

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6799
(6:19-cv-00751-DCN)

KEVIN HERRIOTT

Plaintiff - Appellant

v.

FORD, Associate Warden, in individual and official capacity; MAJOR SMITH;
DAVIS, Captain, in individual and official capacity; DANLEY, Lieutenant, in
individual and official capacity; MCCABE, Acting Warden, in individual and
official capacity; CANNING, Associate Warden, in individual and official
capacity; BRAGG, Food Service Director, in individual and official capacity

Defendants - Appellees

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge
requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge King, and
Judge Quattlebaum.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 20-6799

KEVIN HERRIOTT,

Plaintiff - Appellant,

v.

FORD, Associate Warden, in individual and official capacity; MAJOR SMITH;
DAVIS, Captain, in individual and official capacity; DANLEY, Lieutenant, in
individual and official capacity; MCCABE, Acting Warden, in individual and
official capacity; CANNING, Associate Warden, in individual and official capacity;
BRAGG, Food Service Director, in individual and official capacity,

Defendants - Appellees.

Appeal from the United States District Court for the District of South Carolina, at
Greenville. David C. Norton, District Judge. (6:19-cv-00751-DCN)

Submitted: November 19, 2020

Decided: November 23, 2020

Before WILKINSON, KING, and QUATTLEBAUM, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Kevin Herriott, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kevin Herriott appeals the district court's order accepting the recommendation of the magistrate judge and granting summary judgment to Defendants on Herriott's 42 U.S.C. § 1983 complaint. We have reviewed the record and find [no reversible error.] Accordingly, we affirm for the reasons stated by the district court. *Herriott v. Ford*, No. 6:19-cv-00751-DCN (D.S.C. May 19, 2020). 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

AO 450 (SCD 04/2010) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the
District of South Carolina

Kevin Heriott

Plaintiff

v.

Civil Action No. 6:19-cv-751-DCN

NFN Ford; Harrison Smith; NFN Davis; NFN

Danley; NFN Blackwell; NFN Gaskins; NFN

Baskins; NFN Campbell; NFN Jones; NFN

Amerison; NFN Robbins; NFN McCabe; NFN

Crowe; Mr Canning; NFN Bragg

Defendant

SUMMARY JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars (\$___), which includes prejudgment interest at the rate of ____ %, plus postjudgment interest at the rate of ____ %, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____.

XX other: Defendants' NFN Bragg, Mr Canning, NFN Danley, NFN Davis, NFN Ford, NFN McCabe motion for summary judgment is granted. Major Smith previously terminated on 2/14/2020; NFN Robbins previously terminated on 5/1/2020; NFN Blackwell, NFN Brad, NFN Campbell; NFN Canty, NFN Crowe, NFN Gaskins, NFN Baskins, NFN Jones, NFN Amerison, NFN Baskins previously terminated on 7/10/2019.

This action was *(check one)*:

☐ tried by a jury, the Honorable _____ presiding, and the jury has rendered a verdict.

☐ tried by the Honorable _____ presiding, without a jury and the above decision was reached.

XX decided by the Honorable David C. Norton.

Date: May 19, 2020

CLERK OF COURT

s/Kathy Rich, Deputy Clerk

Signature of Clerk or Deputy Clerk

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

Kevin Herriott,) C/A No.: 6:19-cv-0751 DCN
)
Plaintiff,) **ORDER**
)
vs.)
)
Associate Warden Ford; Associate Warden)
Canning; Captain Davis; Lieutenant)
Danley; Food Service Director Bragg; and)
Acting Warden McCabe)
)
Defendants.)
)

The above referenced case is before this court upon the magistrate judge's recommendation that defendants' motion for summary judgment be granted.

This court is charged with conducting a de novo review of any portion of the magistrate judge's report to which a specific objection is registered, and may accept, reject, or modify, in whole or in part, the recommendations contained in that report. 28 U.S.C. § 636(b)(1). However, absent prompt objection by a dissatisfied party, it appears that Congress did not intend for the district court to review the factual and legal conclusions of the magistrate judge. Thomas v. Arn, 474 U.S. 140 (1985). Additionally, any party who fails to file timely, written objections to the magistrate judge's report pursuant to 28 U.S.C. § 636(b)(1) waives the right to raise those objections at the appellate court level. United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984).¹ **Objections to the Magistrate Judge's Report and Recommendation were timely filed on May 11, 2020 by plaintiff.**

¹In Wright v. Collins, 766 F.2d 841 (4th Cir. 1985), the court held "that a pro se litigant must receive fair notification of the consequences of failure to object to a magistrate judge's report before such a procedural default will result in waiver of the right to appeal. The notice must be 'sufficiently understandable to one in appellant's circumstances fairly to appraise him of what is required.'" Id. at 846. Plaintiff was advised in a clear manner that his objections had to be filed within ten (10) days, and he received notice of the consequences at the appellate level of his failure to object to the magistrate judge's report.

A de novo review of the record indicates that the magistrate judge's report accurately summarizes this case and the applicable law. Accordingly, the magistrate judge's Amended Report and Recommendation is **AFFIRMED**, and defendants' motion for summary judgment is **GRANTED**.

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'David C. Norton', is written over a horizontal line.

David C. Norton
United States District Judge

May 19, 2020
Charleston, South Carolina

NOTICE OF RIGHT TO APPEAL

The parties are hereby notified that any right to appeal this Order is governed by Rules 3 and 4 of the Federal Rules of Appellate Procedure

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

Kevin Herriott,

Plaintiff,

vs.

Associate Warden Ford, Associate
Warden Canning, Captain Davis,
Lieutenant Danley, Food Service
Director Bragg, and Acting Warden
McCabe,

Defendants.

Civil Action No. 6:19-751-DCN-KFM

**AMENDED ORDER AND
REPORT OF MAGISTRATE JUDGE¹**

This matter is before the court on the defendants' motion for summary judgment (doc. 141), and the plaintiff's motion to strike the defendants' motion for summary judgment (doc. 147). The plaintiff, a state prisoner proceeding *pro se*, brought this action alleging violations of his constitutional rights pursuant to 42 U.S.C. § 1983. Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(d)(D.S.C.), this magistrate judge is authorized to review all pretrial matters in cases filed under Section 1983.

BACKGROUND

The plaintiff is an inmate at the South Carolina Department of Corrections ("SCDC"), and he has been housed at different prisons within SCDC, including Kershaw Correctional Institution ("Kershaw"). On March 4, 2019, he filed a complaint against various officers and employees at three SCDC prisons (see C.A. No. 6:19-cv-626, doc. 1). By order dated March 12, 2019, the initial case was severed into three separate actions, each pertaining to the claims related to a particular prison, including this case involving claims

¹ This amended Order and Report and Recommendation corrects the date the plaintiff's initial complaint was filed noted on page three.

arising at Kershaw (doc. 1). After an unsuccessful interlocutory appeal (docs. 31, 65), the plaintiff filed an amended complaint on July 10, 2019 (doc. 57). By orders dated September 16, 2019, and February 14, 2020, the Honorable David C. Norton, United States District Judge, dismissed some of the named defendants and some of the plaintiff's claims (docs. 79, 148). Accordingly, the remaining claims concern the plaintiff's conditions of confinement against the following officers and employees at Kershaw: Acting Warden Wayne McCabe, Associate Wardens Kevin Ford and Joseph Canning, Captain Benjamin Davis, Lieutenant Derek Danley, and Food Service Director Mikel Bragg. The plaintiff alleges in his amended complaint that since November 13, 2018, through and continuing through the present date,² the defendants violated his Eighth and Fourteenth Amendments rights by subjecting him to unconstitutional conditions of confinement while in Kershaw's Restricted Housing Unit ("RHU"), including the lack of indoor and outdoor recreation and exercise, an unhealthy and unsanitary cell without adequate lighting and cleaning materials, a lack of haircuts, and cold, inadequate food (doc. 57, pp. 8-12). He further alleges during this same period, the defendants "responded" to his numerous request to staff member and grievance forms concerning these issues, denying his requests that these conditions be corrected (*id.*, pp. 9-11). He alleges that as a result of these conditions and the defendants' indifference and inaction to them, he suffered physical injuries and pain, and he seeks actual and punitive damages (*id.* p. 13).

On October 16, 2019, the defendants filed an answer denying that they violated the plaintiff's rights and raising the affirmative defense of the plaintiff's failure to exhaust his administrative remedies (doc. 101). The plaintiff filed a reply on October 28, 2019, in which he cites cases on the issue of exhaustion, including the proposition that an inmate must exhaust available remedies, but need not exhaust unavailable ones (doc. 107).

On January 28, 2020, the defendants filed their motion for summary judgment (doc. 141). By order filed January 29, 2020, pursuant to *Roseboro v. Garrison*, 528 F.2d

²The amended complaint is dated July 4, 2019 (doc. 57).

309 (4th Cir. 1975), the plaintiff was advised of the summary judgment procedure and the possible consequences if he failed to respond adequately to the motion (doc. 142). The plaintiff filed a motion to strike on February 10, 2020 (doc. 147), to which the defendants filed a response in opposition on February 24, 2020 (doc. 155). The plaintiff filed his response in opposition to the motion for summary judgment on March 4, 2020 (doc. 161), to which the defendants filed a reply on March 11, 2020 (doc. 163). The plaintiff filed a sur-reply on March 20, 2020 (doc. 164).

In support of their motion for summary judgment, the defendants argue that the plaintiff failed to exhaust his administrative remedies. They point out that the plaintiff arrived at Kershaw on November 13, 2018, and filed his initial complaint here on March 3, 2019, yet he failed to file administrative grievances in the interim for his claims of inadequate lighting, the lack of outdoor recreation and exercise, and the lack of haircuts and cleaning issues (doc. 141-2, Anderson aff. ¶¶ 12, 15, 16). They also present evidence that while the plaintiff did file an unsuccessful grievance about cold and inadequate food on February 7, 2019, he failed to appeal it prior to filing his initial complaint here (*id.* ¶ 13; doc. 141-2, p. 26). Accordingly, they argue that the plaintiff failed to properly exhaust any of his administrative remedies prior to filing this case.

The plaintiff filed a response in opposition to summary judgment arguing that during this period the defendants, along with "gang-affiliated inmates," interfered with his legal mail – and apparently his grievances – in an attempt to "find his testimony" about a riot (doc. 161-1, p. 5). He also argues that the staff would purposely not give him administrative grievance forms, so he wrote his own grievances on plain paper and made copies for his file "because prison officials would not respond when the plaintiff was writing the Wardens and Captain concerning RHU practices all to no avail" (*id.*, pp. 7-9). With his response in opposition, the plaintiff provides numerous exhibits dated outside the relevant period of his arrival at Kershaw thorough the date he filed his initial complaint here (November 13, 2018 - March 3, 2019). Of those exhibits dated within this relevant period, many concern his allegations of mail interference related to his state case, which is not a

pleaded claim here (docs. 161-4, pp. 3-59). Regarding his claims here, the plaintiff provides only a step 1 grievance dated December 26, 2018, concerning food service and showers (doc. 161-5, p. 4); a handwritten "Statement of Grievance" dated February 1, 2019, on the lack of a haircut and cleaning supplies (doc. 161-7, p. 2); an inmate request form dated February 4, 2019, requesting a haircut (*id.*, p. 3); and "duplicate" request to staff member forms dated February 4 and 8, 2019, concerning showers, unsanitary conditions, and the lack of cleaning supplies (*id.*, pp. 17-18).

The defendants filed a reply in support of their motion for summary judgment, arguing that the plaintiff's own exhibits show that he did not exhaust his administrative remedies (doc. 163). The plaintiff then filed a sur-reply, stating again that SCDC's administrative remedies were unavailable, because he was not given grievance forms and that, in any event, they would not have been processed or returned given his "knowledge of mail interference" (doc. 164, p. 2).

APPLICABLE LAW AND ANALYSIS

Plaintiff's Motion to Strike

The plaintiff, citing Federal Rule of Civil Procedure 12, has moved to strike the defendants' motion for summary judgment on the basis that it is "improper, inappropriate, redundant, and immaterial" (doc. 147). However, Rule 12 pertains to pleadings rather than motions, and it is thus inapplicable here. In any event, the undersigned has reviewed the motion for summary judgment and finds it to be in compliance with Rule 56. Moreover, the plaintiff has filed a thorough response with exhibits. Accordingly, the plaintiff's motion to strike (doc. 147) is denied.

Summary Judgment Standard

Federal Rule of Civil Procedure 56 states, as to a party who has moved for summary judgment: "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). As to the first of these determinations, a fact is deemed "material" if proof of its existence or nonexistence would affect the disposition of

the case under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is “genuine” if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings; rather, he must demonstrate that specific, material facts exist that give rise to a genuine issue. *Id.* at 324. Under this standard, the existence of a mere scintilla of evidence in support of the plaintiff’s position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. *Id.* at 248. “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Id.*

Exhaustion

The Prison Litigation Reform Act (“PLRA”), Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended at 42 U.S.C. § 1997e(a) (1996)), mandates, among other things, that prisoners exhaust their administrative remedies prior to filing civil actions concerning prison conditions under Section 1983 or any other federal law. See *Jones v. Bock*, 549 U.S. 199, 211 (2007) (“There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court”). “[T]he PLRA’s exhaustion requirement is mandatory,” *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 677 (4th Cir. 2005), and “applies to all inmate suits about prison life, whether they

involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” *Porter v. Nussle*, 534 U.S. 516, 532 (2002)

The PLRA requires “proper exhaustion” of available administrative remedies prior to filing suit. *Woodford v. Ngo*, 548 U.S. 81, 93-94 (2006). As the Supreme Court noted, “[a]ggrieved parties may prefer not to exhaust administrative remedies for a variety of reasons,” whether it be concerns about efficiency or “bad faith.” *Id.* at 89-90. This is especially true in a prison context. *Id.* at 90 n.1. Nevertheless, “[p]roper exhaustion demands compliance with an agency’s deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings.” *Id.* at 90-91.

“[A]n 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. Bennette*, 517 F.3d 717, 725 (4th Cir. 2008). Thus, an administrative remedy is considered unavailable when: (1) “it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates”; (2) it is “so opaque that it becomes, practically speaking, incapable of use”; or (3) “prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.” *Ross v. Blake*, 136 S. Ct. 1850, 1859-60 (2016).

SCDC’s administrative remedies process for prisoners is outlined in SCDC Policy GA-01.12. This court may take judicial notice of this policy. *Al-Haqq v. Bryant*, No. 2:14-cv-0008-TMC-MGB, 2016 WL 769121, at *2 (D.S.C. Feb. 8, 2016) (citing *Malik v. Ward*, No. 9:08-cv-01886, 2010 WL 936777, at *2 n.4 (D.S.C. Mar. 16, 2010)). The policy provides in relevant part:

13.2 Inmates must make an effort to informally resolve a grievance by submitting a Request to Staff Member Form to the appropriate supervisor/staff within eight (8) working days of the incident. However, in certain cases, informal resolution may not be appropriate or possible.... If informal resolution is not possible, the grievant will complete Form 10-5, Step 1, which is located in common areas, i.e., living areas, libraries, etc. and will place the form in a designated grievance drop box within

five (5) working days of the alleged incident. . . . All information must be placed on SCDC Form 10-5, " Inmate Grievance Form." An inmate will submit a grievance within the time frames established in the policy. . . .

The grievance form must contain information about how, with whom, and when attempts were made to resolve the problem informally within eight (8) working days of the appropriate supervisor's signature date on the SCDC Form 19-11, " Inmate Request To Staff Member" (RTSM). . . .

13.3 All grievances will be picked up on a daily basis, during normal working hours, by an employee designated by the Warden (not the IGC). All grievances will be numbered and entered into the automated system (regardless of whether the issue is grievable or non-grievable) within three (3) working days by an employee designated by the Warden (not the IGC). The employee designated by the Warden will give the grievances to the IGC after the grievance has been entered into the automated system. Upon receipt of a grievance, the IGC will, within three (3) working days, complete the additional text for the grievance into the CRT screen and enter the grievance information in the grievance log book. The time frame for responding to the grievance will begin once the text for the grievance has been entered into the OMS system. . . .

13.5 The Warden will respond to the grievant in writing (in the space provided on SCDC Form 10-5, Step 1) indicating in detail the rationale for the decision rendered and any recommended remedies. The grievant will also be informed of his/her rights to appeal to the next level. The Warden will respond to the grievant no later than 45 days from the date the grievance was formally entered into the OMS system by the IGC. . . .

13.7 Appeal Process: The grievant may appeal by completing the SCDC Form 10-5a, Step 2 to the IGC within five (5) calendar days of the receipt of the response by the grievant. . . . The Inmate Grievance Branch will confirm receipt to the appeal, conduct any further investigation necessary, prepare a report, and present all available information to the responsible official. The responsible official will render the final decision on the grievance within 90 days from the date that the IGC received the appeal of the Warden's decision. . . .

SCDC Policy/Procedure, Inmate Grievance System, GA-01.12 §§ 13.2, 13.3, 13.5, 13.7 (May 12, 2014) available at <http://www.doc.sc.gov/policy/policy.html>.

The plaintiff clearly has not exhausted his administrative remedies. His claims for inadequate lighting, lack of recreation or exercise, cold and inadequate food, and lack of haircuts and cleaning supplies at Kershaw can only arise while he was in custody there, beginning on November 13, 2018, and continue through the date he filed his initial complaint here, March 3, 2019. The defendants' records show that he filed only one grievance about cold and inadequate food during this period on February 7, 2019, which was returned to him unprocessed as incomplete, and he failed to appeal it prior to filing his initial complaint (doc. 141-2, Anderson aff. ¶ 13; doc. 141-2, p. 26). Their records also show that he failed to file relevant grievances on any of his remaining claims during this period. The plaintiff provides his own evidence, showing that he filed a step 1 grievance dated December 26, 2018, concerning food service and showers (doc. 161-5, p. 4), a handwritten "Statement of Grievance" dated February 1, 2019, on the lack of a haircut and cleaning supplies (doc. 161-7, p. 2), an inmate request form dated February 4, 2019, requesting a haircut (*id.*, p. 3), and "duplicate" request to staff member forms dated February 4 and 8, 2019, concerning showers, unsanitary conditions, and the lack of cleaning supplies (*id.*, pp. 17-18). However, he has not demonstrated that he pursued and appealed these grievances. As such, the evidence from both parties shows that the plaintiff did not exhaust his administrative remedies.

The plaintiff argues that his failure to exhaust should be excused since SCDC's administrative remedies were unavailable to him, because the staff would not provide him with grievance forms, and they interfered with his outgoing mail. However, the plaintiff's own exhibits in response to the motion for summary judgment belie these contentions. During the same period at issue, the plaintiff plainly had access to the necessary forms, as he submitted multiple request to staff member and step 1 grievance forms regarding his complaint of interference with his legal mail (docs. 161-4, pp. 3-51). Also contained within these exhibits are copies of his correspondence to and from the state

court, showing that he did in fact receive his mail. In any event, the plaintiff has failed to show that SCDC's administrative grievance procedure was unavailable to him. Because he failed to exhaust his administrative remedies before filing suit here, the defendants are entitled to summary judgment.

CONCLUSION AND RECOMMENDATION

Now, therefore, based upon the foregoing,

IT IS HEREBY ORDERED that the plaintiff's motion to strike the motion for summary judgment (doc. 147) is denied; and

IT IS HEREBY RECOMMENDED that the defendants' motion for summary judgment (doc. 141) be granted.

s/ Kevin F. McDonald
United States Magistrate Judge

May 1, 2020
Greenville, South Carolina

The attention of the parties is directed to the important notice on the following page.

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
300 East Washington Street, Room 239
Greenville, South Carolina 29601

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).

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

Kevin Herriott,

Plaintiff,

vs.

Associate Warden Ford, Associate
Warden Canning, Captain Davis,
Lieutenant Danley, Food Service
Director Bragg, and Acting Warden
McCabe,

Defendants.

Civil Action No. 6:19-751-DCN-KFM

**ORDER AND
REPORT OF MAGISTRATE JUDGE**

This matter is before the court on the defendants' motion for summary judgment (doc. 141), and the plaintiff's motion to strike the defendants' motion for summary judgment (doc. 147). The plaintiff, a state prisoner proceeding *pro se*, brought this action alleging violations of his constitutional rights pursuant to 42 U.S.C. § 1983. Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(d)(D.S.C.), this magistrate judge is authorized to review all pretrial matters in cases filed under Section 1983.

BACKGROUND

The plaintiff is an inmate at the South Carolina Department of Corrections ("SCDC"), and he has been housed at different prisons within SCDC, including Kershaw Correctional Institution ("Kershaw"). On March 4, 2019, he filed a complaint against various officers and employees at three SCDC prisons (see C.A. No. 6:19-cv-626, doc. 1). By order dated March 12, 2019, the initial case was severed into three separate actions, each pertaining to the claims related to a particular prison, including this case involving claims arising at Kershaw (doc. 1). After an unsuccessful interlocutory appeal (docs. 31, 65), the plaintiff filed an amended complaint on July 10, 2019 (doc. 57). By orders dated

September 16, 2019, and February 14, 2020, the Honorable David C. Norton, United States District Judge, dismissed some of the named defendants and some of the plaintiff's claims (docs. 79, 148). Accordingly, the remaining claims concern the plaintiff's conditions of confinement against the following officers and employees at Kershaw: Acting Warden Wayne McCabe, Associate Wardens Kevin Ford and Joseph Canning, Captain Benjamin Davis, Lieutenant Derek Danley, and Food Service Director Mikel Bragg. The plaintiff alleges in his amended complaint that since November 13, 2018, through and continuing through the present date,¹ the defendants violated his Eighth and Fourteenth Amendments rights by subjecting him to unconstitutional conditions of confinement while in Kershaw's Restricted Housing Unit ("RHU"), including the lack of indoor and outdoor recreation and exercise, an unhealthy and unsanitary cell without adequate lighting and cleaning materials, a lack of haircuts, and cold, inadequate food (doc. 57, pp. 8-12). He further alleges during this same period, the defendants "responded" to his numerous request to staff member and grievance forms concerning these issues, denying his requests that these conditions be corrected (*id.*, pp. 9-11). He alleges that as a result of these conditions and the defendants' indifference and inaction to them, he suffered physical injuries and pain, and he seeks actual and punitive damages (*id.* p. 13).

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plaintiff filed a motion to strike on February 10, 2020 (doc. 147), to which the defendants filed a response in opposition on February 24, 2020 (doc. 155). The plaintiff filed his response in opposition to the motion for summary judgment on March 4, 2020 (doc. 161), to which the defendants filed a reply on March 11, 2020 (doc. 163). The plaintiff filed a sur-reply on March 20, 2020 (doc. 164).

In support of their motion for summary judgment, the defendants argue that the plaintiff failed to exhaust his administrative remedies. They point out that the plaintiff arrived at Kershaw on November 13, 2018, and filed his initial complaint here on March 3, 2020, yet he failed to file administrative grievances in the interim for his claims of inadequate lighting, the lack of outdoor recreation and exercise, and the lack of haircuts and cleaning issues (doc. 141-2, Anderson aff. ¶¶ 12, 15, 16). They also present evidence that while the plaintiff did file an unsuccessful grievance about cold and inadequate food on February 7, 2019, he failed to appeal it prior to filing his initial complaint here (*id.* ¶ 13; doc. 141-2, p. 26). Accordingly, they argue that the plaintiff failed to properly exhaust any of his administrative remedies prior to filing this case.

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showers (doc. 161-5, p. 4); a handwritten "Statement of Grievance" dated February 1, 2019, on the lack of a haircut and cleaning supplies (doc. 161-7, p. 2); an inmate request form dated February 4, 2019, requesting a haircut (*id.*, p. 3); and "duplicate" request to staff member forms dated February 4 and 8, 2019, concerning showers, unsanitary conditions, and the lack of cleaning supplies (*id.*, pp. 17-18).

The defendants filed a reply in support of their motion for summary judgment, arguing that the plaintiff's own exhibits show that he did not exhaust his administrative remedies (doc. 163). The plaintiff then filed a sur-reply, stating again that SCDC's administrative remedies were unavailable, because he was not given grievance forms and that, in any event, they would not have been processed or returned given his "knowledge of mail interference" (doc. 164, p. 2).

APPLICABLE LAW AND ANALYSIS

Plaintiff's Motion to Strike

The plaintiff, citing Federal Rule of Civil Procedure 12, has moved to strike the defendants' motion for summary judgment on the basis that it is "improper, inappropriate, redundant, and immaterial" (doc. 147). However, Rule 12 pertains to pleadings rather than motions, and it is thus inapplicable here. In any event, the undersigned has reviewed the motion for summary judgment and finds it to be in compliance with Rule 56. Moreover, the plaintiff has filed a thorough response with exhibits. Accordingly, the plaintiff's motion to strike (doc. 147) is denied.

Summary Judgment Standard

Federal Rule of Civil Procedure 56 states, as to a party who has moved for summary judgment: "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). As to the first of these determinations, a fact is deemed "material" if proof of its existence or nonexistence would affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a

reasonable jury might return a verdict for the non-movant. *Id.* at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings; rather, he must demonstrate that specific, material facts exist that give rise to a genuine issue. *Id.* at 324. Under this standard, the existence of a mere scintilla of evidence in support of the plaintiff's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

Exhaustion

The Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended at 42 U.S.C. § 1997e(a) (1996)), mandates, among other things, that prisoners exhaust their administrative remedies prior to filing civil actions concerning prison conditions under Section 1983 or any other federal law. See *Jones v. Bock*, 549 U.S. 199, 211 (2007) ("There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court"). "[T]he PLRA's exhaustion requirement is mandatory," *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 677 (4th Cir. 2005), and "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle*, 534 U.S. 516, 532 (2002)

The PLRA requires "proper exhaustion" of available administrative remedies prior to filing suit. *Woodford v. Ngo*, 548 U.S. 81, 93-94 (2006). As the Supreme Court noted, "[a]ggravated parties may prefer not to exhaust administrative remedies for a variety of reasons," whether it be concerns about efficiency or "bad faith." *Id.* at 89-90. This is especially true in a prison context. *Id.* at 90 n.1. Nevertheless, "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Id.* at 90-91.

"[A]n 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. Bennette*, 517 F.3d 717, 725 (4th Cir. 2008). Thus, an administrative remedy is considered unavailable when: (1) "it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) it is "so opaque that it becomes, practically speaking, incapable of use"; or (3) "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross v. Blake*, 136 S. Ct. 1850, 1859-60 (2016).

SCDC's administrative remedies process for prisoners is outlined in SCDC Policy GA-01.12. This court may take judicial notice of this policy. *Al-Haqq v. Bryant*, No. 2:14-cv-0008-TMC-MGB, 2016 WL 769121, at *2 (D.S.C. Feb. 8, 2016) (citing *Malik v. Ward*, No. 9:08-cv-01886, 2010 WL 936777, at *2 n.4 (D.S.C. Mar. 16, 2010)). The policy provides in relevant part:

13.2 Inmates must make an effort to informally resolve a grievance by submitting a Request to Staff Member Form to the appropriate supervisor/staff within eight (8) working days of the incident. However, in certain cases, informal resolution may not be appropriate or possible.... If informal resolution is not possible, the grievant will complete Form 10-5, Step 1, which is located in common areas, i.e., living areas, libraries, etc. and will place the form in a designated grievance drop box within five (5) working days of the alleged incident. . . . All information must be placed on SCDC Form 10-5, " Inmate Grievance

Form." An inmate will submit a grievance within the time frames established in the policy. . . .

The grievance form must contain information about how, with whom, and when attempts were made to resolve the problem informally within eight (8) working days of the appropriate supervisor's signature date on the SCDC Form 19-11, "Inmate Request To Staff Member" (RTSM). . . .

13.3 All grievances will be picked up on a daily basis, during normal working hours, by an employee designated by the Warden (not the IGC). All grievances will be numbered and entered into the automated system (regardless of whether the issue is grievable or non-grievable) within three (3) working days by an employee designated by the Warden (not the IGC). The employee designated by the Warden will give the grievances to the IGC after the grievance has been entered into the automated system. Upon receipt of a grievance, the IGC will, within three (3) working days, complete the additional text for the grievance into the CRT screen and enter the grievance information in the grievance log book. The time frame for responding to the grievance will begin once the text for the grievance has been entered into the OMS system. . . .

13.5 The Warden will respond to the grievant in writing (in the space provided on SCDC Form 10-5, Step 1) indicating in detail the rationale for the decision rendered and any recommended remedies. The grievant will also be informed of his/her rights to appeal to the next level. The Warden will respond to the grievant no later than 45 days from the date the grievance was formally entered into the OMS system by the IGC. . . .

13.7 Appeal Process: The grievant may appeal by completing the SCDC Form 10-5a, Step 2 to the IGC within five (5) calendar days of the receipt of the response by the grievant. . . . The Inmate Grievance Branch will confirm receipt to the appeal, conduct any further investigation necessary, prepare a report, and present all available information to the responsible official. The responsible official will render the final decision on the grievance within 90 days from the date that the IGC received the appeal of the Warden's decision. . . .

SCDC Policy/Procedure, Inmate Grievance System, GA-01.12 §§ 13.2, 13.3, 13.5, 13.7 (May 12, 2014) available at <http://www.doc.sc.gov/policy/policy.html>.

The plaintiff clearly has not exhausted his administrative remedies. His claims for inadequate lighting, lack of recreation or exercise, cold and inadequate food, and lack of haircuts and cleaning supplies at Kershaw can only arise while he was in custody there, beginning on November 13, 2018, and continue through the date he filed his initial complaint here, March 3, 2019. The defendants' records show that he filed only one grievance about cold and inadequate food during this period on February 7, 2019, which was returned to him unprocessed as incomplete, and he failed to appeal it prior to filing his initial complaint (doc. 141-2, Anderson aff. ¶ 13; doc. 141-2, p. 26). Their records also show that he failed to file relevant grievances on any of his remaining claims during this period. The plaintiff provides his own evidence, showing that he filed a step 1 grievance dated December 26, 2018, concerning food service and showers (doc. 161-5, p. 4), a handwritten "Statement of Grievance" dated February 1, 2019, on the lack of a haircut and cleaning supplies (doc. 161-7, p. 2), an inmate request form dated February 4, 2019, requesting a haircut (*id.*, p. 3), and "duplicate" request to staff member forms dated February 4 and 8, 2019, concerning showers, unsanitary conditions, and the lack of cleaning supplies (*id.*, pp. 17-18). However, he has not demonstrated that he pursued and appealed these grievances. As such, the evidence from both parties shows that the plaintiff did not exhaust his administrative remedies.

The plaintiff argues that his failure to exhaust should be excused since SCDC's administrative remedies were unavailable to him, because the staff would not provide him with grievance forms, and they interfered with his outgoing mail. However, the plaintiff's own exhibits in response to the motion for summary judgment belie these contentions. During the same period at issue, the plaintiff plainly had access to the necessary forms, as he submitted multiple request to staff member and step 1 grievance forms regarding his complaint of interference with his legal mail (docs. 161-4, pp. 3-51). Also contained within these exhibits are copies of his correspondence to and from the state court, showing that he did in fact receive his mail. In any event, the plaintiff has failed to show that SCDC's administrative grievance procedure was unavailable to him. Because

he failed to exhaust his administrative remedies before filing suit here, the defendants are entitled to summary judgment.

CONCLUSION AND RECOMMENDATION

Now, therefore, based upon the foregoing,

IT IS HEREBY ORDERED that the plaintiff's motion to strike the motion for summary judgment (doc. 147) is denied; and

IT IS HEREBY RECOMMENDED that the defendants' motion for summary judgment (doc. 141) be granted.

s/ Kevin F. McDonald
United States Magistrate Judge

May 1, 2020
Greenville, South Carolina

The attention of the parties is directed to the important notice on the following page.

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
300 East Washington Street, Room 239
Greenville, South Carolina 29601

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).