

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

<b>DONELL J. BLOUNT, SR.,</b>	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 7:04-CV-00429</b>
	)	
<b>GENE JOHNSON, <u>et al.</u>,</b>	)	<b>By: Michael F. Urbanski</b>
<b>Defendants.</b>	)	<b>United States Magistrate Judge</b>

**REPORT AND RECOMMENDATION**

Plaintiff Donell J. Blount, a Virginia inmate proceeding pro se, has filed a civil rights action pursuant to 42 U.S.C. § 1983, with jurisdiction vested under 28 U.S.C. § 1343. Blount is currently an inmate housed in the Virginia Department of Corrections system at Red Onion State Prison (“Red Onion”). This matter is before the court on a motion for summary judgment filed by defendants Officer J. Fleming, Officer H. Grear, D. Mills, Officer R. Sutherland, and Officer T. Vanover. Docket No. 18. Defendants allege that plaintiff has failed to exhaust his administrative remedies regarding the two remaining claims in his complaint concerning an alleged assault and denial of a common fare diet.

The court held an evidentiary hearing on the issue of exhaustion, at which plaintiff contended that he attempted to file informal complaints, grievances, and administrative appeals regarding his claims. The record is undisputed that Blount filed informal complaints about his alleged assault, and that these were received by Red Onion’s institutional investigator. However, Blount provides no evidence to support his claims that he filed a formal grievance or appealed the prison officials’ non-response to his informal complaints regarding this claim. As to his common fare diet claim, a disputed issue of material fact exists as to whether Blount administratively exhausted this claim. As such, it is the

recommendation of the undersigned that defendants' motion for summary judgment be denied regarding plaintiff's common fare diet claim and that it be granted regarding his excessive force claim.

## I

In a December 16, 2004 Memorandum Opinion, the court determined that two of plaintiff's five original claims should be dismissed. Blount himself dismissed another of his five original claims. Two claims remain in the lawsuit. In the first claim, plaintiff alleges that defendants J. Fleming, Vanover, Sutherland, and Greer assaulted him. In the second claim, plaintiff alleges that defendant Mills has refused to allow plaintiff to have a religiously-mandated common fare diet even though other prison officials have approved it for him.

Defendants' motion for summary judgment contends that plaintiff has failed to exhaust his administrative remedies regarding his two remaining claims. In support of their motion for summary judgment, defendants attach an affidavit by R. Mullins, grievance coordinator at Red Onion. Mullins provides in her affidavit that she is generally aware of Blount's allegations in this lawsuit. Mullins Aff. ¶

3. She provides that Red Onion

[i]nmates are oriented to the Inmate Grievance Procedure when they are received into the Department of Corrections. Grievances are to be filed within 30 calendar days from the date of the occurrence or incident. Prior to submitting a grievance, the inmate must demonstrate that he or she has made a good faith effort to informally resolve his or her complaint. This may be accomplished by submitting an informal complaint form to the appropriate Department Head. The criteria for acceptance of a regular grievance are set forth in Division Operating Procedure (DOP) 866, Inmate Grievance Procedure, and are also explained on the back of the regular grievance form. If the inmate meets the criteria for acceptance, the grievance is logged in and a receipt is issued to the inmate.

Id. ¶ 4. Mullins further states that if the regular grievance does not meet the criteria for acceptance, it is returned to the inmate within two working days. Id. ¶ 5. The grievance coordinator completes the intake section on the back of the regular grievance form, explaining why the grievance was not accepted. Id. The inmate then has the opportunity to resubmit the grievance after complying with the criteria for acceptance. Id.

Mullins states that prison procedures dictate that review of the grievance coordinator's decision occurs a number of levels. Id. ¶ 6. "Level I review" is conducted by the warden or superintendent of the facility where the inmate is located. Id. If the inmate is not satisfied with the response to the Level I decision, the inmate may then conduct a "Level II" review to other VDOC officials located outside of the prison. Id. Following this level of review, there is also a "Level III" review to the Director or the Deputy Director of the VDOC. Id.

Three witnesses testified at the evidentiary hearing. Reva Mullins, grievance coordinator at Red Onion State Prison, and Donna Munsey, regional inmate ombudsman at the Roanoke Regional Office of the Department of Corrections, testified in support of the motion for summary judgment. Plaintiff Blount testified in opposition.

Mullins testified that her records indicated that plaintiff had not fulfilled the grievance requirements as to either claim. As to the assault claim, Mullins states that her office has no record of an informal complaint or grievance. On cross-examination, however, Mullins conceded that three of Blount's exhibits, 3, 4 and 5, were informal complaints lodged by Blount on the assault charge, and that these exhibits bore official Red Onion stamps and the handwriting and signature of Red Onion Institutional Investigator C.E. Yates. Nevertheless, Mullins maintained that despite these documents,

her affidavit was correct. Mullins stated that while Blount appeared to have lodged informal complaints with the institutional investigator, her office still had no record of an informal complaint or grievance by Blount as to his claimed assault. In any event, Mullins insisted that there is no indication in prison records that plaintiff had ever filed any formal grievance regarding his assault claim. On the common fare diet claim, Mullins likewise testified that her office had no record of any grievance being filed. Munsey, the regional inmate ombudsman, testified her office had no record of any appeal filed by Blount regarding the alleged assault or the denial of a common fare diet.

Blount testified that he filed administrative or informal complaints and/or grievances regarding both of his claims and attempted to exhaust his administrative remedies prior to filing suit, but had been frustrated in his efforts because Red Onion officials would not respond. As to the assault claim, plaintiff produced copies of three informal complaints regarding the alleged assault. See Docket No. 28, Exhibits 3, 4, and 5. Exhibit 3 is an informal complaint signed as received by Investigator Yates of Red Onion. The documents labeled Exhibits 4 and 5 are also informal complaints signed as received by Investigator Yates. Plaintiff testified that he received no response to these informal complaints, so he attempted to file a grievance with the regional ombudsman.

Regarding his common fare claim, plaintiff likewise testified that he followed the grievance process.<sup>1</sup> Plaintiff offered Exhibits 7 - 10 to demonstrate exhaustion of this claim. Exhibit 7 is a request for common fare diet, Exhibit 8 is an administrative record of a denial of plaintiff's request for common fare diet and Exhibit 9 is a grievance form protesting the denial of common fare diet, albeit not signed

---

<sup>1</sup>Plaintiff and Mullins agreed that no informal complaint was necessary regarding the common fare diet claim as there had been some administrative action regarding it.

by prison authorities. Exhibit 10 is a letter from plaintiff to the regional ombudsman dated June 16, 2004 protesting that one of his grievances had not been handled properly by prison officials. Mullins indicated that her office had no record that plaintiff had ever submitted Exhibit 9 or 10. Mullins acknowledged that Exhibit 9 was a grievance form related to the common fare diet, but she testified that it was not signed, dated, or stamped per the procedure in her office. Similarly, Mullins indicated that the back of the form was marked with a circle which was not the practice in her office.

While normally the evidence provided by Mullins would be sufficient to establish that no grievance was submitted on the diet claim, plaintiff presented some puzzling evidence at the evidentiary hearing. For instance, Exhibit 9 has two curious sets of marks on it in red pen: a circle around plaintiff's building and room number on the front of the document, and a check and a circle around information on the back of the document indicating that plaintiff did not file an informal grievance regarding the matter prior to filing his complaint. Plaintiff indicates that prisoners at Red Onion are not allowed to have red pens, and that these markings indicate that he attempted to file the grievance and that someone in the prison administration saw and wrote on the form. Plaintiff stated, and Mullins agreed, that had plaintiff filed a grievance regarding the denial of common fare diet, he would have done all that he needed to do at the prison level to exhaust his administrative procedures, and that, as such, the notation circled on the back was not correct.

At the evidentiary hearing, plaintiff also stated that some of the materials necessary for him to prosecute his claim were confiscated by Red Onion authorities as contraband that belonged to other inmates. The court has conducted an in camera review of the documents that were confiscated from

plaintiff, and finds that no documents in the set would help him prove his claims.<sup>2</sup> Having done so, none of these items are at all relevant to any issue present in this case.

Following the evidentiary hearing, both parties submitted additional documents for consideration on summary judgment. First, Blount filed the originals of the ten exhibits he introduced at the hearing, some of which contained certain notations in red ink. See Docket No. 28. Second, defendants countered with an affidavit from Sgt. T. Adams, institutional investigator at Red Onion State Prison, indicating that while red pens are indeed contraband inside the prison and that he could not say that Blount has ever been found with one, colored ink pens and the like are removed from inmates “literally on a daily basis.” Docket No. 30, Adams Aff. at 4. Adams’ affidavit also indicates that it is possible that Blount may have sent a document outside the prison which could have been marked in red and returned to him. Id. at 5. Blount disputes these possible scenarios for red ink in a counteraffidavit filed at Docket No. 32. Finally, defendants filed an opinion by the Eastern District of Virginia decided on May 6, 2005 which dismissed an unrelated suit filed by Blount on failure to exhaust grounds.

---

<sup>2</sup> The materials confiscated from plaintiff include the following: (1) a three-page disciplinary appeal from inmate Chris Lupton; (2) several state court motions from a case involving Shaun E. Baker in Henrico County Circuit Court; (3) a verified statement from inmate Lupton from a September 2004 case involving deliberate indifference to his medical needs; (4) a variety of materials related to the divorce of Joseph Patrick Blankenship and Mary Anne Blankenship; (5) a letter from VDOC Regional Director L.W. Huffman to inmate Lupton regarding a possession of contraband charge; (6) a disciplinary hearing report for inmate Lupton; (7) a letter from Warden Braxton to inmate Lupton regarding his appeal; and materials from the cases Piggie v. Hanks, 98 F. Supp. 2d 1003 (N.D. Ind. 2000) and Mayers v. Anderson, 93 F. Supp. 2d 962 (N.D. Ind. 2000), not relevant to any issue present in this case.

## II

42 U.S.C. § 1997e(a) requires a prisoner to exhaust all available administrative remedies prior to filing an action under § 1983. Prisoners must not just initiate grievances, they must also appeal any denial of relief through all levels of administrative review that comprise the administrative grievance process. See Booth v. Churner, 532 U.S. 731 (2001); Langford v. Couch, 50 F. Supp. 2d 544, 547 (E.D. Va. 1999).

However, where prisoners attempt to exhaust and prison officials thwart their ability to do so, the exhaustion requirement is treated as fulfilled. See, e.g., Mitchell v. Horn, 318 F.3d 523, 529 (3d Cir. 2003) (holding that prisoner lacked an available administrative remedy for exhaustion purposes where the prisoner was unable to file a grievance because prison officials refused to provide him with the necessary grievance forms); Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) (finding allegations that prison officials failed to respond to written requests for grievance forms were sufficient to raise an inference that the prisoner had exhausted his “available” administrative remedies); Arnold v. Goetz, 245 F. Supp. 2d 527, 538-39 (S.D.N.Y. 2003) (finding a prisoner who was told that an inmate grievance process existed, but who was frustrated by officials in his attempts to learn how to use it, did not have recourse to an “available” administrative remedy); Davis v. Milwaukee Co., 225 F. Supp. 2d 967, 976 (E.D. Wis. 2002) (holding that when the record established that defendants interfered with the inmates’ ability to exhaust in three ways such grievance procedure might have been “unavailable”). See also Newell v. Angelone, 2002 U.S. Dist. LEXIS 4150 (W.D. Va. Mar. 7, 2002) (Wilson, C.J.) (treating exhaustion and inability to exhaust as the same thing), aff’d, 2003 U.S. App. LEXIS 18125 (4th Cir. Sept. 2, 2003).

## A

Regarding plaintiff's excessive force claim, the record makes clear that plaintiff made some effort to administratively complain of the alleged assault. Blount provides evidence of three informal complaints to counter the prison's assertion that he made no effort to exhaust. See Docket No. 28, Exhibits 3, 4 and 5. All three complaints recite the same event. The first complaint describes the alleged assault, the officers "repeatedly kicked, punched and kneed me while bending my finger. They told me that I would receive the same thing if he told anyone." Id. Stamps on the face of all three informal complaints demonstrate that they were received by various Red Onion staff. Further, Investigator Yates responded to each complaint, indicating that the matter was sent to his office for review and that he would look into it.

Although it is undisputed that Blount filed these informal complaints regarding the alleged assault, there is no evidence he took any other steps to administratively exhaust this claim, including filing a formal grievance or appeal. Plaintiff seeks to overcome this deficiency by attaching letters that he wrote to the prison warden, see Docket No. 4, Exhibit 2, and to the Regional Director discussing the prison's failure to respond to his previous complaints, see Docket No. 4, Exhibit 1. However, these letters date from a period of time before the alleged assault and concern different claims than the assault alleged in the complaint. Thus, they cannot serve to meet the exhaustion requirement as to this claim.

There is, in short, no evidence that Blount filed any formal grievance or appeal regarding the claimed assault. Nor is there any evidence suggesting that he administratively complained of the lack of a response from Investigator Yates regarding this incident. As such, there is no material fact in dispute

that Blount failed to administratively exhaust his assault claim. Nor is there any suggestion that anyone at Red Onion prevented Blount from filing a grievance or appeal or thwarted his efforts to do so. Indeed, his filings in this case and other grievance documents in the record suggest the contrary. Therefore, it is **RECOMMENDED** that defendants' motion for summary judgment be granted as to his assault claim.

## B

Defendants also contend plaintiff failed to exhaust his administrative remedies regarding his common fare diet claim. In her affidavit, grievance coordinator Mullins provides that:

[o]n June 2, 2004, defendant Mills disapproved the Common Fare diet which had been recommended for approval at the Institutional Classification Authority Hearing ("ICA"). Although approval for the Common Fare diet was recommended for approval at the ICA hearing, the final approval for this diet comes from the Common Fare Diet Review Committee at the VDOC.

When the Review Committee disapproved the Common Fare diet, Blount had the right to appeal the Committee's decision through the Inmate Grievance Procedure. Blount could have filed a grievance requesting reconsideration of the decision. Blount did not file an informal complaint or grievance regarding the denial of the Common Fare diet. Our records do not suggest that he even attempted to file a grievance on this issue though he clearly had the right to do so.

Id. ¶ 9. Plaintiff has provided a copy of the decision denying him the common fare diet. See Docket No. 28, Exhibit 7. Blount also has provided a grievance form that he indicates that he filed on June 15, 2004 challenging this denial. See Docket No. 28, Exhibit 8. Finally, plaintiff provides a letter of appeal written to the regional ombudsman protesting that this grievance was returned unsigned. See Docket No. 28, Exhibit 9. Defendants dispute the filing of the regular grievance or appeal, and state that there is no record of either in the grievance coordinator's or regional office.

Plaintiff responds by pointing out that original Exhibit 8 has some notations penned on it in red ink, a color of ink that prisoners at Red Onion are not permitted to possess. In particular, Blount points to a red circle on the front and a red check and circle on the back of the original grievance form which he asserts had to be placed there by prison staff as red ink pens are contraband. Defendants counter with the Adams affidavit, which suggests that, while contraband, red ink is relatively common among inmates.

Blount also claims that he filed an appeal of the return of this grievance with the regional ombudsman, and that a copy of said appeal is attached as Exhibit 10 to Docket No. 28. Donna Munsey testified that the Department of Corrections Regional Office in Roanoke had no record of any appeal filed by Blount regarding denial of the common fare diet.

At summary judgment, the court must construe factual allegations in the nonmoving party's favor and treat them as true. See, e.g., Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 217-18 (4th Cir. 1994); Custer v. Sweeney, 89 F.3d 1156, 1163 (4th Cir. 1996) (stating courts need not accept plaintiffs' "unwarranted deductions," "footless conclusions of law," or "sweeping legal conclusions cast in the form of factual allegations").

As to this issue, therefore, a genuine issue of material fact exists. While the absence of any record of the filing of a grievance or appeal typically would be sufficient to establish plaintiff's failure to exhaust, the unique evidence in this case consisting of the returned regular grievance bearing marks in red ink creates enough of a factual to preclude entry of summary judgment as to the diet claim.

As such, it is **RECOMMENDED** that defendants' motion for summary judgment regarding the common fare diet be denied, and the issue of whether plaintiff administratively exhausted the

grievance process regarding the common fare diet claim be an issue left for the ultimate trier of fact in this case.

### III

The Clerk is directed to immediately transmit the record in this case to the Honorable Glen E. Conrad, United States District Judge. Both sides are reminded that pursuant to Rule 72(b), they are entitled to note objections, if they have any, to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by the reviewing court as a waiver of such objection.

Further, the Clerk is directed to send a certified copy of this Report and Recommendation to all counsel of record.

**ENTER:** This 31<sup>st</sup> day of May, 2005.

/s/ Michael F. Urbanski  
United States Magistrate Judge