UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7341

INMATE STEVE LEE WALDEN MENIUS, a/k/a Radio Shack, SCDC # 298627,

Plaintiff - Appellant,

v.

WARDEN STEPHANE, at Broad River; WARDEN JOYNER, at Lee; MRS. BUSH, (Classification); COUNSELOR HOWLE; OFFICER LOCKLEAR, F-5 Unit,

Defendants - Appellees,

and

SOUTH CAROLINA LAW ENFORCEMENT DIVISION; SOUTH CAROLINA, (D.E.A.); SOUTH CAROLINA DEPARTMENT OF CORRECTIONS; DARLINGTON COUNTY COURT DISTRICT; BENJAMIN GOSNELL; ALL OTHER UNDERCOVER AGENTS WITHIN SCDC, Names not Available but I know their faces and monikers; ALL OTHER AGENTS WITHIN SCDC,

Defendants.

Appeal from the United States District Court for the District of South Carolina, at Rock Hill. Paige Jones Gossett, Magistrate Judge. (0:18-cv-00249-RMG)

Submitted: January 22, 2019 Decided: January 25, 2019

Before MOTZ, KEENAN, and FLOYD, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Steve Lee Walden Menius, Appellant Pro Se. Carmen Vaughn Ganjehsani, RICHARDSON PLOWDEN & ROBINSON, PA, Columbia, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Steve L.W. Menius seeks to appeal the magistrate judge's report and recommendation recommending that the action Menius filed pursuant to 42 U.S.C. § 1983 (2012) be dismissed for failure to exhaust administrative remedies as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (2012). This court may exercise jurisdiction only over final orders, 28 U.S.C. § 1291 (2012), and certain interlocutory and collateral orders, 28 U.S.C. § 1292 (2012); Fed. R. Civ. P. 54(b); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949). The report and recommendation Menius seeks to appeal is neither a final order nor an appealable interlocutory or collateral order. *See Haney v. Addison*, 175 F.3d 1217, 1219 (10th Cir. 1999). Moreover, the doctrine of cumulative finality does not cure this jurisdictional defect. *See Equip. Fin. Grp., Inc. v. Traverse Comput. Brokers*, 973 F.2d 345, 347-48 (4th Cir. 1992); *see also In re Bryson*, 406 F.3d 284, 287-89 (4th Cir. 2005). Accordingly, we dismiss the appeal for lack of jurisdiction. We also deny Menius' 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.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Steve L. W. Menius, Plaintiff, v. Warden Stephane, *at Broad River*; Warden Joyner, *at Lee*; Mrs. Bush, *(Classification)*; Counselor Howle; Officer Locklear, *F-5 Unit*; Defendants.	C/A No. 0:18-249-RMG-PJG **REPORT AND RECOMMENDATION**

Plaintiff Steve L. W. Menius, a self-represented state prisoner, filed this civil rights action against the named defendants pursuant to 42 U.S.C. § 1983. This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C.) for a Report and Recommendation on the defendants' motion for summary judgment.[1] (ECF No. 50.) Pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), the court advised Menius of the summary judgment and dismissal procedures and the possible consequences if he failed to respond adequately to the defendants' motion. (ECF No. 51.) Menius responded in opposition to the defendants' motion. (ECF Nos. 58 & 59.) Having reviewed the parties' submissions and the applicable law, the court concludes that Menius's claims should be dismissed for failure to exhaust his administrative remedies.

[1] It appears that Defendant Howle was never properly served with process. Accordingly, the court recommends that this defendant be dismissed from this action without prejudice. See Fed. R. Civ. P. 4(m).

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BACKGROUND

The following facts are either undisputed or are taken in the light most favorable to Menius, to the extent they find support in the record. Menius alleges that he was convicted of an unspecified offense in Darlington County and that, during the course of his incarceration, the "system" failed to treat him for an unspecified "social disease." (Am. Compl., ECF No. 10 at 5.) Menius was later housed at Broad River Correctional Institution ("BRCI") where, on or about January of 2017, he was beaten by five fellow inmates, who recorded the incident and posted the video online. (Id.) Menius was then transferred to Lee Correctional Institution ("LCI") and housed in the F-5 Unit, where he alleges he was assaulted by an inmate. (Id. at 5-6.) Menius also appears to allege that while at LCI he was poisoned and terrorized by gangs and that the South Carolina Department of Corrections ("SCDC") officers were deliberately indifferent to his health and safety. (Id. at 16-17.)

The court construed Menius's Complaint as bringing claims against the defendants pursuant to 42 U.S.C. § 1983 alleging deliberate indifference and failure to protect in violation of the Eighth Amendment. (Order, ECF No. 17 at 2.) Menius seeks monetary damages.

DISCUSSION

The defendants argue that Menius failed to exhaust his administrative remedies with regard to his claims. A prisoner must exhaust his administrative remedies as required by the Prison Litigation Reform Act ("PLRA"), specifically 42 U.S.C. § 1997e(a). Section 1997e(a) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, 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." This requirement "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and

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whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002). Moreover, exhaustion is required even when a prisoner seeks remedies, such as money damages, that are not available in the administrative proceedings. See Booth v. Churner, 532 U.S. 731, 740-41 (2001). To satisfy this requirement, a plaintiff must avail himself of every level of available administrative review. See generally id. Those remedies neither need to meet federal standards, nor are they required to be plain, speedy, and effective. Porter, 534 U.S. at 524 (quoting Booth, 532 U.S. at 739). Satisfaction of the exhaustion requirement requires "using all steps that the agency holds out, and doing so *properly*." Woodford v. Ngo, 548 U.S. 81, 90 (2006) (quoting Pozo v. McCaughtry, 286 F.3d 1022, 1024 (7th Cir. 2002)). Thus, "it is the prison's requirements, and not the [Prison Litigation Reform Act], that define the boundaries of proper exhaustion." Jones v. Bock, 549 U.S. 199, 218 (2007). The defendants have the burden of establishing that a plaintiff failed to exhaust his administrative remedies. Anderson v. XYZ Corr. Health Servs., Inc., 407 F.3d 674, 683 (4th Cir. 2005).

Pursuant to SCDC policy, an inmate seeking to complain of prison conditions must first attempt to informally resolve his complaint. Next, an inmate may file a "Step 1 Grievance" with designated prison staff. If the Step 1 Grievance is denied, the inmate may appeal to the warden of his facility via a "Step 2 Grievance." Moreover, subject to certain exceptions not applicable here, review from the South Carolina Administrative Law Court ("ALC"), a state executive-branch tribunal, is generally part of the available administrative remedies an inmate must exhaust. S.C. Code Ann. § 1-23-500 ("There is created the South Carolina Administrative Law Court, which is an agency and court of record within the *executive* branch of the government of this State.") (emphasis added); see Furtick v. S.C. Dep't of Corr., 649 S.E.2d 35, 38 (S.C. 2007) (reaffirming that

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"the ALC has jurisdiction over all inmate grievance appeals that have been properly filed") (citing Slezak v. S.C. Dep't of Corr., 605 S.E.2d 506 (S.C. 2004)).

The defendants, through affidavit testimony provided by Sherman Anderson, Chief of the Inmate Grievance Branch, assert that of the grievances filed by Menius, only three Step 1 grievances appear to relate to the claims at issue in this litigation.[2] (Anderson Aff. ¶¶ 3-4, ECF No. 50-1 at 2.) Grievance #0036-18, filed January 18, 2018, referenced the inmate assault at LCI. (Id. ¶ 6, ECF No. 50-1 at 3; ECF No. 50-1 at 17.) This grievance was processed on March 6, 2018 with no action taken because Menius failed to file a Request to Staff within the time period prescribed by SCDC policy. Menius accepted the result and did not file an appeal or a Step 2 grievance. In grievance #0066-18, filed January 30, 2018, Menius alleged that he was suffering from severe mental stress and that SCDC was causing him to self-destruct, referencing the inmate assault at LCI. (Id. ¶ 7, ECF No. 50-1 at 3; ECF No. 50-1 at 15.) This grievance was processed on February 1, 2018 and found to be duplicative of grievance #0036-18. Menius accepted the informal resolution and did not file an appeal or a Step 2 grievance. In grievance # 0080-18, filed February 5, 2018, Menius alleged that he was not safe in lock-up and that his constitutional rights were being violated. (Id. ¶ 8, ECF No. 50-1 at 3; ECF No. 50-1 at 14.) This grievance was processed on February 9, 2018 with no action taken, in part because Menius failed to include a Request to Staff form with his grievance. Menius accepted the informal resolution and did not file an appeal or a Step 2 grievance.

[2] The defendants assert that Menius filed no grievance related to the inmate assault at BRCI. (Anderson Aff. ¶ 9, ECF No. 50-1 at 3.) Menius does not dispute this assertion.

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Menius initiated this action in federal court on January 26, 2018[3]—mere days after filing the first Step 1 grievance related to his claims, and prior to the other two Step 1 grievances arguably related to his claims. Although Menius, in his response to the defendants' motion, alludes to requesting a Step 2 form, it is clear based on the record before the court that any such request occurred after Menius filed the present lawsuit with this court. (Pl.'s Resp. in Opp'n, ECF No. 58 at 3-4.)

The law is clear that exhaustion is a prerequisite to suit and must be completed prior to filing an action. Anderson, 407 F.3d at 676-77; see, e.g., Page v. Paduly, No. 9:09-cv-0952-RMG-BM, 2010 WL 4365644, at *1 (D.S.C. Oct. 28, 2010) (finding that a plaintiff failed to exhaust his administrative remedies where he either did not properly pursue a grievance concerning the issues raised in the case prior to filing the lawsuit, or did not even file grievances until after the lawsuit had already commenced); Cabbagestalk v. Ozmint, C/A No. 2007 WL 2822927, at *1 (D.S.C. Sept. 27, 2007) (noting that the court must look to the time of filing—not the time the district court is rendering its decision—to determine if exhaustion has occurred); see also Jackson v. Dist. of Columbia, 254 F.3d 262, 269 (D.C. Cir. 2001) (rejecting the argument that § 1997e(a) "permits suit to be filed so long as administrative remedies are exhausted before trial"); Freeman v. Francis, 196 F.3d 641, 645 (6th Cir. 1999) (holding a prisoner "may not exhaust administrative remedies during

[3] Houston v. Lack, 487 U.S. 266 (1988) (stating that a prisoner's pleading is filed at the moment of delivery to prison authorities for forwarding to the district court).

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the pendency of the federal suit"). Thus, it is clear on this record that Menius failed to properly exhaust his claims before he filed the instant action on January 26, 2018.[4]

RECOMMENDATION

For the foregoing reasons, the court recommends that Menius's claims be dismissed without prejudice for failure to exhaust his administrative remedies.

Paige J. Gossett
UNITED STATES MAGISTRATE JUDGE

October 19, 2018
Columbia, South Carolina

The parties' attention is directed to the important notice on the next page.

[4] Menius also appears to argue that he could not comply with SCDC policy regarding the timeliness of filing his grievances due to not being able to obtain a grievance form. (Pl.'s Resp. in Opp'n, ECF No. 58 at 1-2.) However, a finding of untimeliness by the grievance committee would not have precluded Menius from availing himself of every level of available administrative review by appealing such a decision. See Booth, 532 U.S. at 740-41. The record is undisputed that Menius did not appeal such a decision or file a Step 2 grievance alleging such an impediment prior to the filing date of the instant lawsuit.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.' " Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).