

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

CHARLES EDWARD BINNS,)	
Plaintiff)	Civil Action No.: 1:13cv00086
)	
v.)	
)	
)	<u>REPORT AND</u>
)	<u>RECOMMENDATION</u>
COMMONWEALTH OF)	
VIRGINIA, DEPARTMENT)	
OF CORRECTIONS, et al.,)	By: PAMELA MEADE SARGENT
Defendants.)	United States Magistrate Judge

The plaintiff, Charles Edward Binns, an inmate formerly incarcerated at Keen Mountain Correctional Center, (“KMCC”), sues numerous defendants seeking injunctive relief and damages under federal and state law for the loss of his vision, which Binns alleges occurred because of a deprivation of or inadequate medical treatment after he was assaulted by another Department of Corrections, (“DOC”), inmate. This case is before the court on the Motion To Dismiss Or, In The Alternative, For Summary Judgment By Defendant John D’Alessandro, (Docket Item No. 12), Motion For Summary Judgment filed on behalf of the DOC defendants, A. Eugene Whited and D.A. Braxton, (Docket Item No. 22), Defendants Hawks, Shelton, And Lester’s Motion To Dismiss Or, In the Alternative, For Summary Judgment, (Docket Item No. 27), and Motion To Dismiss Or, In The Alternative, For Summary Judgment By Defendant Gerard T. Hopkins, M.D., (Docket Item No. 47), (“Motions”). At the court’s request, an evidentiary hearing was held on October 8, 2014. The Motions are before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). The undersigned now submits the following report, recommending that the

Motions be granted and the plaintiff's claims be dismissed based on his failure to exhaust administrative remedies prior to filing suit.

I. Facts

Binns testified that he was an inmate at the DOC's Pocahontas Correctional Center, ("PCC"), on October 31, 2011, when he was assaulted by another inmate. Binns testified that he had been an inmate of the DOC for the past 31 years. During that time, Binns said, he had been housed at 12 or 13 DOC institutions. Binns admitted that he had participated in inmate intake orientation at some of these institutions prior to arriving at KMCC, including explanation of the DOC Grievance Procedures. Binns denied, however, that he received any information regarding the Inmate Grievance Procedure upon his intake at either PCC or KMCC. Binns admitted that he had filed an inmate Grievance prior to his assault in October 2011. He also admitted that he had signed forms while an inmate at PCC, Green Rock Correctional Center and Southhampton Correctional Center, saying that he had received orientation on and been provided with a copy of the Inmate Grievance Procedure. These forms were admitted into evidence as Defendants' Exhibit Nos. 9, 10 and 11.

Binns testified that he suffered severe injuries to his face and head in the attack at PCC on October 31, 2011, and was taken, first, to a hospital in Bluefield, W.Va., and then to the Medical College of Virginia, ("MCV"), Hospital in Richmond. After his release from MCV, Binns was transported back to PCC. The next day, Binns was transferred to KMCC. Binns explained that, upon his arrival at KMCC, the property officer, captain and a nurse sat him down at a table and explained that he was being transferred to KMCC to be placed in segregation because of the assault. Binns said that no orientation occurred, no one explained

the Grievance Procedure, and no one provided him with an Orientation Handbook. Binns said that, if he had been provided with a Handbook, he could not have read it because his eyesight was too poor at that time.

Binns testified that he could not see out of his right eye after the attack and that his vision in his left eye was blurry. Binns testified that, when he arrived at KMCC, he was placed in a segregation cell by himself. Four or five days after being transferred to KMCC, Binns said that he was transported to Abingdon and seen by an ophthalmologist, Dr. Ellison Conrad, M.D. Binns testified that Dr. Conrad told him that he thought he could not see out of his right eye because the interior of the eyeball was full of blood. Dr. Conrad prescribed some eyedrops to reduce the pressure in Binns's right eye and recommended that Binns return to see him in two weeks. Binns testified that it was several days before he received and started using the eyedrops prescribed by Dr. Conrad.

Binns stated that, after being held in segregation for 10 days, he was released to be housed in general population at KMCC. He stated that the day after he was released to general population, he got his cellmate to complete an Emergency Grievance form, stating that he was in extreme pain and requesting that he be given something for pain. This form was admitted into evidence as Defendants' Exhibit No. 6. Binns stated that, after filing this Emergency Grievance, he was given Motrin for pain.

Binns stated that he was eventually taken by correctional officers to be seen again by Dr. Conrad, but that it was not within the recommended two-week period. On this second visit, Binns said that Dr. Conrad told him that the blood in his eye had cleared up, but Dr. Conrad explained that the reason Binns still could not see

out of his right eye was because the retina had detached. Binns said that Dr. Conrad told him that he needed an urgent consultation with a retinal surgeon and that he was recommending to the officials at KMCC that Binns be seen by Dr. Couch, a retinal surgeon with an office in Abingdon.

Binns testified that several weeks passed, and he was taken to see Dr. Conrad for a third time. On this occasion, Binns said that Dr. Conrad was curious as to why Binns had been brought back to see him since he had recommended that Binns needed to urgently be seen by a retinal surgeon. Binns said that, after this third visit to Dr. Conrad, he submitted an Informal Request form to the medical department, inquiring as to when he would be seen by a retinal surgeon. This form was admitted into evidence as Plaintiff's Exhibit No. 1. Binns stated that he submitted this form by placing it in the institutional mail. Nevertheless, the form was returned to him with the only response being, "Please send through institutional mail." Binns said that he did not resubmit the form because it was his understanding that he could submit only one Informal Request regarding an issue.

Binns stated that he later filed an Emergency Grievance on November 16, 2011, inquiring as to when he would be seen by a retinal surgeon, but this Emergency Grievance was rejected at intake because it was determined not to be an emergency. Binns stated that he did not have this Emergency Grievance. Binns testified that he filed another Emergency Grievance on November 19, 2011, and another on December 15, 2011. These forms were admitted into evidence as Defendants' Exhibit Nos. 7 and 8. He said each of these Emergency Grievances was rejected as not being an emergency.

Binns testified that he eventually was taken to see Dr. Couch while he was still an inmate at KMCC. Binns said that Dr. Couch told him that he needed surgery to repair his detached retina. Binns stated that he thought he would be scheduled for surgery with Dr. Couch but, instead, he was transferred to Greenville Correctional Center. Binns said that, once at Greenville, he submitted an Informal Complaint form, asking when he would see a retinal surgeon. After being at Greenville for six days, he was taken to see a retinal surgeon in Richmond on February 6, 2012. On this date, the retinal surgeon told him that his retina had completely detached and that there was nothing that could be done to restore his eyesight in his right eye.

Binns testified that, after learning this information, he did not file any Informal Complaint or Grievance with regard to the medical treatment needed for his eyes. He said that he did not do so because it was too late to save his eyesight.

Mary Trent, Binns's fiancée and the holder of his power of attorney, also testified at the October 8 hearing. Trent testified that, after learning that Binns had been assaulted on October 31, she placed numerous telephone calls to numerous PCC, KMCC and DOC officials in an effort to determine Binns's condition and see that he got the medical treatment he needed to save his eyesight. Trent said that she learned that Binns needed to see a retinal surgeon when she talked to Binns after his second visit to Dr. Conrad. Trent said that she spoke, either in person or by phone, to Warden Braxton, Fleming, Nurse Lester, Whitten, Lt. Vandyke, J.D. Terry, Sherita Bryant and Fred Schilling in an effort to arrange for Binns to be seen by a retinal surgeon.

Captain Shawn Owens, the Acting Grievance Coordinator at KMCC, also testified at the hearing. Owens testified that the Inmate Grievance Procedure is contained in DOC Operating Procedure 866.1. Operating Procedure 866.1 was admitted into evidence as Defendants' Exhibit No. 1, ("Grievance Procedure"). Owens testified that all inmates are instructed in the Inmate Grievance Procedure upon intake to each facility.

Owens stated that the Grievance Procedure listed three different types of forms – Emergency Grievances, Informal Complaints and formal Grievances – to be used to address inmate issues and complaints. Owens stated that an inmate should complete an Emergency Grievance if he was in threat of immediate or irreparable harm. The department to which an Emergency Grievance is sent has only eight hours to respond to the Emergency Grievance, Owens said. Owens said that, if an inmate is dissatisfied with the response to an Emergency Grievance, he may file an Informal Complaint. Owens also said that filing an Emergency Grievance is not required and does not count toward exhaustion of an inmate's administrative remedies.

Owens stated that, if an inmate had an issue or complaint that needed resolving, under the Grievance Procedure, he must first file an Informal Complaint. Owens stated that all Informal Complaints are reviewed upon filing. If they are rejected for any reason, a copy of the Informal Complaint is made and placed in the inmate's grievance file, and the original is returned to the inmate. If the Informal Complaint is accepted, it is logged into a tracking system, given a specific number, and the inmate receives a receipt. The Informal Complaint is then forwarded to the appropriate department for response within 15 days. If the inmate

is not satisfied with the response received or, if the inmate does not receive a response, he must file a formal Grievance.

Again, Owens said, all formal Grievances are reviewed upon intake. If a Grievance is rejected on intake, an inmate has five days to appeal that decision. If the Grievance is accepted, it is logged in, given a tracking number and routed to the appropriate department to respond. The department has 30 days to respond to a Grievance. If an inmate is dissatisfied with the response, or if the inmate does not receive a response, he has five days to file an appeal to the next level. Owens stated that an inmate's medical care and treatment is a grievable issue. A blank Informal Complaint form was admitted as Defendants' Exhibit No. 2, and a blank Regular Grievance form was admitted as Defendants' Exhibit No. 3.

Owens said that Informal Complaint and Grievance forms are available in each prison pod library for those inmates in general population. Inmates held in segregation, must request the forms from their counselors or the correctional officers working their units. Owens testified that, if a Grievance is rejected, a copy of the Grievance is made and placed in the inmate's grievance file, and the original is returned to the inmate. If the Grievance is accepted, it is logged in and given a tracking number, and the inmate is given a receipt for the Grievance.

Owens stated that he had pulled and reviewed Binns's grievance file and determined that Binns had not filed a Regular Grievance while an inmate at KMCC. Owens said that Binns had filed three Informal Complaint forms and three Emergency Grievances while at KMCC, all three of which were found not to be an emergency. Copies of these Emergency Grievances were admitted into evidence as Defendants' Exhibit Nos. 6, 7 and 8. Copies of the Informal

Complaints and a printout of Binns's Offender Grievance Report, showing that these three Informal Complaints had been accepted and logged into the grievance system, were admitted into evidence as Defendants' Exhibit No. 5. One of these Informal Complaints dealt with failing to receive an ordered commissary purchase, another dealt with Binns's inmate account, and the third dealt with Binns's security level. Owens admitted that the printout showed only those Informal Complaints and Grievances that Binns filed through February 1, 2012, the date he was transferred out of KMCC.

Owens testified that, under the Grievance Procedure, an inmate is supposed to file his Grievance with the DOC facility where the event about which he complains occurred. If a Grievance is filed at the wrong facility, he said, the Grievance is rejected, with a box on the back of the form checked telling the inmate to file the Grievance with the proper facility. Owens stated that, if an offender filed a Grievance with KMCC after he had been transferred from the facility, a copy of the Grievance or a copy of the receipt would be in the inmate's file.

Owens testified that each inmate goes through "intake" upon his arrival at KMCC, at which time, the Grievance Procedure is explained to the inmate, and he is given a copy of the Orientation Handbook, which also explains the Grievance Procedure. The inmate is then asked to sign a form indicating that he received the Orientation Handbook.

II. Analysis

While some of the Motions before the undersigned are entitled motions to dismiss, matters outside the pleadings have been submitted to the court. Pursuant to Federal Rules of Civil Procedure Rule 12(d), these motions will be treated as motions for summary judgment under Rule 56. With regard to a motion for summary judgment, the standard for review is well-settled. The court should grant summary judgment only when the pleadings, responses to discovery and the record reveal that “there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(a); *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). A genuine issue of fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248.

In considering a motion for summary judgment, the court must view the facts and the reasonable inferences to be drawn from the facts in the light most favorable to the party opposing the motion. *See Anderson*, 477 U.S. at 255; *Matsushita*, 475 U.S. at 587. In order to be successful on a motion for summary judgment, a moving party "must show that there is an absence of evidence to support the non-moving party's case" or that "the evidence is so one-sided that one party must prevail as a matter of law." *Lexington-South Elkhorn Water Dist. v. City of Wilmore, Ky.*, 93 F.3d 230, 233 (6th Cir. 1996).

The defendants argue that there is no dispute in material fact and that they are entitled to entry of summary judgment as a matter of law because Binns failed

to exhaust his administrative remedies as required by the Prison Litigation Reform Act and Virginia state law prior to filing suit.

The Prison Litigation Reform Act, (“PLRA”), provides that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, ... until such administrative remedies as are available are exhausted.” 42 U.S.C.A. § 1997e(a) (West 2012). “The exhaustion requirement is mandatory, and courts lack the authority to waive that requirement.” *Graham v. Gentry*, 413 F. App’x 660, 663 (4th Cir. Feb. 18, 2011) (citing *Porter v. Nussle*, 534 U.S. 516, 524 (2002)). Virginia Code § 8.01-243.2 states: “No person confined in a state or local correctional facility shall bring or have brought on his behalf any personal action relating to the conditions of his confinement until all available administrative remedies are exhausted.” VA. CODE ANN. § 8.01-243.2 (2007).

The evidence before the court presents no genuine issue of material fact and shows that Binns failed to exhaust his administrative remedies prior to filing this suit. By his own admission, Binns did not file any Informal Complaint or regular Grievance regarding the lack of appropriate, prompt medical treatment. While Binns asserts that he was not properly oriented to the Grievance Procedure on his transfer to KMCC, he admitted that he had received orientation on the Grievance Procedure at institutions where he had been housed prior to his transfer to KMCC. Binns further argues that Trent’s efforts on his behalf should have informed KMCC officials that he was complaining about the lack of prompt, appropriate medical treatment for the injury to his eyes. Trent’s efforts are no substitute, however, for compliance with the Grievance Procedure. *See Woodford v. Ngo*, 548 U.S. 81, 93 (2006) (proper exhaustion required to pursue prisoner claim).

Based on the above ruling, I do not address the defendants' additional arguments, and I recommend that the court enter summary judgment in the defendants' favor based on Binns's failure to exhaust his administrative remedies prior to filing suit.

PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. There is no genuine issue of material fact; and
2. The undisputed evidence shows that Binns failed to exhaust his administrative remedies prior to filing this suit.

RECOMMENDED DISPOSITION

Based on the above-stated reasons, I recommend that the court grant the Motions and enter summary judgment in the defendants' favor based on Binns's failure to exhaust his administrative remedies prior to filing this suit.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo

determination of those portions of the report or specified proposed finding or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file written objection to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14-day period, the Clerk is directed to transmit the record in this matter to the Honorable James P. Jones, United States District Judge.

The Clerk is directed to send copies of this Report and Recommendation to all counsel of record.

DATED: This 12th day of November, 2014.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE