FILED: March 20, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7001
(2:17-cv-00024-RAJ-RJK)

LAMOND LATNEY

Plaintiff - Appellant

v.

ANTHONY PARKER, Chief of Security

Defendant - Appellee

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Wilkinson, Judge Duncan and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7001

LAMOND LATNEY,

Plaintiff - Appellant,

v.

ANTHONY PARKER, Chief of Security,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Raymond A. Jackson, District Judge. (2:17-cv-00024-RAJ-RJK)

Submitted: December 21, 2017 Decided: December 28, 2017

Before WILKINSON and DUNCAN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Lamond Latney, Appellant Pro Se. Michael Gordon Matheson, THOMPSON MCMULLAN PC, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Lamond Latney appeals the district court's order granting Defendant Anthony Parker's motion for summary judgment in this 42 U.S.C. § 1983 (2012) action and dismissing the action due to Latney's failure to exhaust administrative remedies. We have reviewed the record and find no reversible error. Although Latney argues that his institutional complaint was in fact timely and that further remedies were unavailable, the district court properly rejected those assertions. *See Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (holding that proper administrative exhaustion requires compliance with agency deadlines and key procedural rules); *Ross v. Blake*, 136 S. Ct. 1850, 1858-60 (2016) (clarifying when administrative remedies are deemed unavailable). Accordingly, we affirm for the reasons stated by the district court. *Latney v. Parker*, No. 2:17-cv-00024-RAJ-RJK (E.D. Va. July 20, 2017). We deny Latney's motion to appoint counsel. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: December 28, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7001
(2:17-cv-00024-RAJ-RJK)

LAMOND LATNEY

Plaintiff - Appellant

v.

ANTHONY PARKER, Chief of Security

Defendant - Appellee

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

LAMOND LATNEY,

Plaintiff,

v. **ACTION NO. 2:17cv24**

ANTHONY PARKER,
Chief of Security,

Defendant.

DISMISSAL ORDER

Plaintiff, a Virginia inmate, filed this *pro se* action pursuant to 42 U.S.C. § 1983 to redress alleged violations of his constitutional rights. Specifically, Plaintiff contends that Defendant, the Chief of Security at Lawrenceville Correctional Center ("LVCC"), violated his rights under the First, Eighth, and Fourteenth Amendments by falsely accusing Plaintiff of being in possession of a cell phone, which Plaintiff believes led to his removal from his job providing janitorial services in the administrative building and hindered his subsequent attempts to obtain another job. (Compl. at 1-7, ECF No. 1.) Plaintiff also contends that Defendant's false allegations "created a situation that leads to hostile interactions between Plaintiff [and] staff/offenders but has also interfered with Plaintiff's permanent VADOC record, as on paper, without a job it appears that Plaintiff is refusing to adhere to rehabilitative activities (i.e. job program participation)." Plaintiff seeks declaratory relief and compensatory and punitive damages. (*Id.* at 7-8.)

This matter is before the Court pursuant to the Motion for Summary Judgment filed by Defendant on May 12, 2017. (ECF No. 18.) Plaintiff has responded (ECF No. 27), and

Defendant has filed a reply (ECF No. 29). The Motion is therefore ripe for judicial consideration.

I. Summary Judgment Standard

Summary judgment is appropriate only when the Court, viewing the record as a whole and in the light most favorable to the nonmoving party, determines that there exists no genuine dispute "as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also* Fed. R. Civ. P. 56(a); *Seabulk Offshore, Ltd. v. Am. Home Assur. Co.*, 377 F.3d 408, 418 (4th Cir. 2004). "A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party . . . [and] [a] fact is material if it might affect the outcome of the suit under the governing law." *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 568 (4th Cir. 2015) (citations omitted). The moving party has the initial burden to show the absence of an essential element of the nonmoving party's case and to demonstrate that the moving party is entitled to judgment as a matter of law. *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 185 (4th Cir. 2004); *McLean v. Patten Cmtys., Inc.*, 332 F.3d 714, 718 (4th Cir. 2003); *see Celotex*, 477 U.S. at 322-25.

When the moving party has met its burden to show that the evidence is insufficient to support the nonmoving party's case, the burden then shifts to the nonmoving party to present specific facts demonstrating that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Honor*, 383 F.3d at 185; *McLean*, 332 F.3d at 718-19. Such facts must be presented in the form of exhibits and sworn affidavits. *Celotex*, 477 U.S. at 324; *see also M&M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 163 (4th Cir. 1993). In order to successfully defeat a motion for summary judgment, the nonmoving party must rely on more than conclusory allegations, "mere speculation," the

"building of one inference upon another," the "mere existence of a scintilla of evidence," or the appearance of "some metaphysical doubt" concerning a material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002); *Tao of Sys. Integration, Inc. v. Analytical Servs. & Materials, Inc.*, 330 F. Supp. 2d 668, 671 (E.D. Va. 2004). Rather, there must be sufficient evidence that would enable a reasonable fact-finder to return a verdict for the nonmoving party. *See Anderson*, 477 U.S. at 252.

Moreover, while the Court is required to "determine whether there is a genuine issue for trial," *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (quoting *Anderson*, 477 U.S. at 249), the Court "may not 'weigh the evidence and determine the truth of the matter,' because genuine disputes as to the truth of material facts should be submitted to the jury." *Bowman v. Bank of Am., N.A.*, No. 3:13-cv-3436-TLW, 2016 U.S. Dist. LEXIS 184655, at *11 (D.S.C. June 16, 2016 (quoting *Tolan*, 134 S. Ct. at 1866); *see Arthur v. Pet Dairy*, 593 F. App'x 211, 216 (4th Cir. 2015). "The relevant inquiry is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Stewart v. MTR Gaming Grp., Inc.*, 581 F. App'x 245, 247 (4th Cir. 2014) (quoting *Anderson*, 477 U.S. at 251-52).

Defendant asks the Court to dismiss Plaintiff's claims because, *inter alia*, Plaintiff failed to exhaust his administrative remedies prior to filing this action, as required by 42 U.S.C. § 1997e(a). Because the exhaustion of administrative remedies is an affirmative defense, Defendant bears the burden of pleading and proving lack of exhaustion. *Jones v. Bock*, 549 U.S. 199, 216 (2007). In support of his Motion for Summary Judgment, Defendant has submitted: (1) his own declaration (Mem. Supp. Mot. Summ. J. Attach. 1 ("Parker Decl."), ECF

No. 19-1); (2) copies of the Internal Incident Report and Chain of Custody Form for when the cell phone was located in the supply closet (*id.* Ex. A); (3) a declaration from Tanika Walker, the Job Coordinator at LVCC (*id.* Attach. 2, ECF No. 19-3); (4) a copy of an Offender Exception Sheet noting that as of January 28, 2016, Plaintiff and two other inmates were suspended from their work assignments pending further notice (*id.* Ex. 1); (5) a copy of an Institutional Classification Authority ("ICA") Hearing Notification Form dated February 9, 2016 (*id.* Ex. 2); (6) copies of Plaintiff's disciplinary hearing paperwork regarding his institutional conviction for being under the influence of drugs (*id.* Ex. 3); (7) a copy of an ICA Hearing Notification Form dated March 17, 2016 (*id.* Ex. 4); (8) a declaration from Christy Jones, the Institutional Grievance Coordinator at LVCC (*id.* Attach. 3, ECF No. 19-8); (9) copies of Informal Complaints and Regular Grievances submitted by Plaintiff (*id.* Exs. 1, 2); and (10) a copy of Virginia Department of Corrections ("VDOC") Operating Procedure § 866.1 (*id.* Ex. 2 ("Operating Procedure § 866.1")).[1]

At this stage, the Court must determine whether Plaintiff "has proffered sufficient proof, in the form of *admissible* evidence, that could carry the burden of proof of his claim at trial." *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993) (emphasis added). As a general rule, a non-movant must respond to a motion for summary judgment with affidavits or other verified evidence. *Celotex Corp.*, 477 U.S. at 324. A notary public's seal appears on the tenth page of Plaintiff's Complaint; however, the Complaint is not admissible for purposes of summary judgment because Plaintiff has not sworn to its contents under penalty of perjury, and there is no indication that the notary administered an oath to Plaintiff. *See McCoy v. Robinson*,

[1] The Court has omitted the emphasis in quotations from this document.

No. 3:08CV555, 2010 WL 3735128, at *2 (E.D. Va. Sept. 22, 2010) (alterations in original) ("[M]erely notarizing [a] signature does not transform a document into [an] affidavit that may be used for summary judgment purposes." (quoting *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1306-07 (5th Cir. 1998))).

Plaintiff attached several exhibits to his response opposing the Motion for Summary Judgment. These exhibits include: (1) several declarations from other inmates (Resp. Exs. 1, 2, 6, 16, 19, 21); (2) an undated letter of appreciation from M. Shaw to Plaintiff (*id.* Ex. 3); (3) a September 14, 2009 Inmate Job Performance Review (*id.* Ex. 4); (4) an Offender Request Form dated December 12, 2016 (*id.* Ex. 5); (5) copies of grievance paperwork from 2012 (*id.* Ex. 8); (6) two Offender Request Forms dated September 21, 2016 (*id.* Exs. 9, 12); (7) an Offender Request Form dated September 27, 2016 (*id.* Ex. 18); (8) an ICA Hearing Notification Form dated December 10, 2015 (*id.* Ex. 22); and (9) an Offender Request Form dated October 10, 2016 (*id.* Ex. 23).[2]

Even though a notary public's stamp appears on all of the declarations submitted by Plaintiff, none of these are admissible for purposes of summary judgment because the inmates did not swear to their contents under penalty of perjury and there is no indication that the notary administered an oath to these inmates. *See McCoy*, 2010 WL 3735128, at *2 (quoting *Kline*, 845 F.2d at 1306-07). Accordingly, the Court will not consider any of these declarations for purposes of summary judgment.[3]

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[2] Plaintiff also submitted copies of Jones's declaration and the grievance material attached to her declaration, as well as copies of the Internal Incident Report and Chain of Custody Form, and the February 8, 2016 ICA Hearing Notification Form.

[3] Even if the Court were to consider these declarations, they would not change the ultimate conclusion that Plaintiff failed to exhaust his administrative remedies.

Defendant has objected to several of Plaintiff's exhibits.[4] Of, note, Defendant objects to the undated letter of appreciation from M. Shaw, which noted that Plaintiff was receiving a free pint of ice cream for his work in helping LVCC to prepare for an audit, and the September 14, 2009 Inmate Job Performance Review, noting that Plaintiff's overall performance as an educational aide was above satisfactory. Defendant also objects to Plaintiff's December 12, 2016 Offender Request Form, in which Plaintiff wrote about an upcoming annual review, and Plaintiff's October 10, 2016 Offender Request Form, regarding a transfer denial. The Court agrees with Defendant that these documents are not relevant to the claims Plaintiff raises in his Complaint. Accordingly, the Court will not consider these submissions for purposes of summary judgment.[5] Even if the Court were to consider them, their contents would not affect the ultimate conclusion.

In light of the foregoing principles and submissions, the following facts are established for purposes of the Motion for Summary Judgment. All permissible inferences are drawn in favor of Plaintiff.

II. Relevant Facts

A. Background for Plaintiff's Claims

Defendant serves as the Chief of Security at LVCC. (Parker Decl. ¶ 1.) As such, he is "responsible for the overall security of the facility, including the restrictive housing units and all

[4] Defendant's objections include objections to all of the declarations submitted by Plaintiff. Defendant objects to these declarations on the basis that they are either not relevant or that they contain inadmissible hearsay. (Reply at 1-2, ECF No. 29.)

[5] Defendant also objects to Plaintiff's Exhibits 9, 12, and 18, which are Offender Request Forms dated September 21, 2016 and September 27, 2016. However, because these Offender Request Forms concern explanations provided to Plaintiff regarding the grievance system, the Court will consider them for that purpose.

perimeter areas where there is ingress/egress into LVCC." (*Id.* ¶ 5.) His responsibilities "include, without limitation, to supervise security officers assigned to these areas, and to ensure that inmates working in these areas do not create a threat to institutional security." (*Id.*)

In January of 2016, Plaintiff "had a prison job performing janitorial duties in the administration area at LVCC." (*Id.* ¶ 6.) Two other inmates also held this job. (*Id.* ¶ 7.) Plaintiff's "job activities included scrubbing, sweeping, buffing, dusting, and moving equipment." (*Id.* ¶ 6.) Plaintiff "required access to cleaning supplies stored in a supply closet. At the end of each work shift, [Plaintiff] was required to return all chemicals and supplies. A security officer was then required to inspect the closet, and then secure the closet by locking it." (*Id.*)

On one day in January of 2016,[6] Defendant entered the supply closet[7] and "observed a large trash can full of mop heads and the bottom shelf empty." (*Id.* Ex. A, ECF No. 19-1 at 6.) Defendant thought this was unusual "because the mop heads are supposed to be stored on a shelf." (Parker Decl. ¶ 5.) Defendant discovered "a cell phone appearing to be new and not activated with a Sim Card and cut off charging plug." (*Id.* Ex. A, ECF No. 19-1 at 6.) He turned the cell phone over to Investigator Morgan and documented the chain of custody. (*Id.* at 6-7.)

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[6] In his declaration, Defendant states that this incident occurred on approximately January 18, 2016. (Parker Decl. ¶ 9.) However, the Internal Incident Report and the Chain of Custody Form both indicate that the incident occurred on January 27, 2016. (*Id.* Ex. A, ECF No. 19-1 at 6-7.) Because the Court concludes *infra* that Plaintiff has failed to exhaust his administrative remedies with respect to his claims against Defendant, the Court concludes that it need not resolve this discrepancy.

[7] In his declaration, Defendant states that he "discovered that the supply closet was unlocked, and therefore not secure." (Parker Decl. ¶ 9.) The Internal Incident Report does not mention that the supply closet was unlocked. Rather, the Internal Incident Report states that Defendant went into the supply closet "to retrieve a mop bucket." (*Id.* Ex. A, ECF No. 19-1 at 6.)

"Cell phones are contraband, and the interdiction of unauthorized cell phones is a high security priority at LVCC." (Parker Decl. ¶ 10.) Subsequently, Defendant "interviewed each of the three inmates (including [Plaintiff]) with regular access to the supply closet." (*Id.* ¶ 11.) Captains Green and Edmonds were present for the interviews. (*Id.*) During his interview, Plaintiff "was extremely agitated and insubordinate." (*Id.* ¶ 12.) Defendant "became concerned that [Plaintiff's] volatility rendered him unsuitable to work in sensitive areas of LVCC where he may come in contact with members of the public." (*Id.*)

On January 28, 2016, Defendant suspended all three inmates from their job assignments in the administration building pending further notice. (Walker Decl. ¶ 6; *id.* Ex. 1; Parker Decl. ¶ 13.) Defendant does not have the authority "to prevent an inmate from holding a job." (Parker Decl. ¶ 13.) Only the ICA has that power. (*Id.*)

None of the three inmates received disciplinary charges in connection with the cell phone incident. (*Id.* ¶ 15.) On February 9, 2016, Defendant referred Plaintiff to the ICA for consideration of administrative job removal. (Walker Decl. Ex. 2, ECF No. 19-3 at 4.) Defendant recommended that Plaintiff "can be reassigned to another job within the housing unit, but per administration offender will not have an outside job assignment." (*Id.*)[8] Defendant "was concerned that [Plaintiff's] continued work in sensitive areas of LVCC created a security threat due to his volatile and insubordinate behavior." (Parker Decl. ¶ 16.) As a result of ICA proceedings, the other two inmates returned to their jobs in the administration building. (*Id.* ¶ 15.) Plaintiff "was still eligible for employment elsewhere at LVCC." (*Id.* ¶ 16.)

[8] Defendant avers that he "[i]s required to approve all inmates for employment in the restrictive housing and administration building." (Parker Decl. ¶ 14.)

Also on February 9, 2016, Plaintiff "tested positive for THC during a statewide drug test conducted in his housing unit." (Walker Decl. ¶ 8.) On March 2, 2016, he was charged with a violation of Code 122C, "Under the Influence of Drugs." (*Id.* Ex. 3, ECF No. 19-3 at 5.) That same day, Plaintiff accepted the penalty offer of sixty (60) days' loss of visiting privilege. (*Id.* at 7-8.) As a result of this disciplinary conviction, Plaintiff was referred to the ICA for job removal. (*Id.* at 9.) "[Plaintiff] would have been removed from any job and automatically suspended from holding a job for a period of 90 days." (Parker Decl. ¶ 22.) Furthermore, Plaintiff's "guilty plea [to the 122C charge] rendered him ineligible to work in the sensitive areas under [Defendant's] supervision." (*Id.*) "The areas within [Defendant's] control are a high risk for trafficking of drugs and other contraband. Consequently, an offender with a disciplinary conviction for drug-related charges is generally not a suitable candidate for employment in these areas." (*Id.*)

The incident regarding the cell phone "was addressed with correctional officers both in an effort to discover how this incident occurred and to ensure that correctional officers followed procedures." (*Id.* ¶ 17.) As a result, the incident "is well known to some LVCC corrections officers." (*Id.*) According to Plaintiff, this has led him to have several unpleasant interactions with Sgt. Malone. For example, Plaintiff claims that on July 22, 2016, Sgt. Malone disrespected him by yelling, "That's why you don't have a job Latney, because of that cell phone you had up front." (Jones Decl. Ex. 1, ECF No. 19-8 at 6.) Defendant claims that he "never discussed [Plaintiff] with Sgt. Malone." (Parker Decl. ¶ 18.) Moreover, Defendant "never discussed [Plaintiff's] suitability for a job elsewhere at LVCC with other correctional officers." (*Id.* ¶ 23.) If asked, Defendant "would recommend [Plaintiff] for a job in a lower-risk environment, such as a housing unit." (*Id.*)

B. VDOC's Grievance Procedure

The Offender Grievance Procedure requires that, before submitting a formal grievance, the inmate must demonstrate that he or she has made a good faith effort to resolve the grievance informally through the procedures available at the institution. Operating Procedure § 866.1.V.B. Generally, a good faith effort requires the inmate to submit an informal complaint form. *Id.* § 866.1.V.B.1. If the informal resolution effort fails, the inmate must initiate a regular grievance by filling out the standard "Regular Grievance" form. *Id.* § 866.1.VI.A.2.

"The original Regular Grievance (no photocopies or carbon copies) should be submitted by the offender through the facility mail system to the Facility Unit Head's Office for processing by the Institutional Ombudsman/Grievance Coordinator." *Id.* § 866.1.VI.A.2.b. The offender must attach to the Regular Grievance a copy of the Informal Complaint. *Id.* § 866.1.VI.A.2.a. Additionally, "[i]f 15 calendar days have expired from the date the Informal Complaint was logged without the offender receiving a response, the offender may submit a Grievance on the issue and attach the Informal Complaint receipt as documentation of the attempt to resolve the issue informally." *Id.* § 866.1.V.B.2. A Regular Grievance must be filed within thirty days from the date of the incident or occurrence, or the discovery of the incident or occurrence, except in instances beyond the offender's control. *Id.* § 866.1.VI.A.1.

Prior to review of the substance of a grievance, prison officials conduct an "intake" review of the grievance to assure that it meets the published criteria for acceptance. *Id.* § 866.1.VI.B. A grievance meeting the criteria for acceptance is logged in on the day it is received, and a "Grievance Receipt" is issued to the inmate within two days. *Id.* § 866.1.VI.B.3. If the grievance does not meet the criteria for acceptance, prison officials complete the "Intake" section of the grievance and return the grievance to the inmate within two

working days. *Id.* § 866.1.VI.B.4. If the inmate desires a review of the intake decision, he or she must send the grievance form to the Regional Ombudsman within five calendar days of receipt. *Id.* § 866.1.VI.B.5.

Up to three levels of review exist for a Regular Grievance. *Id.* § 866.1.VI.C. The Facility Unit Head of the facility in which the offender is confined is responsible for Level I review. *Id.* § 866.1.VI.C.1. If the offender is dissatisfied with the determination at Level I, he or she may appeal the decision to Level II, a review of which is conducted by the Regional Administrator, the Health Services Director, the Superintendent for Education, or the Chief of Operations for Offender Management Services. *Id.* § 866.1.VI.C.2. The Level II response informs the offender whether he or she "qualifies for" an appeal to Level III. *Id.* § 866.1.VI.C.2.g.

Operating Procedure § 866.1 sets forth time limits for responses to Regular Grievances and appeals of such. At Level I, a response should be issued within 30 calendar days; at Levels II and III, a response should be issued within 20 calendar days. *Id.* § 866.1.VI.D.3. "Expiration of a time limit . . . at any stage of the process shall be considered a denial and shall qualify the grievance for appeal to the next level of review." *Id.* § 866.1.VI.D.5. If the time limit for a response expires, the grievance "will be returned promptly to the offender," and "[t]he respondent will advise the offender on the grievance form of the option to advance the grievance and the appeal information (name/address for the next level of review)." *Id.*

The operating procedure also allows inmates to file emergency grievances. *Id.* § 866.1.VII. Emergency grievances are used for inmates to report "allegations that an offender is subject to a substantial risk of imminent sexual abuse and to situations or conditions which may subject the offender to immediate risk of serious personal injury or irreparable harm." *Id.*

§ 866.1.VII.A. However, emergency grievances do "not satisfy the exhaustion of remedies requirement." *Id.* § 866.1IV.O.2.a.

C. Plaintiff's Attempts to Exhaust

On July 27, 2016, Plaintiff submitted an Informal Complaint, stating that on July 22, 2016, Sgt. Malone "demonstrated disrespectful and inhumane treatment towards [him]." (Jones Decl. Ex. 1, ECF No. 19-8 at 6.) He complained that Sgt. Malone yelled, "That's why you don't have a job Latney, because of that cell phone you had up front." (*Id.*) On August 10, 2016, R. Clarke responded, noting that he had contacted the involved individuals and told them that" it was inappropriate to make comments as indicated above." (*Id.*)

On August 16, 2016, the LVCC Grievance Department received a Regular Grievance from Plaintiff, complaining of Sgt. Malone's conduct on July 22, 2016. (*Id.* at 10.) Plaintiff's Regular Grievance was not logged and did not receive a tracking number because Plaintiff "failed to show that he made an effort to resolve this matter informally by attaching a copy of the Informal Complaint." (Jones Decl. ¶ 10.) The Regular Grievance "was returned to [Plaintiff] with follow-up instructions." (*Id.*) Plaintiff could have, but did not, appeal this intake decision. (*Id.*)

On August 24, 2016, Plaintiff submitted an Informal Complaint, stating that Defendant "fabricated a story of [Plaintiff] having a cell phone . . . to threaten [Plaintiff's] safety, [his] treatment plan, [his] comfortability, and overall defamed [his] character." (Jones Decl. Ex. 1, ECF No. 19-8 at 7.) Unit Manager Spence responded on September 1, 2016, stating: "Mr. Latney, based on the information you provided to me I have learned that this incident or issue occurred in the second week of January 2016. Another issue occurred in March 2016. Any issue that occurred more than 30 days ago is considered not grievable any longer." (*Id.*)

On September 20, 2016, Plaintiff submitted an Informal Complaint, asking why his Regular Grievance concerning Sgt. Malone had not yet been answered. (*Id.* at 8.) On September 21, 2016, Jones responded, stating: "On 8-16-16 your grievance was sent back for insufficient information; therefore, you would not receive a response. Only grievances assigned a tracking number will receive a response." (*Id.*)

On September 20, 2016, the LVCC Grievance Department received a Regular Grievance from Plaintiff regarding Defendant's alleged fabrication that Plaintiff had a cell phone. (*Id.* at 11.) This Regular Grievance "was not logged because the time period for filing a Regular Grievance had expired." (Jones Decl. ¶ 12.) An investigation "revealed that the incident in the administration building involving the cell phone had occurred in January 2016, which is well beyond the thirty-day time limitation for filing Regular Grievances." (*Id.*) Plaintiff could have, but did not, appeal this intake decision. (*Id.*)

On September 23, 2016, the LVCC Grievance Department received two Offender Request Forms from Plaintiff. (Resp. Ex. 9, ECF No. 27-9; Resp. Ex. 12, ECF No. 27-12.) In the first, Plaintiff stated that he did resubmit his grievance regarding Sgt. Malone. (Resp. Ex. 9.) Jones responded, stating that she "did not receive anything from [him] after the initial grievance." (*Id.*) In the second, Plaintiff complained about a "lack of response" concerning his grievance about Defendant. (Resp. Ex. 12.) Jones responded, stating:

> Mr. Latney, with grievances, they have to be filed within 30 days from date of occurrence. Always make sure you file the paperwork in a timely manner. Keep in mind that the 30 days is not from the date of Informal Complaint, but date that the issue happened. Mr. Latney, I respect all offenders and their grievances (or issues) however, I'm [bound] to do my job as policy dictates. You have the right to appeal.

(*Id.*)

On September 28, 2016, the LVCC Grievance Department received another Offender Request Form, in which Plaintiff noted that his grievance regarding Sgt. Malone had yet to receive a response. (Resp. Ex. 18, ECF No. 27-20.) On September 28, 2016, Jones responded, stating:

> Mr. Latney, if an issue happens on another date, such as cursing, vulgar, etc; (or almost all issues) then that becomes another issue w/ another date of occurrence. So for instance, if I used vulgar language last month (and it was deemed expired) then do it again today, that's a new issue. New timeframe.

(*Id.*)

Plaintiff subsequently complained to Assistant Warden of Operations K. Reagans. (*Id.* at 13.) On October 19, 2016, Reagans sent a memorandum to Plaintiff, stating:

> The Grievance Procedure provides an administrative process for an offender to resolve issues and complaints through fair, prompt decisions and actions in response to complaints and grievances. It is reported that you submitted Informal Complaint LVCC-16-INF-02266 on July 27, 2016 alleging misconduct by Sgt. Malone. You were provided a response on August 10, 2016 in which you were informed that involved staff was advised to maintain professionalism while interacting with any offender. On August 24, 2016 you submitted Informal Complaint LVCC 16 INF 02531 with allegations of misconduct by [Defendant] Chief Parker. A response was provided to you by Unit Manager Spence on September 1, 2016. Documentation reflects that you did not file your paperwork in accordance with the timeframe set forth in Operating Procedure 866.1, Grievance Procedure. After looking into your complaint regarding alleged misconduct by [Defendant] Chief Parker, it has been determined that this allegation cannot be substantiated.

(*Id.*)

III. Analysis

With respect to the exhaustion of administrative remedies, the pertinent statute provides: "No action shall be brought with 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 are exhausted." 42 U.S.C. § 1997e(a). This language "naturally requires a prisoner to exhaust the grievance procedures offered, whether or not the

possible responses cover the specific relief the prisoner demands." *Booth v. Churner*, 532 U.S. 731, 738 (2001). Generally, in order to satisfy the exhaustion requirement, an aggrieved party must file a grievance raising the claim and pursue the grievance through all available levels of appeal, prior to bringing his or her action to court. *See Woodford v. Ngo*, 548 U.S. 81, 90 (2006). The Supreme Court has instructed that section 1997e(a) "requires proper exhaustion." *Id.* at 93. The Supreme Court explained that "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules," *id.* at 90, "'so that the agency addresses the issues on the merits.'" *Id.* (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)). The applicable prison rules "define the boundaries of proper exhaustion." *Jones v. Bock*, 549 U.S. 199, 218 (2007). Exhaustion is mandatory, and courts lack discretion to waive the exhaustion requirement. *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

Because the statute does not define the term "available," "courts have generally afforded it its common meaning; thus, an administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it." *Moore v. Bennett*, 517 F.3d 717, 725 (4th Cir. 2008) (citing *Aquilar-Avellaveda v. Terrell*, 478 F.3d 1223, 1225 (10th Cir. 2007); *Kaba v. Stepp*, 458 F.3d 678, 684 (7th Cir. 2006)). Accordingly, a prisoner who has "utilized all available remedies in accordance with the applicable procedural rules, so that prison officials have been given an opportunity to address the claims administratively . . . has exhausted his available remedies, even if prison employees do not respond." *Id.* (internal citation and quotation marks omitted) (citing *Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006)). Recently, the Supreme Court set forth three circumstances in which an administrative remedy would be considered to be unavailable: (1) when the remedy "operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates";

(2) when the remedy is "so opaque that it becomes, practically speaking, incapable of use"; and (3) "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross v. Blake*, 136 S. Ct. 1850, 1858-60 (2016).

The record before the Court establishes that Plaintiff failed to exhaust his administrative remedies with respect to his claims against Defendant. On July 27, 2016, Plaintiff submitted an Informal Complaint regarding Sgt. Malone's comments. (Jones Decl. Ex. 1, ECF No. 19-8 at 6.) Even though Plaintiff now claims that Sgt. Malone's comments stemmed from Defendant's allegedly false allegations concerning the cell phone incident, the Informal Complaint did not make any mention about Defendant's actions. Unsatisfied with the answer he received, Plaintiff submitted a Regular Grievance on August 16, 2016. (*Id.* at 10.) That Regular Grievance was not logged and did not receive a tracking number because Plaintiff "failed to show that he made an effort to resolve this matter informally by attaching a copy of the Informal Complaint." (Jones Decl. ¶ 10.) It was returned to Plaintiff with follow-up instructions. (*Id.*) Plaintiff could have, but did not, appeal this intake decision. (*Id.*)

On August 24, 2016, Plaintiff submitted an Informal Complaint in which he alleged that Defendant had fabricated a story that Plaintiff had a cell phone, and that this fabrication defamed Plaintiff's character and threatened his safety. (Jones Decl. Ex. 1, ECF No. 19-8 at 7.) Spence responded on September 1, 2016, telling Plaintiff that this issue was no longer grievable because it occurred more than thirty (30) days before Plaintiff submitted the Informal Complaint. (*Id.*) Unhappy with that response, Plaintiff submitted a Regular Grievance. (*Id.* at 11.) The Grievance "was not logged because the time period for filing a Regular Grievance had expired." (*Id.*) Plaintiff could have, but did not, appeal this intake decision. (*Id.*)

In his response, Plaintiff contends that he did "exhaust[] his administrative remedies when a complaint could not be resolved at LVCC." (Resp. at 6.) According to Plaintiff, he "could not have appealed an intake decision that refuses to acknowledge sufficient filing and prevented from ever getting logged." (*Id.* at 7.) Plaintiff, however, is mistaken. As noted above, Operating Procedure §866.1 provides for appellate review of intake decisions. Operating Procedure § 866.1VI.B.5. An inmate desiring review of an intake decision must send the grievance form to the Regional Ombudsman within five calendar days of receipt. *Id.* The instructions for doing so are printed clearly on the Regular Grievance intake response form. (*See* ECF No. 27-19 at 3.) Plaintiff has presented no evidence that his ability to appeal the intake decisions was rendered unavailable. *See Ross*, 136 S. Ct. at 1858-60. Accordingly, Plaintiff failed to exhaust his administrative remedies because LVCC never had the "fair opportunity" to examine the merits of his claims regarding Defendant's actions. *See Woodford*, 548 U.S. at 95. For that reason, Defendant is entitled to summary judgment.

IV. Conclusion

For the foregoing reasons, Defendant's Motion for Summary Judgment (ECF No. 18) is **GRANTED**. The Clerk is **DIRECTED** to enter judgment in favor of Defendant.

Plaintiff may appeal from this Dismissal Order by forwarding a written notice of appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510. Said written notice must be received by the Clerk within thirty (30) days of the date of entry of this Dismissal Order. If Plaintiff wishes to proceed *in forma pauperis* on appeal, the application to proceed *in forma pauperis* is to be submitted to the Clerk, United States Court of Appeals, Fourth Circuit, 1100 E. Main Street, Richmond, Virginia 23219.

The Clerk is **DIRECTED** to send a copy of this Dismissal Order to Plaintiff and counsel of record.

IT IS SO **ORDERED**.

Raymond A. Jackson
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
July 20, 2017

Additional material from this filing is available in the Clerk's Office.