**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

ABDUL ABDULRAMAN,
Plaintiff,

vs.

DR. BURKE, et al.,
Defendants.

Case No. 1:12-cv-209
Spiegel, J.
Litkovitz, M.J.

**ORDER AND REPORT AND RECOMMENDATION**

Plaintiff, an inmate currently incarcerated at the Southern Ohio Correctional Facility (SOCF), brings this pro se action pursuant to 42 U.S.C. § 1983 for violations of his civil rights. He names as defendants SOCF officers and staff members Dr. Burke, Dirk Prise, Gary Mohr, Edwin Voorhies, Cynthia Davis, Ms. Holsinger, Lt. Dillon, Lt. Workman, Correctional Officer Southworth, Warden Wanza Jackson, Chaplain York, Deputy Warden Oppy, Mathew Stunnabeck, and Captain Harold Bell.[1] This matter is before the Court on plaintiff's motion for default judgment (Doc. 14); the State of Ohio's motion to strike plaintiff's motion for default judgment (Doc. 21); plaintiff's second motion for default judgment (Doc. 32), defendants' response in opposition to plaintiff's motion for default judgment (Doc. 34), and plaintiff's reply in support of his motion for default judgment (Doc. 36); plaintiff's motion for appointment of counsel (Doc. 37) and defendants' opposing memorandum (Doc. 38); and defendants' motion for summary judgment (Doc. 40), plaintiff's opposing memorandum (Doc. 43), and defendants' reply in support of their motion (Doc. 44).

[1] Plaintiff also named as defendants the State of Ohio, the Rules Infraction Board (RIB), Warden Donnie Morgan and Larry Greene, but these defendants were dismissed from the case by Order dated June 14, 2012. (Doc. 23).

## I. Background

Plaintiff filed two separate lawsuits based on the incidents giving rise to his § 1983 complaint: *Abdulraman* v. *Davis,* Case No. 1:12-cv-220, which plaintiff instituted on March 16, 2012, and the above-captioned case, which plaintiff filed on March 13, 2012. (Doc. 1). The two cases were consolidated by Order of the Court under Case No. 1:12-cv-209 on April 23, 2012. (Doc. 11). The facts giving rise to plaintiff's claims are set forth in the Court's Order and Report and Recommendation issued on May 17, 2012 (Doc. 19), and are incorporated herein by reference. To summarize, plaintiff alleges that he is a Sunni Muslim who, prior to being transferred from another institution (Toledo Correctional Institution) to SOCF, obtained a religious accommodation approval for his hair, which he grew long according to his religious beliefs. Plaintiff alleges that following his transfer to SOCF, he was removed from the general population on multiple occasions in December 2011 based on purported hair grooming infractions. Plaintiff further alleges that in January 2012, the RIB conspired to increase his security grade in response to his hair-related infractions. Plaintiff contends that on January 30, 2012, defendant Davis filed a false conduct report stating that plaintiff did not have a religious exemption to grow his hair long. Plaintiff asserts that on February 1, 2012, a number of defendants participated in forcibly cutting his hair. Plaintiff also claims that he was discriminated against by being denied halal meals and being separated from other Muslims during prayer. In addition, plaintiff alleges that a number of defendants exhibited deliberate indifference to his serious medical needs by denying him mental health treatment and isolating him in lieu of providing such treatment. Plaintiff also appears to allege that defendant Mohr instituted a lockdown process that amounted to deliberate indifference to his safety. In its Report and Recommendation, the Court liberally construed plaintiff's complaint as stating a claim for

relief under the First Amendment; a claim for deliberate indifference to serious medical needs; and a claim for deliberate indifference to safety against defendant Mohr only. (Doc. 19). The Court recommended dismissal of plaintiff's remaining claims for failure to state a claim upon which relief could be granted. The Report and Recommendation was adopted by Order of the Court dated June 14, 2012. (Doc. 23).

**II. Motion for appointment of counsel (Doc. 37)**

Plaintiff, who has been granted leave to proceed *in forma pauperis*, moves the Court to appoint counsel to represent him in this matter. Plaintiff alleges that his incarceration will severely limit his ability to litigate this case, particularly because he is a Somalian immigrant who is unable to read or write and is dependent upon other inmates to assist him. Plaintiff alleges that his efforts to pursue this lawsuit are further hampered by his confinement in virtual administrative segregation and by his limited access to the law library. Plaintiff contends that his case is meritorious and counsel should be appointed in the interest of justice.

The law does not require the appointment of counsel for indigent plaintiffs in cases such as this, *see Lavado v. Keohane*, 992 F.2d 601, 604-05 (6th Cir. 1993), nor has Congress provided funds with which to compensate lawyers who might agree to represent those plaintiffs. The appointment of counsel in a civil proceeding is not a constitutional right and is justified only by exceptional circumstances. *Id.* at 605-06. *See also Lanier v. Bryant*, 332 F.3d 999, 1006 (6th Cir. 2003). Moreover, there are not enough lawyers who can absorb the costs of representing persons on a voluntary basis to permit the Court to appoint counsel for all who file cases on their own behalf. The Court makes every effort to appoint counsel in those cases that proceed to trial, and in exceptional circumstances will attempt to appoint counsel at an earlier stage of the

litigation. No such circumstances appear in this case. Therefore, plaintiff's motion for appointment of counsel is DENIED.

**III. Motions for default judgment (Docs. 14, 32) and motion to strike (Doc. 21)**

Plaintiff filed a motion for default judgment against all defendants on May 9, 2012, alleging only that the complaint had been filed on April 3, 2012, and there had been no response within 20 days. (Doc. 14). The State of Ohio moved on behalf of the individual defendants to strike plaintiff's motion on the ground that the Court lacked jurisdiction to render a default judgment against any named defendant because service had not been executed on any defendant and plaintiff had failed to obtain an entry of default pursuant to Fed. R. Civ. P. 55(a). (Doc. 21). Plaintiff filed a second motion for default judgment on July 11, 2012. (Doc. 32). Plaintiff alleges that the United States Marshal returned certificate of service forms with signatures on May 17 and June 1, 2012, and defendants had not responded even though more than 20 days had elapsed. Plaintiff also submitted a document captioned, "Entry of Default." (Doc. 33). Defendants oppose plaintiff's second motion for default judgment because they contend that they timely responded to the complaint. (Doc. 35). Defendants also request that the Court assess against plaintiff all costs they have incurred in responding to his motions for default judgment because they allege the motions were not made in good faith and are unfounded. In reply, plaintiff acknowledges that defendants have answered the complaint, but he contends the answers are deficient. (Doc. 36).

Plaintiff's motions for default judgment are not well-taken. Service was executed on the various defendants on May 31, June 1, June 4, and June 6, 2012, making defendants' answers due on June 21, 2012, at the earliest. (Doc. 25). Defendants filed a motion for extension of time to file their answer on June 20, 2012 (Doc. 27), and the Court granted them an extension of time

until July 6, 2012. (Doc. 28). Defendants timely filed their answer on July 6, 2012. (Doc. 30). Accordingly, the entry of a default judgment against defendants for failure "to plead or otherwise defend" against this lawsuit is not warranted. *See* Fed. R. Civ. P. 55. Defendants' request that they be awarded the costs they have incurred in responding to plaintiff's motions for default judgment should be denied because defendants have not cited any authority for the Court to assess costs against plaintiff.

**IV. Defendants' motion for summary judgment (Doc. 40)**

Defendants move for summary judgment pursuant to Fed. R. Civ. P. 56 on the ground plaintiff failed to exhaust his available administrative remedies before filing this lawsuit as required by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a).

Fed. R. Civ. P. 56 allows summary judgment to secure a just and efficient determination of an action. The court may only grant summary judgment as a matter of law when the moving party has identified, as his basis for the motion, an absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). The party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue. . . ." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986) (quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968)). The evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 (1970)). Moreover, documents filed by a pro se litigant are "to be liberally construed." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citing *Estelle v. Gamble,* 429 U.S. 97, 106 (1976)).

Under 42 U.S.C. § 1997e, as amended by the PLRA, a prisoner confined in any jail,

prison or other correctional facility may not bring an action challenging "prison conditions" under 42 U.S.C. § 1983 or any other federal law "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Exhaustion of administrative remedies is mandatory under the PLRA. *Booth v. Churner*, 532 U.S. 731, 739 (2001); *Vandiver v. Correctional Med. Serv., Inc.*, 326 F. App'x 885, 888 (6th Cir. 2009). The PLRA mandates "proper" exhaustion, meaning a prisoner must comply with the deadlines and other critical procedural rules that govern an internal grievance process as a precondition to bringing suit in federal court. *Woodford v. Ngo*, 548 U.S. 81, 90, 93 (2006); *Reed-Bey v. Pramstaller*, 603 F.3d 322, 324 (6th Cir. 2010) ("An inmate exhausts a claim by taking advantage of each step the prison holds out for resolving the claim internally and by following the 'critical procedural rules' of the prison's grievance process to permit prison officials to review and, if necessary, correct the grievance 'on the merits' in the first instance."). The grievance process must be completed before a federal complaint has been filed, and the prisoner may not exhaust administrative remedies during the pendency of his federal lawsuit. *Hopkins v. Ohio Dept. of Corrections*, 84 F. App'x 526, 527 (6th Cir. 2003) (citing *Freeman v. Francis,* 196 F.3d 641, 645 (6th Cir. 1999)).

Failure to exhaust is an affirmative defense under the PLRA which must be established by the defendant. *Napier v. Laurel County, Ky,* 636 F.3d 218, 225 (6th Cir. 2011) (citing *Jones v. Bock*, 549 U.S. 199, 204 (2007); *Vandiver*, 326 F. App'x at 888). "[I]nmates are not required to specially plead or demonstrate exhaustion in their complaints." *Jones*, 549 U.S. at 216.

Inmates at SOCF are bound to follow the three-step inmate grievance procedure set forth in OAC § 5120-9-31(K). (Doc. 43, Exh. C, Decl. of Gary Croft, Chief Inspector of the Ohio Dept. of Rehabilitation and Correction (ODRC)). Step one requires the inmate to file an

informal complaint with the direct supervisor of the department or staff member most directly responsible for the issue that is the subject of the complaint within 14 days of the date of the event giving rise to the grievance. (OAC § 5120-9-31(K)(1); Croft Decl., ¶ 4). If the inmate is dissatisfied with the response, he may proceed to step two by filing a notification of grievance with the Institutional Inspector within 14 days from the date of the informal complaint response. (OAC § 5120-9-31(K)(2); Croft Decl, ¶ 5). If the inmate is dissatisfied with the disposition of grievance, he may proceed to step three of the grievance process by submitting an appeal to the Office of the Chief Inspector at ODRC within 14 days of the date of the disposition of grievance. (OAC § 5120-9-31(K)(3); Croft Decl., ¶ 6). The Chief Inspector is to provide a written response within 30 calendar days of receiving an appeal, unless he extends the time frame for good cause and notifies the inmate. (OAC § 5120-9-31(K)(3); Croft Decl., ¶ 6). A decision of the Chief Inspector is final and concludes the grievance process. (OAC § 5120-9-31(K)(3); Croft Decl., ¶ 7).

Here, the undisputed evidence demonstrates that plaintiff failed to exhaust his available administrative remedies prior to filing his federal complaint. The evidence shows that plaintiff filed a notification of grievance dated February 15, 2012 (Grievance No. SOCF-03-12-000045). (Doc. 40, Exh. A, p. 2; Doc. 43). Plaintiff alleged in the notification of grievance that his rights were violated by several staff members at SOCF and he was "physically and emotionally assaulted" when he was "'tricked' and then physically forced" to get his hair cut. (*Id.*). A disposition of grievance was issued on March 6, 2012. (*Id.*; Case No. 1:12-cv-220, Doc. 1-4). It stated that defendant Davis had issued a conduct report to plaintiff for failing to comply with the grooming policy by failing to keep his hair in a ponytail or braided properly; he was found guilty of rules infractions and the RIB ordered him to get a haircut in order to come into compliance

with the policy; plaintiff was informed by defendant Oppy in the informal complaint response that he had no current hair exemption at SOCF; the institutional inspector had spoken with Davis and was informed that plaintiff had been unable to produce any documentation to support the alleged exemption; and Chaplain York found no record of a request for documentation for an exemption by plaintiff upon his transfer to SOCF. (Doc. 40, Exh. A, p. 2; Doc. 43; Case No. 1:12-cv-220, Doc. 1-4). Plaintiff's grievance was denied and he was informed of his right to appeal the decision. (*Id.*). Plaintiff appealed the disposition of grievance to the Chief Inspector on March 7, 2012. (Doc. 40, Exh. A, p. 3; Doc. 43; Case No. 1:12-cv-220, Doc. 1-4). Plaintiff instituted this lawsuit only days later, prior to receiving the decision of the Chief Inspector on appeal, which was issued on May 8, 2012. (Doc. 40, Exh. B). Plaintiff filed a supplemental complaint in this case on May 15, 2012 (Doc. 17), one week after the Chief Inspector issued his decision on appeal.[2] Plaintiff acknowledged in the supplemental complaint that the grievance process had been completed upon issuance of the decision of the Chief Inspector on appeal by noting: "Grievance appeal exhausted and attached. Chief Inspector modified the inspector grievance decision on appeal number 03-12-000045. . . ."

The evidence produced by defendants in support of their motion for summary judgment and plaintiff's submissions therefore establish that plaintiff did not complete the third step of the inmate grievance procedure for the grievance pertaining to his alleged religious exemption (Grievance No. 03-12-000045) until after he had filed his federal complaint. Moreover, plaintiff does not dispute that Grievance No. 03-12-000045 is the only grievance he filed with respect to the claims raised in this lawsuit. Accordingly, because plaintiff has not come forward with

[2] The Chief Inspector's decision modified the decision of the Institutional Inspector by acknowledging that plaintiff had been granted a religious exemption in May 2011 at another institution pursuant to which his hair could be worn "in a ponytail, braids or plaits style" and that he was granted permission to grow his beard to a specific width. (*See* Doc. 17).

evidence to rebut defendants' showing that he failed to exhaust his administrative remedies as to any claim prior to bringing suit, defendants are entitled to summary judgment as a matter of law. *See Hopkins*, 84 F. App'x at 527 ("When a prisoner fails to exhaust his administrative remedies before filing a civil rights complaint in federal court, or only partially exhausts administrative remedies, dismissal of the complaint is appropriate.").

**IT IS THEREFORE ORDERED THAT:**

1. Plaintiff's motion for appointment of counsel (Doc. 37) is DENIED.

**IT IS THEREFORE RECOMMENDED THAT:**

1. Plaintiff's motions for default judgment (Docs. 14, 32) be DENIED.

2. The State of Ohio's motion to strike plaintiff's motion for default judgment (Doc. 21) be DENIED as moot.

3. Defendants' motion for summary judgment be GRANTED and plaintiff's claims be dismissed without prejudice for failure to exhaust administrative remedies pursuant to 42 U.S.C. § 1997e.

4. The Court certify pursuant to 28 U.S.C. § 1915(a)(3) that an appeal of any Order adopting the Report and Recommendation would not be taken in good faith. *See McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997).

Date: 2/4/13

Karen L. Litkovitz
United States Magistrate Judge

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Civil Action No. 1:12-cv-209
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**NOTICE**

Pursuant to Fed. R. Civ. P. 72(b), **WITHIN 14 DAYS** after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. This period may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based in whole or in part upon matters occurring on the record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon, or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections **WITHIN 14 DAYS** after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters,* 638 F.2d 947 (6th Cir. 1981).

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