



## **(PC-G) Goolsby v. Cate et al**

2014 | Cited 0 times | E.D. California | September 19, 2014

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EASTERN DISTRICT OF CALIFORNIA

THOMAS GOOLSBY, Plaintiff, vs. GENTRY, et al., Defendants.

1:11cv01773 LJO DLB PC FINDINGS AND RECOMMENDATIONS FOR SUMMARY JUDGMENT  
BASED ON FAILURE TO EXHAUST (Document 33-1) THIRTY-DAY DEADLINE

Plaintiff Thomas Goolsby

forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed this action on October 25, 2011. A. PROCEDURAL HISTORY

On May 20, 2013, the Court screened found the following cognizable claims: (1) First Amendment retaliation claim against Defendants Gentry, Noyce, Eubanks, Tyree, Medrano, Holman, Holland and Steadman; and (2) violation of due process against Defendants Eubanks, Tyree, Medrano, Holland and Gutierrez. The Court dismissed all other claims and Defendants. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

On November 26, 2013, Defendants filed a motion to dismiss the due process claims based on failure to state a claim and failure to exhaust. 1

Defendant Holman joined in the motion on December 13, 2013.

Plaintiff filed his opposition on January 6, 2014, and with Court permission, he filed a supplemental opposition on January 28, 2014.

Defendants filed their reply on March 13, 2014. Plaintiff filed a motion for leave to file a surreply, along with a surreply, on March 24, 2014. 2

outside evidence, the Court converted the portion of the motion to dismiss based on 12(b)(6) into a motion for partial summary judgment.



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Albino v. Baca, 747 F.3d 1162 (9th Cir. 2014), the Court converted the exhaustion portion of the motion to dismiss into a to Rule 56(d) and permitted the parties to file supplemental responses. Plaintiff filed his

supplemental response on August 15, 2014. Defendants did not file a supplemental response.

In the interest of clarity, the Court will rule on the two portions of the motion for summary judgment by separate Findings and Recommendations. Therefore, the instant Findings and Recommendations address only the portion of the motion for summary judgment based on failure to exhaust the due process claim against Defendants Holland and Gutierrez. The issue is fully briefed and ready for decision pursuant to Local Rule 230(l).

1 Defendants are not moving to dismiss the retaliation claim. 2 surreply relate to the 12(b)(6) portion of the motion to dismiss. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

B. ALLEGATIONS IN FAC Plaintiff is currently housed at the R. J. Donovan Correctional Facility. The events at issue occurred while he was incarcerated at CCI in Tehachapi, California. Plaintiff alleges that Defendants Gentry, Noyce, Eubanks, Tyree and Medrano initiated a validation packet against him on the orders of Defendants Holland and Steadmon. Plaintiff alleges that this was done in retaliation for filing appeals and lawsuits against them. He explains that in June 2010, he was placed in Ad-Seg pending conclusion of an investigation into his gang activities. On August 27, 2010, Defendant Noyce concluded the investigation and found insufficient evidence to validate Plaintiff as an associate of a prison gang. On September 10, 2010, he was released back into the general population. In December 2010, Plaintiff met with Defendant Holman in preparation for his inmate

you to drop your lawsuits on her or . . . else your [sic] going back to the hole permanently

On February 11, 2011, he was placed in Ad-Seg pending validation as an associate of the Nazi Low Rider prison gang. Defendant Eubanks gave him his validation packet and Defendant Tyree signed his lock-up order. Plaintiff alleges that upon reviewing his packet, the documents in his validation packet were the same as those used by Defendant Noyce to find insufficient evidence six months prior. On April 11, 2011, Plaintiff alleges that Defendant Eubanks admitted that the only reason that Plaintiff was validated was because of his lawsuits and appeals. He alleges that his placement in segregated housing has made it more difficult to conduct legal work, prosecute litigation and access the law library.

support validation. On January 26, 2010, Defendant Eubanks authored a confidential 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

memorandum indicating that he found a filter list in the property of two other inmates.



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evidence of gang association. Plaintiff appealed this issue. The appeal was answered by Defendants Holland and Defendant Gutierrez, who were aware of the use of the illegal filter list but continued to allow its use. Plaintiff further contends that in response to the validation packet, he wrote a detailed rebuttal to the allegations. He handed his rebuttal to Defendant Eubanks, yet the packet stated that the investigation was already complete. Defendant Eubanks did nothing with the rebuttal and failed to investigate his contentions. Plaintiff contends that this violated his right to due process because it denied him an opportunity to be heard in a meaningful way. Plaintiff appealed this issue. The appeal was answered by Defendants Holland and Gutierrez, who were aware of the issue but did nothing to allow Plaintiff to be heard in a meaningful way. was confiscated by Defendant Tyree on May 15, 2009. He contends that this address book

included names of prisoners, some of which were friends or were witnesses to planned litigation. Defendant Medrano reviewed the names and came up with two inmates who were validated. Plaintiff had no idea that these inmates were validated at the time he received their information, and had he known, he would not have possessed their information. The two inmates in question were both witnesses in a legal action that Plaintiff was prosecuting, and neither was contacted for personal or gang-related reasons. He contends that Defendants Medrano and Tyree had no evidence that Plaintiff possessed their information for any reasons other than legitimate ones. Plaintiff brought this issue to the attention of Defendants Holland and Gutierrez, but they failed to review the issue in any meaningful manner. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

### C. SUMMARY JUDGMENT STANDARD

The failure to exhaust is subject to a motion for summary judgment in which the court may look beyond the pleadings. *Albino v. Baca*, 747 F.3d 1162, 1170 (9th Cir. 2014). If the Court concludes that Plaintiff has failed to exhaust, the proper remedy is dismissal without prejudice. *Jones*, 549 U.S. at 223-24; *Lira v. Herrera*, 427 F.3d 1164, 1175-76 (9th Cir. 2005).

o the prisoner shows a failure *Albino*, 747 F.3d at 1166. [following such denial] the district judge *Id.* The *Albino* court specified that the court should act as the finder of fact in connection with an and of a prisoner s claim. *Id.* at 1168, 1170.

In judging the evidence at the summary judgment stage, the Court may not make credibility determinations or weigh conflicting evidence, *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) (quotation marks and citation omitted), and it must draw all inferences in the light most favorable to the nonmoving party and determine whether a genuine issue of material fact precludes entry of judgment, *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 942 (9th Cir. 2011) (quotation marks and citation omitted), cert. denied, 132 S.Ct. 1566 (2012). The Court determines only whether there is a s must be liberally construed because he is a pro se prisoner. *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010) (quotation marks and citations omitted). 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28



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### D. DISCUSSION

1. Exhaustion Requirement Pursuant to the Prison Litigati respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner

confined in any jail, prison, or other correctional facility until such administrative remedies as are available administrative remedies prior to filing suit. *Jones v. Bock*, 549 U.S. 199, 211, 127

S.Ct. 910 (2007); *McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). Exhaustion is required regardless of the relief sought by the prisoner and regardless of the relief offered by the process, *Booth v. Churner*, 532 U.S. 731, 741, 121 S.Ct. 1819 (2001), and the exhaustion requirement applies to all suits relating to prison life, *Porter v. Nussle*, 435 U.S. 516, 532, 122 S.Ct. 983 (2002). An administrative grievance must alert the prison to the nature of the wrong for which redress is sought. *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009).

#### 2. Appeals Process

administrative grievance system for prisoners to appeal any departmental decision, action, . Cal. Code Regs. tit. 15, § 3084.1. Generally, a prisoner must proceed through an initial informal level and three formal levels of review, culminating in a third-level decision. Cal. Code Regs. tit. 15, § 3084.7. In order to satisfy section 1997e(a), California state prisoners are required to use this process to exhaust their claims prior to filing suit. *Woodford v. Ngo*, 548 U.S. 81, 85-86, 126 S.Ct. 2378 (2006); *McKinney*, 311 F.3d at 1199-1201.

3. Analysis Defendants argue that Plaintiff failed to exhaust his due process claims against Defendants Holland and Gutierrez. They Second Level on July 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

Alomari Decl., Ex. F. The Court found that Plaintiff stated a claim against them in their role as appeal reviewers because Defendant Gutierrez was an Institutional Gang Investigation captain, and Plaintiff had alleged that Defendant Holland instructed other Defendants to validate him. These facts suggested that as appeal reviewers, they may have turned a blind eye to a constitutional violation committed by subordinates. *Jett v. Penner*, 439 F.3d 1091, 1098 (9th Cir. 2006). The undisputed facts show that Plaintiff filed appeal log number CCI-11-0708, the appeal that raised the underlying due process issues, on or about June 9, 2011. Alomari Decl. ¶ 6, Ex. F. On July 21, 2011, Defendants Holland and Gutierrez issued a response at the Second Level. Alomari Decl. ¶ 6, Ex. F. Plaintiff sought review at the Third Level, which was denied on October 3, 2011. Alomari Decl. ¶ 6, Ex. F. It is also undisputed that Plaintiff did not file a separate appeal relating solely to the July 21, 2011, Second Level review by Defendant Holland and Gutierrez. Defendants contend that - 0708 could not have exhausted the issues against Defendants Holland and Gutierrez because it was filed prior to their involvement in the appeal. In opposition, Plaintiff argues that CCI-11-0708 sufficed to



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exhaust the claims against Defendants Gutierrez and Holland. He argues that pursuant to section 3084.2 of Title 15 of the California Code of Regulations, his only option to contest the Second Level decision of Defendants Holland and Gutierrez was to file at the Third Level. In essence, then, Plaintiff believes that he did exactly what he was supposed to do, and all he could do, to challenge the actions of Defendant Holland and Gutierrez. Plaintiff argues that

therefore had the opportunity to correct their actions. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

The Court does not agree that the underlying appeal exhausted the claims against Defendants Holland and Gutierrez. he prison on Sapp v. Kimbrell, 623 F.3d 813, 822- Id. at 824. CCI-11-0708, filed before Defendants Holland and Gutierrez reviewed his appeal, did not, and could not, have sufficiently put the prison on notice of his claims against either Defendant Holland or Gutierrez. issues related to his gang validation. Alomari Decl., Ex. F. He did not identify any individuals, but rather set forth six reasons why he believed his gang validation was not proper. In this action, Plaintiff alleges that when Defendants Holland and Gutierrez reviewed his appeal at the Second Level, they did not allow him to be heard in a meaningful way and/or failed to review his issues in a meaningful way. Moreover, while he alleges that Defendant Holland was involved in the underlying retaliation, Defendant Gutierrez was not involved until he reviewed the appeal at the Second Level. The requirement of a separate appeal is supported by Section 3084.1(b), which states: ive remedies shall not be considered exhausted relative to any new issue, information, or person later named by the appellant that was not included in the originally submitted [appeal] and addressed through all required levels of administrative review up to and In other words, although Plaintiff contends that the Third Level review necessarily included his claims against Defendants Holland and Gutierrez, new claims are not permitted as the appeal moves through the levels of review. A prisoner does not exhaust administrative remedies when he includes new issues from one level of review to another. Dawkins v. Butler, 2013 WL 2475870, \*8 (S.D. Cal. 2013) (a claim made for the first 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

review was insufficient to exhaust the issue where it was not included in the original appeal). Even if Plaintiff could have properly raised the specific issues against Defendants Holland and Gutierrez after the Second Level review, he did not do so. On the section of the 602 form where an inmate can explain the reasons for dissatisfaction with the Second Level decision, e of my Alomari Decl., Ex. F. Plaintiff also argues that he would not have been permitted to file a separate appeal because filing at the Third Level was his only option for appealing the Second Level decision. He believes that if he had filed a separate appeal, it would have been considered appeal system abuse. The failure to exhaust may be excused where the administrative remedies are rendered the burden of demonstrating that the grievance process was unavailable to him through no fault of his own. Sapp, 623 F.3d at 822-23; Nunez v. Duncan, 591 F.3d 1217, 1224 (9th Cir. 2010); Brown v. Valoff, 422 F.3d 926, 939-40 (9th Cir. 2005). Here, although Plaintiff believes that there was no avenue to appeal his claims against Defendants Holland and Gutierrez, there is no evidence that he made reasonable,



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good faith effort to exhaust but was prevented from doing so. Sapp, 623 F.3d at 823; Nunez, 591 F.3d at 1224. Plaintiff therefore failed to carry his burden of demonstrating that administrative remedies were unavailable. argument that appealing the issue to the Third Level would necessarily include a claim that the

reviewers erred in their decision. However, given the undisputed facts and applicable law, the Court finds that separate appeals were necessary to properly exhaust the due process claims against Def 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

claims against them were distinct enough from the original appeal to require separate appeals. See eg. Simpson v. Justin, 2013 WL 3070625 (E.D. Cal. 2013). E. CONCLUSION AND RECOMMENDATION

Based on the foregoing, it is HEREBY RECOMMENDED that: 1. Defendants motion for summary judgment the due process claims against Defendants Holland and Gutierrez, filed on November 25, 2013, be GRANTED;

2. The due process claims against Defendants Holland and Gutierrez be DISMISSED WITHOUT PREJUDICE for

3. Defendant Gutierrez be DISMISSED from this action as the due process claim is the only claim against him.

These Findings and Recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within thirty (30) days after being served with these Findings and Recommendations, the parties may file

filing a response within fourteen (14) days after bei

objections. The parties are advised that failure to file objections within the specified time may Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991).

IT IS SO ORDERED. Dated: September 19, 2014 /s/ Dennis L. Beck UNITED STATES MAGISTRATE JUDGE

