



force claims of 1998 and 1999. As plaintiff has not requested a jury trial, the district court properly noted it is the ultimate trier of fact as to the issue of administrative exhaustion for plaintiff's 2004 claim. Accordingly, the district court recommitted the case to the undersigned Magistrate Judge for proposed findings of fact and conclusions of law. This matter is thus before the court for report and recommendation on the issue of whether plaintiff has fully exhausted his administrative remedies regarding his 2004 claim.

## I

Plaintiff's complaint alleges that defendants Wright, McConnell, and McCowan used excessive force against him on September 6, 2004. Defendants assert that plaintiff has not exhausted his administrative remedies regarding this claim in a manner that complies with Division Operating Procedure ("DOP") 866.<sup>1</sup> Plaintiff argues that he made a good faith attempt to follow the grievance procedure, submitting numerous documents to various persons in an attempt to grieve his claim, after his initial grievance efforts were frustrated.

For example, plaintiff testified at the evidentiary hearing that he filed two informal complaints, one on September 6, 2004 and one on September 7, 2004, but did not receive a response to either complaint. Plaintiff testified that he then filed a regular grievance pursuant to

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<sup>1</sup> DOP 866 provides that an inmate must first make a good faith effort to informally resolve his complaint. If relief is not received, the inmate may file a regular grievance but must show that he attempted to use the informal process first. Only one issue per grievance is to be addressed. Taylor Aff. Encl. A.

If the grievance does not meet the criteria for acceptance, it is returned to the inmate with an explanation of why the grievance was not accepted. The inmate may then resubmit the grievance, or send the grievance to the Regional Ombudsman within five (5) days. For grievances that are accepted, a response at Level I is made. If the inmate is dissatisfied with that response, he may appeal to Level II, and in limited situations, to Level III. Taylor Aff. Encl. A.

DOP 866 at the end of September or in October of 2004.<sup>2</sup> However, no record of this grievance exists.

Grimes testified that after failing to receive a reply to his grievance, he filed a letter with the Regional Ombudsman on October 27, 2004. The letter was returned to Grimes, along with a note encouraging him to utilize the inmate grievance procedures. Grimes then submitted a regular grievance form on November 18, 2004, which was not accepted because it contained more than one issue. Plaintiff submitted another regular grievance form on November 30, 2004, but it was again not accepted because plaintiff did not provide sufficient information. On January 5, 2005, plaintiff mailed a letter to the Regional Ombudsman's office. The letter was again returned to the plaintiff, not accepted, advising Grimes to follow the inmate grievance procedure. Plaintiff did not appeal any of the responses he received to his filings.

Construing the facts in the light most favorable to the non-moving party, this court found enough of a factual issue to preclude entry of summary judgment in favor of defendants on plaintiff's 2004 excessive force claim. Defendants objected to the report and recommendation issued by the undersigned on December 19, 2005. In their objections, defendants argue the plaintiff has the burden of proving that he has properly filed and exhausted his grievance, and that plaintiff has offered no such evidence.

However, the Fourth Circuit has found failure to administratively exhaust to be an affirmative defense that must be pleaded and proven *by the defendant*. Anderson v. XYZ Correctional Health Servs., 407 F.3d 674, 683 (4th Cir. 2005) (emphasis added); Hayes v.

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<sup>2</sup> When asked by the court whether plaintiff was referring to the September 29, 2004 grievance he claims to have filed in his October 27, 2004 letter to the Regional Ombudsman, plaintiff stated that should be right.

Stanley, 137 Fed. Appx. 565 (4th Cir. 2005); accord Wyatt v. Terhune, 315 F.3d 1108, 1109 (9th Cir. 2003); Casanova v. Dubois, 304 F.3d 75, 77 n.3 (1st Cir. 2002); Ray v. Kertes, 285 F.3d 287, 295 (3d Cir. 2002); Foulk v. Charrier, 262 F.3d 687, 697 (8th Cir. 2001); Massey v. Helman, 196 F.3d 737, 735 (7th Cir. 1999). Thus, the defendant must offer evidence to show that plaintiff failed to properly exhaust his administrative remedies. This court finds that defendants have met their burden of showing plaintiff failed to properly exhaust in this case. Plaintiff's grievance file contains no acceptable grievance regarding the 2004 claim, and there is no credible evidence to suggest that plaintiff filed a proper regular grievance on September 29, 2004 that went unanswered by prison officials, as he claims to have done.

## II

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) states: "No action shall be brought with respect to prison conditions ... by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Id. 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). Prisoners bringing excessive force claims under § 1983 must comply with the requirements of § 1997e(a). Johnson v. Garraghty, 57 F. Supp. 2d 321, 328 (E.D. Va. 1999).

Section 1997e's exhaustion requirement is mandatory. Porter v. Nussle, 534 U.S. 516, 524 (2002). Generally, federal courts have held that strict compliance with an existing grievance procedure is required for administrative exhaustion. Grimes v. Fowler, No. 2:01cv70526, 2003 U.S. Dist. LEXIS 4075, at \*6 (W.D. Va. Mar. 19, 2003) ("Cases interpreting [42 U.S.C.A. §

1997e(a)] have consistently required strict compliance with the applicable procedures.”); see also Poor v. Grayson, 46 Fed. Appx. 825, 826 (6th Cir. 2002) (dismissing plaintiff’s complaint for failure to exhaust administrative remedies because plaintiff demonstrated partial, rather than full, exhaustion); Chelette v. Harris, 229 F.3d 684, 688 (8th Cir. 2000) (“The statute’s requirements are clear: If administrative remedies are available, the prisoner must exhaust them.”); Espaillet v. Mousseau, No. 03338SM, 2004 U.S. Dist. LEXIS 14549, at \*6 (D.N.H. 2004) (“The ‘strict compliance’ requirement bars an inmate from claiming exhaustion when he has bypassed steps in the administrative process or failed to avail himself of available administrative appeals.”); Rivera v. Goord, 253 F. Supp. 2d 735, 746 (S.D.N.Y. 2003) (finding that generally, correctional officers are entitled to strict compliance with administrative procedures); Houze v. Segarra, 217 F. Supp. 2d 394, 397 (S.D.N.Y. 2002) (“Prison officials are entitled to require strict compliance with an existing grievance procedure.” (citing Hemphill v. New York, 198 F. Supp. 2d 546 (S.D.N.Y. 2002))); Ahmed v. Sromovski, 103 F. Supp. 2d 838, 844 (D. Pa. 2000) (stating, in general, courts have required strict compliance with formal grievance procedures); cf. Wyatt v. Leonard, 193 F.3d 876, 880 (6th Cir. 1999) (finding substantial compliance with exhaustion requirement was enough *where § 1997e(a) had not been enacted* at the time the incident in question occurred or when the complaints were made) (emphasis added).

However, some courts have held that an inmate may satisfy the requirements of § 1997e(a) in certain situations where the technical requirements of exhaustion have not been met. The exhaustion requirement may be treated as fulfilled if prison officials thwart an inmate’s attempts to exhaust, for example, by refusing to educate the inmate on the grievance process,

refusing to provide the inmate with necessary grievance forms, or failing to file inmate grievances. See, e.g., Mitchell v. Horn, 318 F.3d 523, 529 (3d Cir. 2003); Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001); Arnold v. Goetz, 245 F. Supp. 2d 527, 538-39 (S.D.N.Y. 2003); Davis v. Milwaukee Co., 225 F. Supp. 2d 967, 976 (E.D. Wis. 2002); O'Connor v. Featherston, No. 01cv3251, 2002 U.S. Dist. LEXIS 7570, at \*5 (S.D.N.Y. Apr. 29, 2002). Additionally, an inmate may have exhausted all available administrative remedies if he or she files a proper grievance to which prison officials fail to respond. Amaro v. Taylor, 170 F. Supp. 2d 460, 464 (D. Del. 2000) (“An inmate has exhausted his available administrative remedies when he has filed a grievance to which prison officials fail to respond.”); see also O'Connor, 2002 U.S. Dist. LEXIS 7570, at \*6.

### III

In her affidavit, Fonnice Taylor (“Taylor”), Red Onion’s grievance coordinator, asserts that plaintiff did not exhaust the administrative remedies available to him through the inmate grievance procedure regarding his September 6, 2004 excessive force claim. Taylor Aff. ¶ 13. Taylor outlines the documents filed by plaintiff, and the reasons those documents did not comply with DOP 866 procedure. Taylor Aff. ¶¶ 8-12. According to the documentation in plaintiff’s file, Grimes never properly grieved his claim and thus did not fully exhaust his administrative remedies. Plaintiff has offered no credible evidence to the contrary.

At the direction of the undersigned at the evidentiary hearing, Plaintiff filed a series of documents with the court on November 28, 2005 as evidence of his administrative exhaustion. Docket No. 49. While it is often hard to decipher plaintiff’s writings, the evidence he provided reveals nothing short of Grimes’ own confusion as to what he filed and when. Plaintiff has

offered no credible evidence to support his assertion that he properly exhausted his remedies pursuant to DOP 866 procedures.

**A. Plaintiff's Recollection of Grievances Filed is Not Credible.**

As evidence of exhaustion, plaintiff provided letters dated September 9, 2004 directed to Internal Affairs, and September 12, 2004 directed to the assistant chief of the investigative unit, both of which refer to informal complaints filed by plaintiff on September 6, 2004 and September 7, 2004. Plaintiff also provided the court with an October 4, 2004 informal request complaint form in which plaintiff notes he filed a DOP 866 regular grievance form on September 29, 2004, as well as the two (2) prior informal complaints on September 6 and 7, 2004. No actual documentation of the two (2) September informal complaints or the September 29, 2004 regular grievance plaintiff claims to have filed exists.

In an October 27, 2004 letter to the Regional Ombudsman, however, plaintiff states he executed “an *informal* inmate’s Regular Grievance ... DOP #866 form, dated 9/29/04....” Docket No. 49 (emphasis added). In the letter, plaintiff also refers to his informal complaints of September 6 and 7, 2004, as well as his informal complaint of October 4, 2004.

Plaintiff also provides a copy of a regular grievance form filed November 18, 2004, in which he refers to a September 24, 2004 “informal request complaint form” that he had originally filed. Docket No. 49. This November 18, 2004 regular grievance was not accepted because it stated more than one issue. In this grievance, plaintiff also states he filed an October 24, 2004 informal complaint, of which there is no documentation.

Plaintiff filed a second grievance on November 18, 2004, again referencing an October 24<sup>th</sup> informal complaint, as well as an October 19, 2004 DOP 866 regular grievance form, of

which there is no record. Most notably, however, this second November 18<sup>th</sup> grievance refers to a September 25, 2004 “R.O.S.P.’s informal request form.” Docket No. 49. Prison officials failed to accept this second November 18<sup>th</sup> regular grievance, again because it contained more than one issue.

On November 30, 2004, plaintiff filed yet another regular grievance form, stating he placed an informal request complaint form, dated November 4, 2004 and relating to the September 6, 2004 excessive force incident, into the unit mailbox but received no response. He also referred to a November 1, 2004 regular grievance form, relating to the same incident. We have copies of neither the November 4<sup>th</sup> informal complaint nor the November 1<sup>st</sup> regular grievance Grimes claims to have filed. This November 30, 2004 grievance was not accepted and again returned to the plaintiff, because plaintiff did not clearly state what he was grieving.

On January 2, 2005 plaintiff handwrote what he called a “Regular Grievance Form,” mentioning a December 8, 2004 informal complaint and a December 5, 2004 regular grievance, as well as two November 30, 2004 regular grievances and two November 4, 2004 informal complaints. This handwritten “regular grievance” mentions two different issues: first, the September 6, 2004 excessive force claim, and second, the confiscation of plaintiff’s headphones on the same day. No documentation of either the December 8<sup>th</sup> informal complaint or the December 5<sup>th</sup> regular grievance has been provided.

Plaintiff provided another letter he wrote to the Regional Ombudsman on January 5, 2005, referencing both his prior letter of October 27, 2004 and his January 2, 2005 “personal designed style Regular Grievance form...DOP #866 written report....” Docket No. 49. This

letter was returned to Grimes because his issue was unclear, and he was encouraged to utilize the established grievance procedures.

On February 7, 2005 plaintiff filed yet another regular grievance form in which he notes a February 1, 2005 regular grievance form and four (4) prior February 1, 2005 informal complaint forms. This grievance was returned because of plaintiff's failure to utilize the informal process<sup>3</sup> before he grieved what appears to be his lack of response to the previously filed grievances and informal complaints. There is no documentation of any February 1<sup>st</sup> informal complaints or regular grievances.

Finally, plaintiff provides an August 14, 2005 letter to internal affairs in which he notes that he "referraled [sic] such 9/6/04 [excessive force] instance to your entity, immediately following such ordeal." Docket No. 49. No other specifics were provided.

Plaintiff also provides the court with a number of other grievances and responses he has received regarding various issues, including a package Grimes claims was never mailed to the District Court, the laundry service, and an inoperative night light. These grievances do not appear to be related to the September 6, 2004 excessive force incident.

**B. Plaintiff Did Not Strictly Comply with the Procedures Outlined in DOP 866.**

Plaintiff has put forth no credible evidence that he properly filed a grievance pursuant to DOP 866 procedures. Plaintiff claims to have filed a grievance on September 29, 2004, after filing two unanswered informal complaints in the days following the alleged assault. However, no record of these documents exists. While plaintiff does consistently reference the September 6

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<sup>3</sup> As of January 2005, DOP 866 required inmates to attach informal complaints to regular grievance forms.

and 7, 2004 informal complaints<sup>4</sup> in subsequent filings, his wavering recollection of the September 29, 2004 regular grievance he claims to have filed is unpersuasive.

In his informal request/complaint form dated October 4, 2004, plaintiff says he filed a DOP 866 regular grievance on September 29, 2004. However, plaintiff later refers to the document filed on September 29, 2004 as an “informal inmate’s” regular grievance, in his October 27, 2004 letter to the Regional Ombudsman. Such language suggests plaintiff might have actually filed an informal complaint as opposed to a regular grievance at the end of September 2004. If it was an informal complaint Grimes recalls filing in September of 2004, no documentation of it would exist. See, supra, footnote 4.

Grimes then refers to the September filing as a *September 24, 2004* “original filed informal request complaint form” in his November 18, 2004 regular grievance. In his second November 18, 2004 regular grievance, plaintiff refers to a *September 25, 2004* informal request form. This evidence tends to suggest that plaintiff did in fact file an informal complaint some time in September, though he seems to be unable to correctly recall the date the document was filed.

Plaintiff’s account of when he filed grievances is incredible. Not only does plaintiff inconsistently refer to dates in September on which he claims to have filed a regular grievance,

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<sup>4</sup> According to the evidentiary hearing testimony of grievance coordinator Fonnice Taylor, informal complaints are not logged into the system, so there is no way of knowing whether they were filed. However, in September of 2004, inmates only needed to state that they had filed an informal complaint on their regular grievance form; inmates were not required to attach the informal complaint to the grievance. Therefore, Grimes would not have been barred from filing a proper regular grievance pursuant to DOP 866 by not having received a reply to his informal complaints. In 2005, the rule changed, requiring informal complaints to be attached to grievances filed.

but he also inconsistently refers to this grievance as both an informal complaint, and a formal DOP 866 regular grievance. In various other filings, plaintiff discusses a number of other documents he calls DOP 866 regular grievance forms and claims to have filed throughout the fall of 2004 and early 2005. However, a majority of these claimed grievances are not documented. Additionally, in a handwritten “regular grievance,” plaintiff notes he actually has two (2) issues relating to September 6, 2004: an assault as well as the confiscation of his headphones. In short, plaintiff’s account of his efforts to administratively exhaust is confused and contradictory and it is unclear from his testimony just what documents were filed by plaintiff, at what time, and regarding what issue. At the end of the day, there is no credible evidence that plaintiff exhausted his available administrative remedies by filing a proper grievance that was not responded to by prison officials.

Additionally, plaintiff has not provided evidence to prove prison officials thwarted his efforts to grieve by failing to educate him on DOP 866 procedures. Plaintiff is indisputably aware of and familiar with the grievance process. In her affidavit, Fannie Taylor states Grimes was formally oriented with the grievance procedure upon his arrival at Red Onion in September of 1998, and that he signed a statement acknowledging such. Taylor Aff. ¶ 7. After a transfer, Grimes received a packet containing information on the grievance procedure upon his return to Red Onion, but he was unable to sign an acknowledgment because he was restrained. Id. A staff member signed instead, stating he witnessed plaintiff receive the information. Id. The grievance process was revised on September 1, 2004, and plaintiff again acknowledged he had received a revised copy of DOP 866. Id.

Defendants have offered evidence that plaintiff has successfully filed thirty-five (35) grievances to date. Defs.' Suppl. Arg. to Mot. S.J. Ex. I. Grimes also provides the court with copies of a number of grievances he filed but that were returned to him with the reasons they were denied. Furthermore, Grimes filed a previous § 1983 action in the Western District of Virginia that was dismissed in March of 2003 because plaintiff failed to properly exhaust his administrative remedies. Grimes v. Fowler, No. 2:01cv70526, 2003 U.S. Dist. LEXIS 4075 (W.D. Va. Mar. 19, 2003) (Jones, J.). In his decision dismissing the action, Judge Jones found Grimes had never filed a "regular grievance form" as required by DOP 866. Id. at \*4-5. Not only was plaintiff aware of proper grievance procedures, but he was also familiar with improper grievance procedures.

Plaintiff is undoubtedly fully aware of the DOP 866 procedures. He was oriented with the procedures on three (3) different dates. He successfully filed thirty-five (35) grievances between 1998 and 2005. In addition, Grimes' previous § 1983 action, in which he claimed to have filed a regular grievance form that was lost, destroyed or otherwise undocumented, was dismissed because he failed to follow DOP 866 procedures. He had numerous grievances returned to him, not accepted, because he failed to follow proper procedures. Armed with this knowledge, plaintiff had the opportunity to file a proper grievance regarding the September 6, 2004 incident, yet failed to do so.

Grimes has provided the court with no other evidence that his efforts to grieve were frustrated in any way by prison officials. He does not claim that Red Onion officials failed to provide him with the necessary forms, or offer evidence that officials actively obstructed his ability to grieve his claim. Taking into account the detailed grievance process, it is unlikely that

a regular grievance filed by Grimes would have been overlooked. See Grimes v. Fowler, 2003 U.S. Dist. LEXIS 4075, at \*5. Plaintiff filed a number of letters, complaints and grievances regarding his September 6, 2004 excessive force claim that were filed, documented, and returned with notations as to why the documents were not accepted. Grimes had ample opportunity to grieve his issue but never did so in a way that complied with DOP 866 standards.

#### IV

Based on the testimony by the parties at the evidentiary hearing, and the evidence filed by both plaintiff and defendants, this court finds that the defendant has met its burden of proving plaintiff has not fully complied with DOP 866 procedures. Plaintiff has offered no credible evidence to the contrary. While it appears that the plaintiff did file a number of documents in an attempt to grieve his claim, he did not file any in a manner consistent with the DOP 866 procedures of which he was indubitably familiar.

Whether or not plaintiff filed informal complaints in the days following the incident in question is of no import. The issue is whether Grimes filed an acceptable regular grievance form regarding the September 6, 2004 incident. Plaintiff claims to have filed one some time around the end of September; however, plaintiff is uncertain as to the date and as to exactly what kind of document he filed. Plaintiff's recollection is inconsistent, his writings are difficult to decipher, and no documentation of an acceptable grievance exists. Plaintiff's testimony simply cannot be trusted.

Because plaintiff failed to file a proper regular grievance form regarding the September 6, 2004 incident, he has failed to exhaust his administrative remedies. Accordingly, the undersigned recommends this action be **DISMISSED** without prejudice. To hold otherwise

would be contrary to the notion of strict compliance, as well as the policy considerations behind § 1997e(a), especially that of judicial efficiency. See Porter v. Nussle, 534 U.S. 516, 524-25 (2002); Sallee v. Joyner, 40 F. Supp. 2d 766, 771-72 (E.D. Va. 1999); Johnson v. Garraghty, 57 F. Supp. 2d 321, 327 (E.D. Va. 1999).

The Clerk is directed to immediately transmit the record in this case to the Honorable Samuel G. Wilson, 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 24<sup>th</sup> day of January, 2006.

/s/ Michael F. Urbanski  
United States Magistrate Judge