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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

CHESTER RAY WISEMAN,  
  
vs.  
  
ROBERT J. HERNANDEZ, Warden; et al.,  
  
Plaintiff,  
  
Defendant.

CASE NO. 08cv1272-LAB (NLS)  
**ORDER ADOPTING REPORT  
AND RECOMMENDATION**

**I. Introduction**

This is a prisoner civil rights case, filed under 42 U.S.C. § 1983. Plaintiff Chester Wiseman alleges that his First and Eighth Amendment rights were violated at R.J. Donovan Correctional Facility (where he was previously incarcerated) when he was denied access to the law library and deprived of outdoor exercise. The defendants are prison officials at Donovan.

Pursuant to 28 U.S.C. § 636(b) and Civil Local Rules 72.1(c) and (d), Wiseman’s complaint was referred to Magistrate Judge Nita Stormes for a report and recommendation (“R&R”). Defendants moved to dismiss the present complaint on May 26, 2010. Judge Stormes issued her R&R on December 8, 2010, recommending that the motion to dismiss be granted. Wiseman filed an objection to the R&R on January 18, 2011.

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1 **II. Legal Standards**

2 This Court has jurisdiction to review the R&R pursuant to Rule 72 of the Federal Rules  
3 of Civil Procedure. “The district judge must determine de novo any part of the magistrate  
4 judge’s disposition that has been properly objected to. The district court may accept, reject,  
5 or modify the recommended disposition; receive further evidence; or return the matter to the  
6 magistrate judge with instructions.” Fed. R. Civ. P. 72(b)(3). The district judge “must  
7 review the magistrate judge’s findings and recommendations de novo *if objection is made*,  
8 but not otherwise.” *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en  
9 banc).

10 Because Wiseman is a prisoner and is proceeding pro se, the Court construes his  
11 pleadings liberally and affords him the benefit of any doubt. See *Karim-Panahi v. L.A. Police*  
12 *Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988). That said, “[p]ro se litigants must follow the same  
13 rules of procedure that govern other litigants.” *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir.  
14 1987).

15 **III. Discussion**

16 The R&R concludes that Wiseman’s claims should be dismissed because he has  
17 failed to exhaust his administrative remedies as mandated by the Prison Litigation Reform  
18 Act. See 42 U.S.C. § 1997e(a). Prisoners in California must proceed through several levels  
19 of administrative review: (1) informal resolution; (2) formal written appeal on a CDC 602  
20 inmate appeal form; (3) second level appeal to the institution head; and (4) third level appeal  
21 to the Director of the California Department of Corrections. *Barry v. Ratelle*, 985 F.Supp.  
22 1235, 1237 (S.D. Cal. 1997). On a motion to dismiss, a court can look beyond the pleadings  
23 to resolve factual issues regarding exhaustion. *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n.  
24 4 (9th Cir. 2003).

25 **A. Denial of Access to the Courts**

26 Wiseman’s claim that he was denied access to the Courts is based on the allegation  
27 that prison staff at Donovan refused to provide him with his legal papers, and with library  
28 access, after he was placed in an “Administrative Segregation” unit.

1 Wiseman maintains he made an informal verbal request for his papers, and for library  
2 access, when he was initially moved into AdSeg on March 10, 2008. (TAC ¶ 15.) He  
3 followed this up with a written request on March 12, 2008, which was never answered.  
4 (TAC ¶ 16.) He made another verbal request on March 17, 2008. (TAC ¶ 18.) On April 15,  
5 2008, Wiseman filed a written appeal. (TAC ¶ 21.) On May 5, 2008, he made another  
6 verbal request. (TAC ¶ 25.) He filed a second written appeal on May 6, 2008. (TAC ¶ 26.)  
7 He made another verbal request on May 9, 2008. (TAC ¶ 27.) He filed yet another inmate  
8 appeal on May 12, 2008, which was refused on the ground that an appeal was already  
9 pending. (TAC ¶ 28.) On June 13, 2008, Wiseman appealed to Hernandez, alleging that  
10 he was still being denied his legal property and meaningful library access *and* asking  
11 Hernandez to take action. (TAC ¶ 30.) Wiseman received a response to his June 13, 2008  
12 letter on July 11, 2008; he was told that his treatment by prison staff was consistent with  
13 prison policy. (TAC ¶ 32.) If this is all true, and the Court must accept that it is, then  
14 Wiseman arguably worked his way through the first, second, and third levels of review.<sup>1</sup>

15 But Wiseman did not appeal to the California Department of Corrections. In fact, he  
16 “concedes that his appeals were never decided at the third level.” (R&R Obj. at 2.) The  
17 declarations of prison officials who track inmate appeals confirms this. (See Foston Decl.  
18 ¶ 8; Franklin Decl. ¶¶ 11–12.) Instead, Wiseman takes the position that this would have  
19 been fruitless because he never received any meaningful response to his first-level appeals:

20 In this case, Plaintiff “properly filed” his inmate appeals by either  
21 giving them directly to the officer involved or sending them to the  
22 Inmate Appeals Office. None of the appeals in question have  
23 ever received responses. Once Plaintiff placed the appeals in  
24 the hands of prison officials, he lost all control over how they  
25 were handled. Once they failed to respond to the appeals within  
26 time constraints established by prison regulations, Plaintiff had  
27 no more remedies available for him to exhaust.

28 (Opp’n Br. at 5.) Wiseman is correct that a failure to exhaust may be excusable when a

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26 <sup>1</sup> Wiseman’s account of his successive grievances in his complaint is roughly  
27 consistent with an account in a declaration attached to his opposition to the pending motion  
28 to dismiss. (See Doc. No. 59-1.) The Court says “roughly” because Wiseman, in his  
declaration, mentions an April 6, 2008 appeal that is not mentioned in his complaint.  
(Wiseman Decl. ¶ 2.) According to his complaint, Wiseman filed his first appeal on April 15,  
2008. (TAC ¶ 21.)

1 prisoner's conscientious efforts to exhaust are obstructed by prison staff. See *Nunez v.*  
2 *Duncan*, 591 F.3d 1217, 1224–26 (9th Cir. 2010); *Ngo v. Woodford*, 539 F.3d 1108 (9th Cir.  
3 2008). The Court sees no reason, however, to excuse Wiseman's failure to take his  
4 grievance to the California Department of Corrections. However unresponsive Wiseman  
5 believes the Donovan staff was to his first-level appeals, the fact is that *on his own account*  
6 he submitted a second-level appeal to Warden Hernandez and that appeal was answered.<sup>2</sup>  
7 (TAC ¶¶ 30, 32.) If that answer was unsatisfying, Wiseman could have, and should have,  
8 appealed to the Director of the California Department of Corrections. There is no indication,  
9 in his complaint or other briefing, that *that* third-level appeal would have been pointless to  
10 even attempt.<sup>3</sup> Thus, the Court agrees with the R&R's conclusion that "[b]ecause Plaintiff  
11 does not offer any evidence or argument that he even attempted to submit a "Director's  
12 Level" appeal he has failed to exhaust his administrative remedies." (R&R at 10.) Wiseman  
13 did not make "every effort to make full use of the prison grievance process." *Nunez*, 591  
14 F.3d at 1224.

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17 <sup>2</sup> The Court is not even convinced that the Donovan staff was as unresponsive as  
18 Wiseman seems to believe. On April 4, 2008 he was given some of his legal papers. (TAC  
19 ¶ 20.) On April 18, 2008 he was escorted to the library and allowed to work there for two  
20 hours. (TAC ¶ 22.) Around May 6, 2008 he was told that because of work in the property  
21 room, there would be a delay in the delivery of his legal property. (TAC ¶ 26.) And on May  
22 15, 2008 he was assured, in response to his inmate appeal, that he would receive library  
23 access. (TAC ¶ 29.) These may not have been the responses Wiseman was looking for,  
24 and they may have even exacerbated his alleged injuries in his view. But they do *not*  
25 suggest that the Donovan staff was obstructing the administrative channels by which  
26 Wiseman could have his grievances heard. Along these lines, the declarations submitted  
27 by Wiseman and his cellmate Vencil Green (whose statements are not very helpful to  
28 Wiseman) merely suggest that Wiseman submitted his first-level appeals and did not receive  
a meaningful response; this does not entitle Wiseman to throw up his hands and proclaim  
that there would be no point in pursuing his grievances up the administrative ladder.

<sup>3</sup> In his objection to the R&R, Wiseman takes issue with its statement that "the record  
demonstrates that Plaintiff was familiar with the requirements of the administrative review  
process having submitted twelve "Director's Level" appeals between 2001 and 2009, and  
additionally having sixteen appeals screened out for various flaws." (R&R at 9–10.) The  
Court agrees that Wiseman's mere awareness of the administrative review process has  
minimal relevance to whether he exhausted all of his administrative remedies in the present  
case. That said, in context Judge Stormes's statement was a response to Wiseman's point  
that he has "no more remedies available . . . to exhaust," which implies an ignorance of the  
Director-level review.

1 Even if the Court were unable to agree with the R&R in this regard, it is persuaded  
2 by the R&R's analysis of the substantive merits of Wiseman's claim that he was denied  
3 access to the Courts. He has not adequately pleaded: (1) the loss of a nonfrivolous  
4 underlying claim; (2) the official acts frustrating the litigation; and (3) some remedy that is  
5 available as recompense but that is not otherwise available in a future suit. *Christopher v.*  
6 *Harbury*, 536 U.S. 403, 413–14 (2002). Wiseman offers no meaningful argument in rebuttal,  
7 other than referencing the arguments he raised in his opposition to the motion to dismiss.  
8 (R&R Obj. at 4.)

9 **B. Deprivation of Outdoor Exercise**

10 The R&R couples the exhaustion of Wiseman's outdoor exercise claim with his denial  
11 of access claim, but in the Court's judgment they call for separate discussions. Wiseman  
12 claims that on April 15, May 9, and June 30 of 2008 he complained verbally about his lack  
13 of outdoor exercise. (TAC ¶¶ 34–36.) On July 14, 2008, he formalized his complaints in a  
14 letter to the Warden, Chief Deputy Warden, and Associate Warden of Donovan. (TAC ¶38.)  
15 He went one level higher, on August 17, 2008, by submitting a letter to the Secretary of the  
16 California Department of Corrections. (TAC ¶39.) And he received a response to this letter  
17 on August 17, 2008 from the Associate Director of the California Department of Corrections,  
18 who said “[Donovan] realizes the need for additional yard space in these unforeseen  
19 overflow units and is currently in the process of building additional yard areas to  
20 accommodate inmate yard access needs within the ASU.” (TAC ¶ 40.) On this account,  
21 Wiseman was arguably more thorough in his exhaustion of his outdoor exercise claim than  
22 his denial of access claim, because he actually reached out to the California Department of  
23 Corrections in what might be construed as a third-level appeal.<sup>4</sup> But Wiseman admits,  
24 nonetheless, that he never exhausted his third-level appeals, and the declarations of Foston

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26 <sup>4</sup> This account, the Court notes, is somewhat at odds with that in the declaration  
27 Wiseman submitted with his opposition to the motion to dismiss. In that declaration,  
28 Wiseman claims to have submitted actual written appeals contesting his lack of outdoor  
exercise on May 12, 2008 and April 15, 2008. (Wiseman Decl. ¶¶ 6, 8.) He makes no  
mention in the declaration of the verbal complaints or his letters of July 14, 2008 and August  
17, 2008.

1 and Franklin confirm this. The Court therefore reaches the same conclusion about  
2 Wiseman's lack of exercise claim as his lack of access claim: Wiseman failed to exhaust his  
3 administrative remedies.

4 **IV. Conclusion**

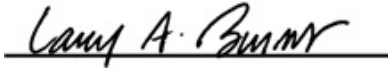
5 The Court **ADOPTS** the R&R. The Defendants' motion to dismiss for failure to  
6 exhaust (and, as to the lack of access claim, for failure to state a claim) is **GRANTED**.

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8 **IT IS SO ORDERED.**

9 DATED: March 25, 2011

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**HONORABLE LARRY ALAN BURNS**  
United States District Judge

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