e(a) strongly
15 suggests that the PLRA uses the term ‘exhausted’ to mean what the term means in
16 administrative law, where exhaustion means proper exhaustion.” Id. at 92.
17 Therefore, the PLRA exhaustion requirement requires proper exhaustion. Id.
18 “Proper exhaustion demands compliance with an agency’s deadlines and other
19 critical procedural rules because no adjudicative system can function effectively
20 without imposing some orderly structure on the course of its proceedings.” Id. at
21 90-91 (footnote omitted).

22 The State of California provides its inmates and parolees the right to appeal
23 administratively “any departmental decision, action, condition, or policy which they
24 can demonstrate as having an adverse effect upon their welfare.” Cal. Code Regs.
25 tit. 15, § 3084.1(a). It also provides its inmates the right to file administrative
26 appeals alleging misconduct by correctional officers. See id. § 3084.1(e). In order
27 to exhaust available administrative remedies within this system, a prisoner must
28 proceed through several levels of appeal: (1) informal resolution, (2) formal written

1 appeal on a CDC 602 inmate appeal form, (3) second level appeal to the institution
2 head or designee, and (4) third level appeal to the Director of the California
3 Department of Corrections and Rehabilitation. Id. § 3084.5; Barry v. Ratelle, 985 F.
4 Supp. 1235, 1237 (S.D. Cal. 1997). This satisfies the administrative remedies
5 exhaustion requirement under § 1997e(a). Id. at 1237-38.

6 Because exhaustion under § 1997e(a) is an affirmative defense, a complaint
7 may be dismissed for failure to exhaust only if failure to exhaust is obvious from the
8 face of the complaint and/or any attached exhibits. See Wyatt v. Terhune, 315 F.3d
9 1108, 1119-20 (9th Cir. 2003). A concession to nonexhaustion is a valid ground for
10 dismissal, provided no exception to exhaustion applies. Id. at 1120.

11 Here, it is obvious from the face of the complaint and attachments that
12 plaintiff has not exhausted his administrative remedies. (Compl. 2.) Plaintiff
13 indicates that his inmate appeal was denied at the first formal level, and that it was
14 not the highest level of appeal available to him. (Id.) Section 1997e(a) requires that
15 plaintiff present his claims to each level of administrative review set forth above
16 before raising those claims in a § 1983 complaint in federal court. As it is clear from
17 the complaint that plaintiff has not pursued all levels of administrative grievances
18 available to him, and there is no applicable exception to the exhaustion requirement,
19 dismissal without prejudice is appropriate.

20 B. Motion for Leave to Proceed *In Forma Pauperis*

21 Plaintiff's motion to proceed in forma pauperis (Docket No. 2) is
22 GRANTED. The total filing fee that will ultimately be due is \$350.00. In view of
23 plaintiff's lack of income and zero account balance over the last six months, no
24 initial partial filing fee is due. Funds for the filing fee will be taken from income to
25 plaintiff's account in accordance with 28 U.S.C. § 1915(B)(1). A copy of this order
26 and the attached instructions will be sent to plaintiff, the prison trust account office,
27 and the Court's financial office.

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CONCLUSION

For the foregoing reasons, this action is hereby DISMISSED without prejudice to plaintiff's refiling his claims after all available administrative remedies have been exhausted.

This order terminates Docket No. 2.

DATED: May 19, 2009



JAMES WARE
United States District Judge

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

INSTRUCTIONS FOR PAYMENT OF PRISONER'S FILING FEE

The prisoner shown as the plaintiff or petitioner on the attached order has filed a civil action in forma pauperis in this court and owes to the court a filing fee. Pursuant to 28 U.S.C. § 1915, the fee is to be paid as follows:

The initial partial filing fee listed on the attached order should be deducted by the prison trust account office from the prisoner's trust account and forwarded to the clerk of the court as the first installment payment on the filing fee. This amount is twenty percent of the greater of (a) the average monthly deposits to the prisoner's account for the 6-month period immediately preceding the filing of the complaint/petition or (b) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint/petition.

Thereafter, on a monthly basis, 20 percent of the preceding month's income credited to the prisoner's trust account should be deducted and forwarded to the court each time the amount in the account exceeds ten dollars (\$10.00). The prison trust account office should continue to do this until the filing fee has been paid in full.

If the prisoner does not have sufficient funds in his/her account to pay the initial partial filing fee, the prison trust account office should forward the available funds, and carry the balance forward each month until the amount is fully paid.

If the prisoner has filed more than one complaint, (s)he is required to pay a filing fee for each case. The trust account office should make the monthly calculations and payments for each case in which it receives an order granting in forma pauperis and these instructions.

The prisoner's name and case number must be noted on each remittance. The initial partial filing fee is due within thirty days of the date of the attached order. Checks should be made payable to Clerk, U.S. District Court and sent to Prisoner Accounts Receivable, U.S. District Court, 450 Golden Gate Avenue, Box 36060, San Francisco, CA 94102.

cc: Plaintiff
Finance Office

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

RANDOLPH M. DIAZ,
Plaintiff,

Case Number: CV09-00078 JW

CERTIFICATE OF SERVICE

v.

M. MARTEL, et al.,
Defendants.

_____/

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 5/28/2009, 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.

Randolph M. Diaz T-21566
Mule Creek State Prison
P. O. Box 409040
Ione, Ca 95640

Dated: 5/28/2009

Richard W. Wieking, Clerk
/s/ By: Elizabeth Garcia, Deputy Clerk