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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11 VENSON LANE MYERS,

CASE NO.08-CV-117 W (WMc)

12
13 Plaintiff,

ORDER ADOPTING REPORT
AND RECOMMENDATION AND
DISMISSING PLAINTIFF'S
COMPLAINT

14 vs.

15 L.E. SCRIBNER, et al.,

16
17 Defendants.

18 Plaintiff Venson Lane Myers, a California prisoner proceeding *pro se*, filed this
19 civil rights lawsuit stemming from prison officials' denial of Plaintiff's proposal to host
20 a religious feast for 800 prisoners. On August 21, 2008, Defendants filed an
21 unenumerated motion to dismiss the complaint for, among other grounds, failure to
22 properly exhaust administrative remedies. (Doc. No. 11.) On December 3, 2008,
23 Magistrate Judge William McCurine, Jr., issued a Report and Recommendation (the
24 "Report), recommending that the Court grant the motion. Plaintiff, thereafter, filed
25 objections to the Report.

26 The matter is decided on the papers submitted. See S.D. Cal. Civ. R. 7.1(d)(1).
27 For the following reasons, the Court **ADOPTS** the Magistrate Judge's Report (Doc.
28 No. 19) and **GRANTS** Defendants' motion to dismiss without prejudice (Doc. No. 11).

1 **I. BACKGROUND**

2 On approximately July 7, 2007, Plaintiff considered organizing a Christian-based
3 celebratory feast. (*Comp.*, 4.¹) Plaintiff alleges that based on his research of prison rules
4 and regulations, inmate religious groups are permitted no more than two religious
5 events each year where the prison provides foods with religious significance. (*Id.*)

6 On August 23, 2007, Plaintiff discussed his planned religious feast with the
7 Associate Warden, Defendant Bulteman. (*Comp.*, 3.) Defendant Bulteman told
8 plaintiff to submit a proposal to the prison chaplain, Defendant Richey, for
9 consideration. (*Id.*)

10 On or about September 24, 2007, Plaintiff submitted a request for administrative
11 approval of a religious food feast on December 8, 2007 for 800 members of the Christian
12 inmate community. (*Comp.*, 12.) After various communications with Prison officials,
13 on October 3, 2007, Plaintiff was notified by Defendant Bulteman that the proposal
14 for a December 8, 2007 Christian feast was denied. (*Id.*, 5, 9.)

15 On October 8, 2007, Plaintiff filed a formal first-level appeal, designated as CAL-
16 A-07-01891, concerning the denial of the proposed Christian feast. (*Comp.*, 10.) On
17 October 14, 2007, Plaintiff filed an additional formal appeal, to be attached to the
18 previous appeal (CAL-A-07-01891). (*Id.*, 13.) On October 24, 2007, a formal hearing
19 was held on Plaintiff's appeal. (*Id.*, 3, 15.)

20 On December 12, 2007, Defendant Bulteman issued a formal decision
21 acknowledging that the Christian faith places religious significance on "celebration
22 bread and wine (juice)" in accordance with the Lord's Supper and granting, in part, the
23 appeal. (*Report*, 3.) The decision, therefore, stated that such a ceremony would be
24 allowed. (*Id.*) But the decision denied the proposed attendance of 800 inmates, citing
25 safety and security concerns, and denied Plaintiff's claim that Chaplain Richey
26 cancelled worship services in retaliation for the appeal. (*Id.*) Finally, the decision also

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28 ¹The page number reference is based on the pagination of documents found in the
Court's ECF system.

1 informed Plaintiff that "the issue may be submitted at the Second Level of Review."
2 (*Comp.*, 15.)

3 On January 18, 2008, Plaintiff filed the present action under 42 U.S.C. § 1983.
4 On August 21, 2008, Defendants filed the motion to dismiss arguing, among other
5 things, that Plaintiff failed to exhaust administrative remedies.

6 On December 3, 2008, Magistrate Judge McCurine issued the Report
7 recommending that the Court grant the motion to dismiss. On December 22, 2008,
8 Plaintiff filed objections, which he supplemented on January 9, 2009.

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10 **II. LEGAL STANDARD**

11 The duties of the district court in connection with a magistrate judge's report and
12 recommendation are set forth in Rule 72(b) of the Federal Rules of Civil Procedure and
13 28 U.S.C. § 636(b)(1). The district court "must make a de novo determination of those
14 portions of the report ... to which objection is made," and "may accept, reject, or modify,
15 in whole or in part, the findings or recommendations made by the magistrate." 28
16 U.S.C. § 636(b)(1)(C); *see also* United States v. Remsing, 874 F.2d 614, 617 (9th Cir.
17 1989); United States v. Raddatz, 447 U.S. 667, 676 (1980). When no objections are
18 filed, the district court may assume the correctness of the magistrate judge's findings of
19 fact and decide the motion on the applicable law. *See* Campbell v. United States Dist.
20 Court, 501 F.2d 196, 206 (9th Cir. 1974). Under such circumstances, the Ninth
21 Circuit has held that "a failure to file objections only relieves the trial court of its burden
22 to give de novo review to factual findings; conclusions of law must still be reviewed de
23 novo." Barilla v. Ervin, 886 F.2d 1514, 1518 (9th Cir. 1989) (citing Britt v. Simi Valley
24 Unified Sch. Dist., 708 F.2d 452, 454 (9th Cir. 1983)).

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26 **III. ANALYSIS**

27 Having read and considered the papers submitted, including Plaintiff's objections,
28 the Court concludes the Report presents a well-reasoned analysis of the issue.

1 The Prison Litigation Reform Act (PLRA) provides that “[n]o action shall be
2 brought with respect to prison conditions under section 1983 of this title, or any other
3 Federal law, by a prisoner confined in any jail, prison or other correctional facility until
4 such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).
5 This requirement applies to inmate lawsuits about prison life. Porter v. Nussle, 534
6 U.S. 516, 532 (2002). Exhaustion of prison administrative procedures is mandatory.
7 Id. at 524.

8 The PLRA exhaustion requirement is not jurisdictional, but is an affirmative
9 defense that may be raised in a unenumerated Rule 12(b) motion. Wyatt v. Terhune,
10 315 F.3d 1108, 1119 (9th Cir. 2003). In deciding such a motion, “courts may look
11 beyond the pleadings and decide disputed issues of fact.” Id. When the court
12 determines that a prisoner has not properly exhausted administrative remedies, the
13 proper remedy is dismissal without prejudice. Id. at 1120.

14 California provides prisoners the right to appeal administratively “any
15 departmental decision, action, condition or policy perceived by those individuals as
16 adversely affecting their welfare.” Cal. Code Regs. Tit. 15 § 3084.1(a). There are four
17 levels of administrative appeal: (1) informal resolution; (2) formal written appeal on a
18 602 inmate appeal form; (3) second level appeal to the institution head, and (4) third
19 level appeal to the Director of the California Department of Corrections and
20 Rehabilitation. Barry v. Ratelle, 985 F.Supp. 1235, 1237 (S.D. Cal. 1997). Following
21 a decision at the third formal level, a prisoner has exhausted his or her administrative
22 remedies. Cal. Code Regs. Tit. 15 §§ 3084.1(a) and 3084.5(e)(2).

23 Here, in recommending that the Court grant Defendants’ motion to dismiss, the
24 Magistrate Judge found that Plaintiff failed to properly exhaust his administrative
25 remedies because he did not file a second level formal appeal of Defendant Bulteman’s
26 December 12, 2007 decision. Plaintiff’s objection does not dispute this finding. Instead,
27 Plaintiff appears to be arguing that he did not have to pursue additional levels of appeal
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1 because the proposed religious feast—scheduled for December 8, 2007— passed before
2 Defendant Bulteman’s decision was rendered.

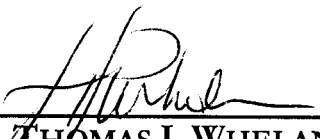
3 But as explained above, a prisoner’s exhaustion of administrative remedies is
4 mandatory. Porter, 534 U.S. at 524. And the Court’s independent research has not
5 revealed any case excusing exhaustion under similar circumstances. For these reasons,
6 the Court will adopt the Report’s analysis and dismiss the complaint.

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8 **IV. CONCLUSION**

9 For the foregoing reasons, the Court **ADOPTS** the Magistrate Judge’s Report
10 (Doc. No. 19) and **GRANTS** Defendants’ motion to dismiss without prejudice (Doc.
11 No. 11).² The Petition is **DISMISSED** in its entirety, and the clerk of the court shall
12 close the district court file.

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14 **IT IS SO ORDERED.**

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16 DATED: March 23, 2009



17 **HON. THOMAS J. WHELAN**
18 United States District Court
19 Southern District of California

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²Defendants have not argued that any future attempt by Plaintiff to exhaust
administrative remedies would be time barred. Accordingly, the lawsuit is dismissed without
prejudice so that Plaintiff may refile the litigation if he exhausts the administrative remedies.