

UNITED STATES DISTRICT COURT  
 FOR THE CENTRAL DISTRICT OF ILLINOIS

JUAN BRISENO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	14-CV-2263
	)	
SHERIFF BUKOWSKI,	)	
C/O ROBERTS,	)	
C/O O'NEIL,	)	
C/O TOBECK,	)	
C/O PERKINS, and	)	
C/O PAQUETTE,	)	
	)	
Defendants.	)	

**ORDER**

**JOE BILLY MCADE, U.S. District Judge.**

Plaintiff, proceeding pro se from his incarceration in a Colorado federal prison, pursues claims arising from an incident in the Kankakee County, Illinois, Jerome Combs Detention Center (JCDC) on August 26, 2014. In short, Plaintiff allegedly tried to break up an assault, whereupon inmates began assaulting Plaintiff. Officer Roberts and Officer Paquette allegedly refused to open the door despite Plaintiff's repeated pleas for help. Eventually Officer Roberts allegedly came into the dayroom and, without justification,

tasered Plaintiff. (Compl. paras 1-3.) The Court's merit review order identified claims of (1) excessive force; (2) failure-to-protect; and, (3) an unconstitutional policy or practice regarding the use of tasers.

The Court dismissed this case on December 8, 2015, for failure to exhaust administrative remedies. (12/8/15 Order, d/e 35). Plaintiff had maintained that he never received a response to the two grievances he filed about the incident. Defendants had maintained in their reply that Plaintiff would have kept a "pink copy" of the grievance about the incident if Plaintiff had actually filed a grievance. On October 30, 2015, the Court directed Plaintiff to address that issue, stating in pertinent part:

By November 16, 2015, Plaintiff is directed to respond to Defendants' assertion that Plaintiff did not mention the Defendants or any individuals in his purported grievance and that Plaintiff would have retained the pink copy of the triplicate grievance form if he had filed a grievance.

Plaintiff filed no response. The Court then granted Defendants' motion for summary judgment and dismissed the case.

On December 28, 2015, Plaintiff filed a motion for reconsideration. He maintained that he had not received the

10/30/15 text order and that “the pink copy of plaintiff’s grievances was not forwarded by the USMS from JCDC custody to BOP custody.” (d/e 37, p. 1). He declared that “my personal papers including all pink copies of all grievances filed were lost in transit.” Id. p. 2.

The Court granted Plaintiff’s motion for reconsideration and held an evidentiary hearing on July 6, 2016, to resolve the exhaustion question, which turned on Plaintiff’s credibility. Roberts v. Neal, 745 F.3d 232, 234 (7<sup>th</sup> Cir. 2014)(a swearing contest regarding exhaustion requires an evidentiary hearing); Pavey v. Conley, 544 F.3d 739, 742 (7<sup>th</sup> Cir. 2008). A transcript of that hearing will be filed in this case.

The parties agree that, if the procedures at JCDC were followed, Plaintiff would have received a pink copy of the grievance or grievances he filed about the incident. The grievance is in triplicate form, with a pink, white and yellow copy. Plaintiff testified that inmates were to place all three copies in the lock box, and the officer retrieving the grievances would sign the pink copy and return the pink copy to the inmate and then deliver the grievance to the appropriate person for a response. The Chief of Corrections

testified that the inmate was actually supposed to keep the pink copy *before* turning the grievance in, but the difference is immaterial. For purposes of this order, the Court accepts Plaintiff's testimony that the procedure in place required Plaintiff to submit all three copies of the form and wait for the return of the pink copy.

Plaintiff testified at the hearing that he filed two grievances about the incident and never received the pink copies or any response. Defendants point to the fact that Plaintiff received responses to his other grievances, but those other grievances were about mundane matters such as hair clippers and eyeglasses. That Plaintiff received responses on his other grievances is not persuasive evidence that he did not file a grievance about the excessive force. Pyles v. Nwaobasi, --- F.3d ---, 2016 WL 3924376 \* 6 (7th Cir. 2016)(reversing dismissal on exhaustion grounds: "The fact that other grievances were returned to Pyles says nothing about whether *this* grievance was returned to Pyles."). A grievance about excessive force by guards might be more likely to be "lost" in the grievance process, since such a grievance may trigger an investigation and possible disciplinary action against the guards.

Here, however, Plaintiff's own contradictory positions and evasive explanations are what impeach his credibility. Plaintiff testified at the hearing that he had not received the pink copy back on either of the purported grievances he filed. This testimony directly contradicts Plaintiff's statement in his motion to reconsider, filed before the evidentiary hearing, that the pink copies had been lost when he was transferred from JCDC to the Chicago federal prison. (d/e 37). When asked to explain at the evidentiary hearing, Plaintiff testified that he had misunderstood—that he thought he was supposed to explain what happened to *other* pink copies of grievances dealing with issues that have nothing to do with this case. This explanation is not believable. The Court specifically directed Plaintiff to address Defendants' assertion that Plaintiff would have retained the pink copies of the grievances about the incident. Plaintiff responded in his motion to reconsider that the pink copies had been lost. He never said he had not received pink copies back. Changing his story at the evidentiary hearing—from officials losing the pink copy to never receiving a pink copy—enabled Plaintiff to avoid questions about why he had not produced

the pink copies in discovery before he was transferred to the Chicago federal prison.

Further, Plaintiff never mentioned anything about any pink copies being lost in transit until after the Court dismissed the case. Plaintiff's motion to reconsider stated that the pink copies had been lost in transit between JCDC and the federal prison in Chicago. Yet in asking for an extension to respond to the motion for summary judgment, Plaintiff asserted that he had just received his property after being transferred from the Chicago federal prison to the Colorado federal prison. (d/e 30). He mentioned nothing about lost papers—he asked for an extension because he did not yet have access to those papers. His testimony at the hearing was equally equivocal: he testified that his papers were lost in Chicago but then later testified that they were lost en route to Colorado.

In short, Plaintiff's answers were evasive and a moving target during the hearing, contradicting statements in his written pleadings. The Court does not find Plaintiff's testimony that he filed grievances about the incident credible. Accordingly, Defendants' motion for summary judgment on exhaustion will be granted.

**IT IS THEREFORE ORDERED:**

1. The court reporter is directed to prepare and file a transcript of the evidentiary hearing on July 6, 2016.
3. Defendants' motion for summary judgment is granted (22).
4. This case is dismissed, without prejudice, for Plaintiff's failure to exhaust his administrative remedies.
5. Plaintiff must still pay the full filing fee even though his case has been dismissed. The agency having custody of Plaintiff shall continue to make monthly payments to the Clerk of Court, as directed in the Court's prior order.
6. If Plaintiff wishes to appeal this dismissal, he must file a notice of appeal with this Court within 30 days of the entry of judgment. Fed. R. App. P. 4(a). A motion for leave to appeal in forma pauperis should set forth the issues Plaintiff plans to present on appeal. See Fed. R. App. P. 24(a)(1)(C). If Plaintiff does choose to appeal, he will be liable for the \$505 appellate filing fee irrespective of the outcome of the appeal.
7. The clerk is directed to enter a judgment and to close this case.

8. The clerk is directed to notify the court reporter that a transcript is to be filed.

ENTERED: 8/17/2016

FOR THE COURT:

**s/Joe Billy McDade**  
JOE BILLY MCDADE  
UNITED STATES DISTRICT JUDGE