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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 ROBERT MCCULLOCK,

12 Plaintiff,

13 v.

14 ROBERT BROWN, et al.,

15 Defendants.

Case No.: 18-cv-548-WQH-JLB

ORDER

16 HAYES, Judge:

17 The matters before the Court are 1) the Motion for Summary Judgment filed by
18 Defendants Robert Brown, Fabrice Hadjadj, J. Davies, and P. Covello (ECF No. 58); and
19 2) the Report and Recommendation issued by the Magistrate Judge (ECF No. 85).

20 **I. BACKGROUND**

21 Plaintiff Robert McCulloch is a prisoner currently incarcerated at Richard J.
22 Donovan Correctional Facility (“RJDCF”) and proceeding *pro se* and *in forma pauperis* in
23 this civil rights action pursuant to 42 U.S.C. § 1983.

24 On June 12, 2017, RJDCF inmate Andrew Cejas filed a prison grievance on behalf
25 of himself and six other inmates, including Plaintiff (the “Group Appeal”). (Ex. B,
26 Declaration of T. Ramos in Support of Defendants’ Motion for Summary Judgment
27 (“Ramos Decl.”), ECF No. 58-2 at 12, 16). In the Group Appeal, RJD-D-17-3023, the
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1 inmates alleged that Defendant Robert Brown violated the First Amendment of the United
2 States Constitution and the Religious Land Use and Institutionalized Persons Act
3 (“RLUIPA”) by failing to provide “a chaplain for supervision of [w]eekly Buddhist
4 services in the chapel” and failing to provide an “alternative indoor area” for services if a
5 chaplain or volunteer supervisor is not available. (*Id.* at 14, 16). The inmates requested that
6 RJDCF provide chapel access or an alternative indoor area for weekly Buddhist services
7 and that RJDCF provide supervision for the services, including a “prisoner minister” if a
8 chaplain or Buddhist volunteer is unavailable. (*Id.* at 16). The Group Appeal was accepted
9 at the first level of review and granted on July 21, 2017. (*Id.* at 17). The RJDCF Appeals
10 Office determined that in “[a] review of the last seven scheduled [Buddhist] services, the
11 Buddhist inmates met twice.” (*Id.*). The RJDCF Appeals Office stated that Buddhist
12 volunteers “have now been directed, to communicate directly to R. Brown, CRM and
13 Chaplain F. Hadjadj when they cannot attend, and Chaplain F. Hadjadj will be required to
14 provide coverage” (*Id.*).

15 On July 25, 2017, the inmates submitted the Group Appeal for the second level of
16 review, stating that they were “dissatisfied with [f]irst level response” (*Id.* at 13). The
17 Group Appeal was accepted at the second level of review and granted on August 24, 2017.
18 (*Id.* at 13, 20). On August 31, 2017, the inmates submitted the Group Appeal for the third
19 level of review, stating that they were “dissatisfied with the second level response.” (*Id.* at
20 13). On October 17, 2017, the California Department of Corrections and Rehabilitation
21 (“CDCR”) Office of Appeals rejected the Group Appeal and notified the inmates that
22 “[y]our appeal was granted at the institutional level. There is no unresolved issue to be
23 reviewed at the Third Level of review.” (*Id.* at 11, 13). The CDCR Office of Appeals stated:

24 Be advised that you cannot appeal a rejected appeal, but you should take the
25 corrective action necessary and resubmit the appeal within the timeframes
26 specified in CCR 3084.6(a) and CCR 3084.8(b). Pursuant to CCR 3084.6(e),
27 once an appeal has been cancelled, that appeal may not be resubmitted.
28 However, a separate appeal can be filed on the cancellation decision. The
original appeal may only be resubmitted if the appeal on the cancellation is
granted.

1 (*Id.* at 11). The inmates did not take any further administrative action on the Group Appeal.

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3 On February 2, 2018, Plaintiff filed an individual prison grievance, Appeal RJD-D-
4 18-00579, complaining about the lack of weekly Buddhist religious services. (Ex. C,
5 Ramos Decl., ECF No. 58-2 at 28, 30). Plaintiff’s grievance was accepted at the first level
6 of review and partially granted on March 6, 2018. (*Id.* at 30, 34-35). On March 14, 2018,
7 Plaintiff submitted Appeal RJD-D-18-00579 for the second level of review. (*Id.* at 31).
8 Plaintiff’s Appeal was accepted at the second level of review and denied on April 24, 2018.
9 (*Id.* at 31, 36-37). On May 5, 2018, Plaintiff submitted Appeal RJD-D-18-00579 for the
10 third level of review. (*Id.* at 31). Plaintiff’s Appeal was accepted at the third level of review
11 and denied on August 8, 2018. (*Id.* at 28, 31). The CDCR Office of Appeals notified
12 Plaintiff that “[t]his decision exhausts the administrative remedy available to the appellant
13 within CDCR.” (*Id.* at 29).

14 Plaintiff filed an Amended Complaint in this Court against Defendants Robert
15 Brown, Fabrice Hadjadj, J. Davies, and P. Covello on April 28, 2018, seven days before
16 Plaintiff submitted Appeal RJD-D-18-00579 for the third level of review.¹ (ECF No. 4).
17 Plaintiff brings claims against Defendants under 42 U.S.C. § 1983 violations of the First
18 and Fourteenth Amendments of the United States Constitution and the Religious Land Use
19 and Institutionalized Persons Act (“RLUIPA”). Plaintiff alleges that Defendants violated
20 Plaintiff’s federal and constitutional rights by failing to provide weekly chapel access for
21 Buddhist services, failing to provide supervision for weekly Buddhist services, and failing
22 to provide food at state expense for bi-annual Buddhist holidays. Plaintiff seeks declaratory
23 relief, injunctive relief, and damages, including punitive damages.²

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26 ¹ Plaintiff attempted to file the original Complaint on March 15, 2018. (ECF No. 1). The Court rejected
27 the document for non-compliance with the Local Rules. (ECF No. 2).

28 ² Plaintiff further alleges class claims on behalf of a class of similarly situated Buddhist prisoners at
RJDCF who were denied access to weekly Buddhist services.

1 On September 18, 2018, Defendants filed an Answer to Plaintiff's Amended
2 Complaint. (ECF No. 24). On June 26, 2019, Defendants filed a Motion for Summary
3 Judgment. (ECF No. 58). Defendants move for summary judgment on the grounds that
4 Plaintiff failed to exhaust his administrative remedies and failed to establish a triable issue
5 of fact as to his First Amendment, Fourteenth Amendment, and RLUIPA claims.
6 Defendants further move for summary judgment on the grounds that Plaintiff's claims
7 based on actions that occurred prior to 2014 are time-barred, Defendants are entitled to
8 qualified immunity, and Plaintiff lacks standing to assert class claims. On July 15, 2019,
9 Plaintiff filed an Opposition to Defendants' Motion for Summary Judgment. (ECF No. 64).

10 On January 28, 2019, the Magistrate Judge issued a Report and Recommendation
11 recommending that the Court grant Defendants' Motion for Summary Judgment. (ECF No.
12 85). The Report and Recommendation concluded that Plaintiff failed to exhaust his
13 administrative remedies prior to filing the Complaint. The Report and Recommendation
14 stated:

15 . . . [T]he [Prison Litigation Reform Act] requires that a state prisoner exhaust
16 all administrative remedies before proceeding to federal court. 42 U.S.C. §
17 1997e(a). In California, the exhaustion process is complete when a decision
18 is issued at the third level of review. Cal. Code Regs. tit. 15, § 3084.1(b);
19 *Harvey v. Jordan*, 605 F.3d 681, 683 (9th Cir. 2010) The undisputed
20 evidence before the Court shows that Plaintiff did not submit his [individual]
21 grievance to the third level of review until May 5, 2018, and [the Office of
22 Appeals] did not issue a final decision on Appeal RJD-[D-]18-00579 until
23 August 8, 2019. Because Plaintiff had only submitted Appeal RJD-18-[D-]
24]00579 to the second level of review at the time he filed the Amended
25 Complaint on April 28, 2018, Plaintiff failed to exhaust this appeal prior to
26 filing this action.

27 . . .

28 The undisputed evidence before the Court demonstrates that Plaintiff did not
receive a third level decision on the Group Appeal's merits; rather, the appeal
was rejected. Defendants have therefore met their burden to show that the
[Group Appeal] does not exhaust Plaintiff's administrative remedies. *See* Cal.
Code Regs. tit. 15, § 3084.6(a)(1); *Bradley v. Villa*, No. 1:10-cv-01618 LJO
GSA PC, 2015 WL 3540673, at *4 (E.D. Cal. June 3, 2015) ("A cancellation
or rejection at the third level does not exhaust an inmate[']s administrative

1 remedies because it is not a decision on the merits of the claim.”)
2 Moreover, Plaintiff makes no argument that he was satisfied with the relief
3 granted at the first and second levels of review. On the contrary, the record
4 shows that the movant on the Group Appeal, Cejas, was *not* satisfied with the
5 relief at the first and second levels of review Accordingly, the Group
6 Appeal cannot exhaust any of Plaintiff’s claims.

7 (ECF No. 85 at 10-11, 14-16). The Report and Recommendation further concluded that
8 Plaintiff failed to exhaust his administrative remedies for all claims against Defendants
9 Hadjadj, Davies, and Covello and for Plaintiff’s RLUIPA claim for failure to provide bi-
10 annual Buddhist holiday foods. The Report and Recommendation concluded that
11 Defendant Brown is entitled to summary judgment on the merits of Plaintiff’s claims and
12 is entitled to qualified immunity.

13 On February 12, 2020, Plaintiff filed Objections to the Report and Recommendation.
14 (ECF No. 86). Plaintiff objects to the Report and Recommendation’s conclusion that
15 Plaintiff failed to exhaust his administrative remedies with Group Appeal RJD-D-17-3023.
16 Defendants did not file any response.

17 **II. LEGAL STANDARD**

18 The duties of the district court in connection with a report and recommendation of a
19 magistrate judge are set forth in Rule 72(b) of the Federal Rules of Civil Procedure and 28
20 U.S.C. § 636(b). The district judge must “make a de novo determination of those portions
21 of the report . . . to which objection is made,” and “may accept, reject, or modify, in whole
22 or in part, the findings or recommendations made by the magistrate.” 28 U.S.C. §
23 636(b)(1). The district court need not review de novo those portions of a report and
24 recommendation to which neither party objects. *See Wang v. Masaitis*, 416 F.3d 992, 1000
25 n. 13 (9th Cir. 2005); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003)
26 (en banc) (“Neither the Constitution nor the [Magistrates Act] requires a district judge to
27 review, de novo, findings and recommendations that the parties themselves accept as
28 correct.”).

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1 **III. DISCUSSION**

2 The Report and Recommendation concluded that Defendants are entitled to
3 summary judgment because Plaintiff failed to exhaust his administrative remedies, that
4 Defendant Brown is entitled to summary judgment on the merits of Plaintiff’s claims, and
5 that Defendant Brown is entitled to qualified immunity.

6 **a. Exhaustion of Group Appeal RJD-D-17-3023**

7 Plaintiff objects to the Report and Recommendation’s conclusion that Plaintiff failed
8 to exhaust his administrative remedies with Group Appeal RJD-D-17-3023. Plaintiff
9 contends that the Group Appeal “is clearly exhausted” because it was granted at the first
10 two levels of review. (ECF No. 86 at 5). Plaintiff contends that the Group Appeal “was not
11 cancelled or rejected.” (*Id.*). Construing Plaintiff’s Objections liberally, Plaintiff further
12 contends that CDCR’s administrative process was so confusing that exhaustion was
13 “effectively unavailable.”³ (*Id.* at 4).

14 42 U.S.C. § 1997e provides in relevant part, “No action shall be brought with respect
15 to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner
16 confined in any jail, prison, or other correctional facility until such administrative remedies
17 as available are exhausted.” 42 U.S.C. § 1997e(a). For inmates of the CDCR, “all appeals
18 are subject to a third level of review . . . before administrative remedies are deemed
19 exhausted.” Cal. Code Regs. tit. 15, § 3084.1(b). However, “[a]n inmate has no obligation
20 to appeal from a grant of relief, or a partial grant that satisfies him, in order to exhaust his
21 administrative remedies.” *Harvey*, 605 F.3d at 685. In addition, an inmate need not exhaust
22 “unavailable” remedies. *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016).

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25 ³ Plaintiff also appears to contend that Defendants told Plaintiff that the Group Appeal was fully exhausted.
26 (*See* ECF No. 86 at 5 (“Defendant states, on page 76, lines 24-25 of Deposition of Plaintiff, May 15, 2019,
27 (attached) “Now, I found one appeal that was exhausted - - .”). At Plaintiff’s May 15, 2019, Deposition,
28 the attorney for Defendants stated, “Q: Now, I found one appeal that was exhausted - - well, that went
through all three levels, and it’s—.” (ECF No. 58-1 at 54:24-25). The Court cannot determine the context
of this statement because the full deposition transcript is not part of the record. Plaintiff’s contention is
without merit.

1 [A]n administrative scheme might be so opaque that it becomes, practically
2 speaking, incapable of use. In this situation, some mechanism exists to
3 provide relief, but no ordinary prisoner can discern or navigate it When
4 rules are so confusing that . . . no reasonable prisoner can use them, then
they're no longer available Accordingly, exhaustion is not required.

5 *Id.* at 1859-60 (internal quotations and citations omitted). “[A] cancellation or rejection
6 decision does not exhaust administrative remedies.” 15 Cal. Code Regs. tit. 15, § 3084.1(b).

7 In this case, the RJDCF Appeals Office granted the Group Appeal at the first two
8 levels of review. The record reflects that the inmates that submitted the Group Appeal were
9 not satisfied with the decisions at the first two levels of review. (*See* Ex. B, Ramos Decl.,
10 ECF No. 58-2 at 13 (second level appeal stating that the inmates were “dissatisfied with
11 [f]irst level response” and third level appeal stating that the inmates were “dissatisfied with
12 the second level response”). The granting of the Group Appeal at the first and second
13 levels did not exhaust Plaintiff’s administrative remedies.

14 The CDCR Office of Appeals rejected the Group Appeal at the third level of review.
15 (*See* Ex. B, Ramos Decl., ECF No. 58-2 at 13). The CDCR Office of Appeals notified the
16 inmates that “[t]here is no unresolved issue to be reviewed at the Third Level of review.”
17 (*Id.* at 11). The CDCR Office of Appeals advised the inmates that “you cannot appeal a
18 rejected appeal, but should take the corrective action necessary and resubmit the appeal
19 within the timeframes specified in CCR 3084.6(a) and CCR 3084.8(b).” (*Id.*; *see* 15 Cal.
20 Code Regs. tit. 15, § 3084.1(h)(2) (“The inmate or parolee submitting the [group] appeal
21 shall be responsible for sharing the appeal response with the inmates or parolees who
22 signed the appeal attachment.”)). The CDCR Office of Appeals provided “clear and
23 sufficient instructions regarding further actions the inmate or parolee must take to qualify
24 the appeal for processing.” 15 Cal. Code Regs. tit. 15, § 3084.6(a)(1). Although the CDCR
25 Office of Appeals provided instructions for how to proceed with a rejected appeal and with
26 a cancelled appeal, both processes required further action by the inmates. In addition, the
27 Inmate Appeal Form made clear that the Group Appeal was “[r]ejected” at the third level.
28 (*Ex.* B, Ramos Decl., ECF No. 58-2 at 13). Plaintiff has not demonstrated that the CDCR’s

1 administrative process is so “unknowable . . . that no ordinary prisoner can make sense of
2 what it demands.” *Ross*, 136 S. Ct. at 1859 (quotation omitted); *see also Ross*, 136 S. Ct.
3 at 1859 (“When an administrative process is susceptible of multiple interpretations . . . the
4 inmate should err on the side of exhaustion.”). The Court concludes that the Report and
5 Recommendation correctly determined that Plaintiff did not exhaust his administrative
6 remedies with the Group Appeal.

7 No party has objected to the Report and Recommendation’s conclusion that Plaintiff
8 failed to exhaust his administrative remedies on all claims against Defendants Hadjadj,
9 Davies, and Covello and on his RLUIPA claim for bi-annual holiday foods. The Court
10 concludes that the Report and Recommendation correctly determined that Plaintiff failed
11 to exhaust his claims against Defendants Hadjadj, Davies, and Covello and failed to
12 exhaust his RLUIPA claim for bi-annual holiday foods.

13 The Court adopts the portion of the Report and Recommendation related to the
14 Group Appeal.

15 **b. Exhaustion of Appeal RJD-D-18-00579**

16 No party has objected to the Report and Recommendation’s conclusion that Plaintiff
17 failed to exhaust his administrative remedies with Appeal RJD-D-00579. *See McKinney v.*
18 *Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002) (holding that a prisoner must exhaust his
19 administrative remedies before filing the complaint, and a prisoner does not comply with
20 the mandatory exhaustion requirement by exhausting available administrative remedies
21 during the court of the litigation). The Court adopts the portion of the Report and
22 Recommendation related to Plaintiff’s exhaustion of Appeal RJD-D-18-00579.

23 **c. Merits and Qualified Immunity**

24 Plaintiff does not object to any conclusion of the Report and Recommendation
25 related to the merits of Plaintiff’s claims. However, Plaintiff contends generally that his
26 claims have merit. The Court has conducted a *de novo* review of the Report and
27 Recommendation and the entire file, including Plaintiff’s Objections. The Court concludes
28 that the Report and Recommendation correctly determined that summary judgment in

1 Defendant Brown's favor is appropriate on the merits of Plaintiff's claims and that
2 Defendant Brown is entitled to qualified immunity. The Court adopts the remainder of the
3 Report and Recommendation.

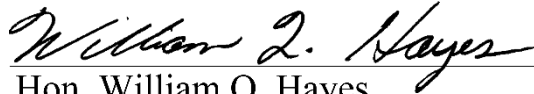
4 **IV. CONCLUSION**

5 IT IS HEREBY ORDERED that the Report and Recommendation (ECF No. 85) is
6 adopted in full.

7 IT IS FURTHER ORDERED that Plaintiff's Objections to the Report and
8 Recommendation (ECF No. 23) are overruled.

9 IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment (ECF
10 No. 58) is granted. The Clerk shall enter judgment in favor of Defendants and against
11 Plaintiff.

12 Dated: March 2, 2020


13 Hon. William Q. Hayes
14 United States District Court