IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

KENNETH J. FLETCHER,

Plaintiff,

vs.

Civil Action 2:09-CV-1130
Judge Graham
Magistrate Judge King

WARDEN MICHAEL D. SHEETS,
et al.,

Defendants.

ORDER AND
REPORT AND RECOMMENDATION

Plaintiff alleges that, while incarcerated at the Ross Correctional Institution ("RCI"), defendants –- employees of the Ohio Department of Rehabilitation and Correction and officers at RCI –- subjected plaintiff to conditions that constituted cruel and unusual punishment, failed to protect plaintiff and failed to provide prescription medication. This matter is now before the Court on *Defendants' Motion to Dismiss Plaintiff's Amended Complaint*, Doc. No. 51 ("*Motion for Summary Judgment*"),[1] and *Plaintiff's Motion to Obtain Facts Pursuant to Civ. R. 56(d) and Request to Lift Stay of Discovery*, Doc. No. 63 ("*Plaintiff's Rule 56(d) Motion*"). For the reasons that follow, *Plaintiff's Rule 56(d) Motion* is **GRANTED in part and DENIED in part** and it is **RECOMMENDED** that the *Motion for Summary Judgment* be **GRANTED in part and DENIED in part**.

[1]As noted *infra*, the Court advised the parties of its intent to treat the motion to dismiss as one for summary judgment. *Order*, Doc. No. 60.

I. BACKGROUND

Plaintiff, an inmate in the custody of the Ohio Department of Rehabilitation and Correction ("ODRC"), has been incarcerated at RCI since November 23, 2005. *Affidavit of Kenneth Fletcher*, ¶¶ 1-2, attached to *Plaintiff's Memorandum in Opposition to Motion for Summary Judgment*, Doc. No. 66 ("*Plaintiff Affidavit*" and "*Plaintiff's Supplemental Response*"). On December 16, 2009, plaintiff filed this action. *Complaint*, Doc. No. 1. On January 27, 2011, plaintiff filed an amended complaint, naming as defendants RCI and six individuals, including RCI Warden Michael D. Sheets and RCI administrative assistant Marty Thornsbury. *Amended Complaint*, Doc. No. 33, ¶¶ 6-7. Plaintiff's claims are based on the events involving, and following, his placement in isolation with another inmate, Jasen Craven, on January 4, 2008. *Id*. at ¶¶ 3-4. Specifically, plaintiff alleges that defendant Corrections Officers David Tumbleson, Grady Warren and/or Jerry Nichols refused to move plaintiff from the cell after plaintiff expressed fear of injury from Craven. *Id*. at ¶¶ 23-28. Plaintiff alleges that Mr. Craven attacked him that night and plaintiff was hospitalized. *Id*. at ¶¶ 29-32. Following plaintiff's release from the hospital on January 16, 2008,[2] he further alleges, RCI officials refused to administer his prescribed pain medication for more than 12 hours. *Id*. at ¶¶ 34-35.

On January 27, 2011, defendants Michael D. Sheets and Marty Thornsbury filed a motion to dismiss the *Amended Complaint* in part,

[2]The *Amended Complaint* refers to a hospital release date in 2009. *Id*. at ¶ 34. Other references to the time-frame in the *Amended Complaint* suggest that this reference was in error and that plaintiff's release was actually in 2008.

which was later granted in part. *Opinion and Order*, Doc. No. 79 (dismissing Count 4 against defendants Sheets and Thornsbury and dismissing Count 5). On May 3, 2011, all of the defendants filed their *Motion for Summary Judgment* which addresses the *Amended Complaint*. Shortly thereafter, defendants filed an unopposed motion to stay discovery pending resolution of the *Motion for Summary Judgment*, which was granted on June 1, 2011. *Order*, Doc. No. 58.[3]

After plaintiff opposed defendants' motion, the Court advised the parties of its intent to convert the motion to dismiss to one for summary judgment under Rule 56 and ordered additional briefing. *Order*, Doc. No. 60. *Plaintiff's Rule 56(d) Motion* was filed, as was his supplemented response to the *Motion for Summary Judgment. Plaintiff's Supplemental Response*. Defendants have opposed *Plaintiff's Rule 56(d) Motion*, Doc. No. 69, and filed a supplemental reply in support of the *Motion for Summary Judgment*. *Defendants' Reply to Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss / Converted Motion for Summary Judgment (Doc. #: 66)*, Doc. No. 71 ("*Defendants' Supplemental Reply*").

III. *PLAINTIFF'S RULE 56(D) MOTION*

The *Motion for Summary Judgment* addresses primarily the issue of exhaustion as to certain claims. Plaintiff does not seek discovery as to exhaustion, conceding that he has already conducted discovery related to that issue. However, plaintiff does ask the Court to lift the stay of discovery so that he can conduct additional merits

[3]Previously, the Court had extended the pretrial schedule, requiring, *inter alia*, that non-damages related discovery be completed by July 31, 2011, and that motions for summary judgment be filed no later than August 31, 2011. *Order*, Doc. No. 45.

discovery. *Plaintiff's Rule 56(d) Motion*, p. 3; *Affidavit in Support of Motion to Obtain Facts* (*"Rule 56(d) Affidavit"*), ¶¶ 3-9, attached thereto.

Rule 56(d) establishes the proper procedure where a party concludes that additional discovery is necessary in order to respond to a motion for summary judgment:

> **When Affidavits Are Unavailable**. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
>
> (2) allow time to obtain affidavits or declarations or to take discovery; or
>
> (3) issue any other appropriate order.

Fed. R. Civ. P. 56(d). The affidavit required by the rule must "indicate to the district court [the party's] need for discovery, what material facts it hopes to uncover, and why it has not previously discovered the information." *Cacevic v. City of Hazel Park*, 226 F.3d 483, 488 (6th Cir. 2000) (citing *Radich v. Goode*, 886 F.2d 1391, 1393-94 (3d Cir. 1989)). A motion under Rule 56(d) may be properly denied where the requesting party "makes only general and conclusory statements regarding the need for more discovery and does not show how an extension of time would have allowed information related to the truth or falsity of the [document] to be discovered," *Ball v. Union Carbide Corp.*, 385 F.3d 713, 720 (6th Cir. 2004) (citing *Ironside v. Simi Valley Hosp.*, 188 F.3d 350, 354 (6th Cir. 1999)), or where the affidavit "lacks 'any details' or 'specificity.'" *Id*. (quoting *Emmons v. McLaughlin*, 874 F.2d 351, 357 (6th Cir. 1989)). *See also Cardinal v. Metrish*, 564 F.3d 794, 797-98 (6th Cir. 2009) ("If the plaintiff

makes only general and conclusory statements in his affidavit regarding the needed discovery, lacks any details or specificity, it is not an abuse of discretion for the district court to deny the request."). Finally, it is within the discretion of the district court whether or not to permit additional discovery under Rule 56(d). *See*, *e.g.*, *Egerer v. Woodland Realty, Inc.*, 556 F.3d 415, 425-26 (6th Cir. 2009).

In support of plaintiff's motion under Rule 56(d), his counsel represents by way of affidavit that none of the parties' depositions have been taken and that he requires additional time to depose defendants. *Rule 56(d) Affidavit*, ¶¶ 3, 7. Plaintiff's counsel represents that "[f]urther discovery is needed to avoid prejudice to Plaintiff." *Id*. at ¶ 9.

This case was filed in December 2009. On May 20, 2010, the Court established a discovery deadline of December 1, 2010, *Preliminary Pretrial Order*, Doc. No. 17, which was later extended to June 30, 2011. Doc. No. 29. After plaintiff sought an extension of time to disclose experts, the Court granted the requested extension and modified the discovery deadline accordingly, requiring that discovery be completed by July 31, 2011. *Order*, Doc. No. 45. The stay of discovery was entered, without opposition from plaintiff, on June 1, 2011. *Order*, Doc. No. 58. Although plaintiff complains that defense counsel failed to provide deposition dates for the defendants before the stay was issued, *i.e.*, approximately two months before the close of discovery, *Rule 56(d) Affidavit*, ¶¶ 2-3, the Court notes that plaintiff had more than one year, from May 2010 to June 1, 2011, in which to secure deposition dates from defense counsel. Plaintiff

offers no explanation as to why he did not depose, or why he was unable to depose, defendants during that year. *See Cacevic*, 226 F.3d at 488.

Moreover, the *Rule 56(d) Affidavit* provides no details as to what specific, material facts plaintiff hopes to discover in the depositions. *Cacevic*, 226 F.3d at 488. Instead, plaintiff's counsel asserts that defendants' depositions as they "relate[] to the merits of Plaintiff's complaint" are necessary to discover "[f]acts relating to the events of the dates in question" including "the orders, conversations, intent, and knowledge of the Defendants[.]" *Id*. at ¶ 8. As discussed *supra*, conclusory statements, devoid of any specificity, about the need for discovery are usually insufficient to establish a need for additional discovery under Rule 56(d). *See Ball,* 385 F.3d at 720.

Nevertheless, the Court notes that defendants offer no evidentiary support contradicting plaintiff's counsel assertion that defense counsel failed to provide deposition dates for defendants. *See generally*, Doc. No. 69. In addition, defendants do not specifically oppose the requested extension of time for merits discovery, focusing instead on the issue of exhaustion. *Id*. Under these circumstances, and considering the strong policy of deciding cases on the merits, *see*, *e.g.*, *Shepard Claims Service, Inc. v. William Darrah & Associates*, 796 F.2d 190, 194 (6th Cir. 1986), the Court concludes that its discretion is better exercised by permitting a short extension of discovery limited to the surviving claims addressed *infra*.

III. *MOTION FOR SUMMARY JUDGMENT*

A. Standard

The standard for summary judgment is well established. This standard is found in Rule 56 of the Federal Rules of Civil Procedure, which provides in pertinent part:

> The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(a). In making this determination, the evidence must be viewed in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144 (1970). Summary judgment will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986). However, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The mere existence of a scintilla of evidence in support of the opposing party's position will be insufficient; there must be evidence on which the jury could reasonably find for the opposing party. *Anderson,* 477 U.S. at 251.

The party moving for summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Catrett,* 477 U.S. at 323. Once the moving party has met its initial burden, the burden

then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson,* 477 U.S. at 250 (quoting former Fed. R. Civ. P. 56(e)); *Talley v. Bravo Pitino Restaurant, Ltd.,* 61 F.3d 1241, 1245 (6th Cir. 1995)("nonmoving party must present evidence that creates a genuine issue of material fact making it necessary to resolve the difference at trial"). "Once the burden of production has so shifted, the party opposing summary judgment cannot rest on the pleadings or merely reassert the previous allegations. It is not sufficient to 'simply show that there is some metaphysical doubt as to the material facts.'" *Glover v. Speedway Super Am. LLC,* 284 F.Supp.2d 858, 862 (S.D. Ohio 2003) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986)). Instead, the non-moving party must support the assertion that a fact is genuinely disputed. Fed. R. Civ. P. 56(c)(1).

In ruling on a motion for summary judgment "[a] district court is not ... obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *Glover,* 284 F.Supp. 2d at 862 (citing *InteRoyal Corp. v. Sponseller,* 889 F.2d 108, 111 (6th Cir. 1989)). Instead, a "court is entitled to rely, in determining whether a genuine issue of material fact exists on a particular issue, only upon those portions of the verified pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties." *Id. See also* Fed. R. Civ. P. 56(c)(3).

B. Exhaustion[4]

Defendants contend that plaintiff has failed to exhaust his administrative remedies as to Count 1 (failure to protect) and Court 2 (unconstitutional custom or policy based on refusal to protect inmates) as against defendants Thornsbury, RCI administrative assistant, Gordon S. Price, Captain at RCI, David Tumbleson, RCI Corrections Officer, Grady Warren, RCI Corrections Officer, and Jerry Nichols, RCI Corrections officer (collectively, "the non-warden defendants"),[5] and as to Count 3 (failure to provide prescription medication) and 4 (unconstitutional custom or policy based on refusal to provide prescription medication) as against all of these non-warden defendants except defendant Thornsbury ("the remaining non-warden defendants"). *Motion for Summary Judgment*, pp. 4-7; *Defendants' Supplemental Reply*, pp. 4-8.

1. Standard for Exhaustion

The Prison Litigation Reform Act ("PLRA") requires that a prisoner filing a claim under federal law relating to prison conditions must first exhaust available administrative remedies. *Porter v. Nussle*, 534 U.S. 516 (2002); *Booth v. Churner*, 532 U.S. 731 (2001). The statute provides, in pertinent part:

> No action shall be brought with respect to prison conditions under [section 1983 of this title], or any other Federal

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[4]As noted *supra*, plaintiff agrees that he has conducted discovery as to the issue of exhaustion and implicitly concedes that this issue is ripe for resolution.

[5]Defendants also move to dismiss claims against RCI and state law claims but, as plaintiff notes, RCI was previously dismissed as a party. Doc. No. 54, pp. 2, 4-5; *Opinion and Order*, Doc. No. 10. Likewise, all state law claims were previously dismissed. *Id*. Accordingly, the Court will not address arguments as they relate to these matters.

> law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

In order to satisfy this exhaustion requirement, an inmate plaintiff must "complete the administrative review process in accordance with the applicable procedural rules[.]" *Woodford v. Ngo*, 548 U.S. 81, 88 (2006). "[F]ailure to exhaust is an affirmative defense under the PLRA, and [ ] inmates are not required to specifically plead or demonstrate exhaustion in their complaints." *Jones v. Bock*, 549 U.S. 199, 216 (2007). Exhaustion is not a jurisdictional predicate but the requirement is nevertheless mandatory, *Wyatt v. Leonard*, 193 F.3d 876, 879 (6th Cir. 1999), even if proceeding through the administrative procedure would appear to the inmate to be "futile." *Hartsfield v. Vidor*, 199 F.3d 305, 308-10 (6th Cir. 1999).

Ohio has established a procedure for resolving inmate complaints. Ohio Admin. Code § 5120-9-31. The procedure is available to an inmate "regardless of any disciplinary status, or other administrative or legislative decision to which the inmate may be subject," § 5120-9-31(D), and is intended to "address inmate complaints related to any aspect of institutional life that directly and personally affects the grievant," including "complaints regarding policies, procedures, conditions of confinement. . . ." § 5120-9-31(A). This administrative procedure includes three steps. Ohio Admin. Code § 5120-9-31. First, an inmate must file an informal complaint with "the direct supervisor of the staff member, or department most directly responsible for the particular subject matter of the complaint." Ohio Admin. Code §

5120-9-31(K)(1). If that complaint does not result in a decision satisfactory to the inmate, the inmate can appeal the decision to the Inspector of Institutional Services. Ohio Admin. Code § 5120-9-31(K)(2). If that appeal is found to be without merit, the inmate can then appeal the decision to the Chief Inspector. Ohio Admin. Code § 5120-9-31(K)(3). Notwithstanding this three-step procedure, however, "[g]rievances against the warden or inspector of institutional services must be filed directly to the office of the chief inspector" and must show that the warden "was personally and knowingly involved in a violation of law, rule or policy, or personally and knowingly approved or condoned such a violation." Ohio Admin. Code § 5120-9-31(M). "The decision of the chief inspector or designee is final." *Id*.

2. Evidence Presented

In the case *sub judice*, defendants refer the Court to the documents filed in support of the motion to dismiss previously filed by defendants Warden Sheets and Thornsbury. *Motion to Dismiss*, p. 8 n.11 (citing to, *inter alia*, *Defendants' (Sheets and Thornsberry) Partial Motion to Dismiss Amended Complaint*, Doc. No. 34 ("*First Motion to Dismiss*")). Specifically, defendants proffer the declaration of Robert Whitten, RCI's Institutional Inspector, and the declaration of Suzanne Evans, a correctional grievance officer with ODRC's Central Office. *See Exhibit A*, ¶ 2 ("*Evans Declaration*") and *Exhibit B*, ¶ 2 ("*Whitten Declaration*"), attached to the *First Motion to Dismiss*. Mr. Whitten avers that plaintiff has never filed any notifications of grievance with RCI's Office of the Institutional

Inspector. *Whitten Declaration*, ¶ 3. Ms. Evans avers that, from January 1, 2008 until the present, plaintiff has filed only one notification of grievance directly with the Chief Inspector [hereinafter "Grievance 1"].[6] *Evans Declaration*, ¶ 8; *Exhibit A-1*, pp. 1-2, attached thereto. Page 1 of Grievance 1 complains that defendant Thornsbury placed plaintiff, a Muslim, in isolation, at the direction of Warden Sheets, with an inmate known to dislike Muslims and who subsequently attacked plaintiff, resulting in plaintiff's hospitalization. *Exhibit A-1*, p. 1. Page 2 of Grievance 1 details plaintiff's belief that he was placed in isolation for refusing to participate in a news interview, asserting that Warden Sheets acted unprofessionally and vindictively. *Id*. at 2. Grievance 1 was denied on May 21, 2008, and Ms. Evans avers that plaintiff has filed no grievance appeals. *Exhibit A-1*, p. 3; *Evans Declaration*, ¶ 8.

In supplementing his opposition to the *Motion for Summary Judgment*, plaintiff avers that, on January 29, 2008, he "submitted two different documents as grievances directly to the Chief Inspector. Both grievances had the same first page; however, the second pages of the grievances are different because I wished to provide additional information. I filed both grievances at the same time." *Plaintiff Affidavit*, ¶ 14. These two grievances include Grievance 1 and the document attached to *Plaintiff Affidavit* [hereinafter "Grievance 2"] [collectively, "grievances"]. *Plaintiff Affidavit*, ¶¶ 14-16. Unlike Page 2 of Grievance 1, Page 2 of Grievance 2 specifically complains

[6]This grievance is dated January 25, 2008, with a receipt stamp date January 29, 2008. *Exhibit A-1*, attached to the *First Motion to Dismiss* ("Grievance 1").

that, after plaintiff was released from the hospital, a "Dr. Coulter" told him that plaintiff's medication may be dispensed only by staff nurses or doctors. Grievance 2, p. 2. After spending a night in isolation without a mattress, he asked an unidentified nurse for medication. *Id*. Although she initially declined his request, the nurse gave plaintiff his prescribed medication the next day. *Id*.

Defendants also proffer the Declaration of Linda Coval, Deputy Chief Inspector, Office of the Chief Inspector of ODRC. *Exhibit C*, ¶ 2, attached to Doc. No. 53 ("*Coval Declaration*"). As Deputy Chief Inspector, Ms. Coval monitors the application and disposition of the inmate grievance procedure throughout all ODRC institutions. *Id*. Ms. Coval avers that her office, "[a]s a matter of course, maintains a copy of each page of each grievance document it receives" even if a document appears to be a duplicate grievance. *Id*. at ¶ 4. Therefore, "[i]f Mr. Fletcher had filed such a document [a grievance that contained the same first page as Grievance 1, *i.e.*, Grievance 2], Ms. Coval's office would maintain a copy of it." *Id*. at ¶ 5. Her office has only one two-page grievance (*i.e.*, Grievance 1) from plaintiff. *Id*.

3. Application

Defendants argue that plaintiff failed to exhaust his administrative remedies as to the non-warden defendants.[7] This Court previously dismissed Counts 3 and 4 as against defendants Warden Sheets and Thornsbury. *Opinion and Order*, Doc. No. 79. These claims

[7]As plaintiff notes, defendants do not argue that plaintiff failed to exhaust his administrative remedies as to Counts 1 and 2 as against Warden Sheets.

against the remaining non-warden defendants and Count 1 (failure to protect) and Count 2 (unconstitutional custom or policy based on refusal to protect inmates) against all of the non-warden defendants fail for the same reasons previously articulated by the Court. As to the claims against the non-warden defendants, plaintiff was required to follow the three-step grievance procedure outlined in Ohio Admin. Code § 5120-9-31(K). Rather than following that procedure, however, plaintiff bypassed the first two procedural steps and filed his grievances[8] directly with the Chief Inspector. *Plaintiff Affidavit*, ¶¶ 14-15. Plaintiff therefore failed to properly exhaust his administrative remedies as to Counts 3 and 4 as against the remaining non-warden defendants and as to Counts 1 and 2 as against all of the non-warden defendants.

Plaintiff, however, argues that the procedure that he actually followed was proper because the grievances against the non-warden defendants also concerned Warden Sheets. *Plaintiff's Supplemental Response*, pp. 13-16. Stated differently, plaintiff argues that, when grieving against multiple individuals, including the warden, he need only file one grievance directly with the Chief Inspector. *Id*. Defendants disagree, contending that plaintiff was required to follow the three-step procedure outlined in Ohio Admin Code § 5120-9-31(K) as to claims against the non-warden defendants. *Motion for Summary Judgment*; *Defendants' Supplemental Reply*. Defendants' argument is well-taken.

In support of his position that he need only file one grievance

[8]The Court accepts, for present purposes, that plaintiff submitted two grievances to the Chief Inspector.

directly with the Chief Inspector if a grievance involves the Warden and other, non-warden, individuals, plaintiff argues that it is "not clear" whether the Ohio Administrative Code requires one or multiple grievances "when a grievance involves both the Warden and other institutional staff." *Plaintiff's Supplemental Response*, pp. 15-16. Plaintiff is correct that the Court's analysis must begin with the actual language of the Ohio Administrative Code. *Cf*. *Brilliance Audio, Inc. v. Haights Cross Comm'n, Inc.*, 474 F.3d 365, 371 (6th Cir. 2007) ("As with any question of statutory interpretation, we must first look to the language of the statute itself."); *Pittsburgh & Conneaut Dock Co. v. Director, Office of Workers' Compensation Programs*, 473 F.3d 253, 266 (6th Cir. 2007) ("In all cases of statutory construction, the starting point is the language employed by Congress.") (citing *Appleton v. First Nat'l Bank of Ohio*, 62 F.3d 791, 801 (6th Cir. 1995) (internal quotation marks omitted)). However, the plain language of Ohio Admin Code § 5120-9-31 specifically provides two different procedures that an inmate must follow when pursuing grievances against institutional staff or against the warden. Ohio Admin Code § 5120-9-31(K), (M). Neither of these two provisions provide exceptions to the detailed procedures. *Id*. Stated differently, nothing in the plain language of Ohio Admin Code § 5120-9-31(K) permits an inmate pursuing a grievance against a member of the institutional staff to bypass the first two steps of the three-step procedure simply by naming the warden in the same grievance. Because this language is clear, the Court's inquiry is complete. *See, e.g.*, *Brilliance Audio, Inc.*, 474 F.3d at 371; *Pittsburgh & Conneaut Dock Co.*, 473 F.3d at 266 ("Moreover, where the statute's language is

plain, the sole function of the courts is to enforce it according to its terms.") (citing *Chapman v. Higbee Co.*, 319 F.3d 825, 829 (6th Cir.2003) (internal quotation marks omitted)).

Plaintiff nevertheless contends that the relevant statutory language, that "[w]henever feasible, inmate complaints should be resolved at the lowest step possible[,]" Ohio Admin Code § 5120-9-31(K), permits an inmate to bypass the first two steps if an inmate complains of actions of staff and of the warden in the same grievance. This Court disagrees. Accepting plaintiff's construction would permit an inmate to circumvent the three-step procedure as to claims against staff simply by characterizing the grievance as one against the warden as well. This result, for which plaintiff cites to no case authority, renders Ohio Admin Code § 5120-9-31(K) superfluous or insignificant, which is an unacceptable outcome. *See*, *e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (citations and internal quotation marks omitted). Indeed, even plaintiff does not appear to be persuaded by his own argument. After asserting that it was proper to file his grievances against the staff directly with the Chief Inspector, he later concedes that he only "substantially complied" with the requirements of Ohio Admin. Code § 5120-9-31 by doing so. *Plaintiff's Supplemental Response*, p. 16. Plaintiff cites to no authority that supports the contention that "substantial compliance" with the Code provisions is sufficient to exhaust his administrative remedies. Again, accepting plaintiff's contention that bypassing the

first two steps contained in Ohio Admin. Code § 5120-9-31(K) is acceptable renders those provisions meaningless, a result that this Court must avoid. *TRW Inc.*, 534 U.S. at 31.

Moreover, even assuming, *arguendo*, that plaintiff's reading of Ohio Admin. Code § 5120-9-31(K)is correct, plaintiff has still failed to exhaust his administrative remedies. Under plaintiff's construction, an inmate does not have an unfettered right to file a grievance directly with the Chief Inspector. *Plaintiff's Supplemental Response*, pp. 15-16 (quoting Ohio Admin. Code § 5120-9-31(K) ("*Whenever feasible*, inmate complaints should be resolved at the lowest step possible.")) (emphasis added). Instead, plaintiff's reliance on this particular provision requires that, first, it not be feasible to follow step one or step two. *Id*. Here, plaintiff simply asserts that, because his grievances involved Warden Sheets, he was automatically permitted to file directly with the Chief Inspector. He offers no evidence or argument demonstrating that it was not feasible for him to follow the first two steps required by subsection (K). Under any analysis, then, plaintiff has not shown that he exhausted his administrative remedies as to Counts 3 and 4 as against the remaining non-warden defendants and as to Counts 1 and 2 as against all the non-warden defendants.

C. Claims Against Warden Sheets

Defendants argue that plaintiff has failed to demonstrate that Warden Sheets violated a constitutional right or that Warden Sheets was personally responsible for any such violation. As plaintiff notes, defendants do not attach any evidence but simply argue, *inter*

alia, that plaintiff has not presented information necessary to establish his claims. *See*, *e.g.*, *Defendants' Supplemental Reply*, pp. 4-5. Defendants' own argument suggests that additional merits discovery is necessary as to the remaining claims against Warden Sheets. Under these circumstances, summary judgment as to Counts 1 and 2 as against Warden Sheets is premature. Moreover, the Court concludes that limited discovery as to these issues is necessary.

WHEREUPON, it is **RECOMMENDED** that *Defendants' Motion to Dismiss Plaintiff's Amended Complaint*, Doc. No. 51, be **GRANTED in part and DENIED in part** and that *Plaintiff's Motion to Obtain Facts Pursuant to Civ. R. 56(d) and Request to Lift Stay of Discovery*, Doc. No. 63, be **GRANTED in part and DENIED in part**. Specifically, plaintiff's *Rule 56(f) Motion* is **GRANTED** as it relates to Count 1 (failure to protect) and Count 2 (unconstitutional law, custom or policy based on a refusal to protect inmates) as against defendant Warden Michael D. Sheets, but **DENIED** as to claims against the non-warden defendants. It is therefore **ORDERED** that the stay is lifted and that the discovery deadline is **EXTENDED** to October 31, 2011, to permit the parties to conduct limited discovery as it relates to Counts 1 and 2 against Warden Sheets. The deadline for filing motions for summary judgment is **EXTENDED** to November 30, 2011.

Further, it is **RECOMMENDED** that

1. defendants' motion dismiss, converted into a motion for summary judgment, Doc. No. 51, be **GRANTED** as to Counts 1 and 2 as against defendants Marty Thornsbury, Gordon S. Price, David Tumbleson, Grady Warren and Jerry Nichols;

2. defendants' motion be **GRANTED** as to Counts 3 and 4 as against defendants Gordon S. Price, David Tumbleson, Grady Warren and Jerry Nichols; and that

3. defendants' motion be **DENIED as to Count 1 (failure to protect) and Count 2 (unconstitutional law, custom or policy based on a refusal to protect inmates) as against defendant Warden Michael D. Sheets, but without prejudice to renewal** after the limited discovery period established herein.

If any party seeks review by the District Judge of this *Report and Recommendation,* that party may, within fourteen (14) days, file and serve on all parties objections to the *Report and Recommendation,* specifically designating this *Report and Recommendation,* and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. §636(b)(1); F.R. Civ. P. 72(b). Response to objections must be filed within fourteen (14) days after being served with a copy thereof. F.R. Civ. P. 72(b).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to *de novo* review by the District Judge and of the right to appeal the decision of the District Court adopting the *Report and Recommendation. See Thomas v. Arn,* 474 U.S. 140 (1985); *Smith v. Detroit Federation of Teachers, Local 231 etc.,* 829 F.2d 1370 (6th Cir. 1987); *United States v. Walters,* 638 F.2d 947 (6th Cir. 1981).

August 30, 2011 *s/Norah McCann King*

Norah McCann King
United States Magistrate Judge