

DISTRICT COURT OF GUAM  
TERRITORY OF GUAM

FRANCISCO ARIAS, ) CIVIL CASE NO. 15-00012  
Plaintiff, )  
vs. )  
D. O. C. , JOSE A. SAN AGUSTIN, Director, ) REPORT AND RECOMMENDATION  
ALAN BORJA, Prison Facility Admin., )  
SAMUEL DONATO, Captain, DR. RAJA )  
SAAD, M.D., in their official capacities, )  
Defendants. )

The above matter comes to the court pursuant to a referral for a Report and Recommendation. The undersigned hereby submits his Report and Recommendation.

BACKGROUND

On May 1, 2015, Plaintiff, Francisco Arias, filed a complaint against the Department of Corrections,<sup>1</sup> (DOC) Director Jose A. San Agustin, Prison Security Administrator Alan Borja, Captain Samuel Donato, and Dr. Raja Saad. Plaintiff seeks court intervention to ensure that the Department of Corrections and Dr. Raja establish a system of health care that addresses the medical needs of the inmates/detainees on a “timely manner to ensure that the 8TH AMENDMENT RIGHTS are not violated” and to enforce a better health care policy. Plaintiff also is seeking damages against Defendants in the amount of \$25,000 for Negligent Infliction of Mental and Emotional Distress and another \$25,000 in punitive damages for a total damage

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<sup>1</sup>For purposes of the motion herein, the court has treated the Department of Corrections as a party herein as it is the first named entity in Plaintiff’s Defendants’ list. Furthermore, a specific reference for relief against the Department of Corrections has been made in the complaint by Plaintiff.

1 amount of \$50,000.00. Defendants have moved to dismiss the complaint. The motion to  
2 dismiss was referred to the undersigned for a Report and Recommendation.

### 3 DISCUSSION

4 Plaintiff alleges in his complaint that he made three grievance complaints in relation to  
5 medical prescriptions not being refilled, treatment for an infection on his toe, and his diabetic  
6 condition. Plaintiff further alleges that his toe has been disfigured because of a lack of timely  
7 medical action. These grievances allegedly spanned two months and without medical attention.

8 Defendants have filed a motion to dismiss arguing that Plaintiff failed to exhaust his  
9 administrative remedies and that he seeks an improper remedy.

10 The court, in addressing the motion, notes that Plaintiff has been served with the motion  
11 but has failed to file any opposition thereto. Under CVLR 7(f), Plaintiff must serve and file an  
12 opposition within 21 days after service. Plaintiff has not done so.

13 The court also finds based upon Defendants' motion that Plaintiff has not exhausted his  
14 administrative remedies. He has failed to take the alleged wrongdoing through the grievance  
15 procedure.

16 Defendants list Plaintiff's grievances in Table 1 of their moving papers. Grievance  
17 complaints were filed on February 13, 2015, March 9, 2015, April 10, 2015, and May 11, 2015.  
18 It appears from Table 1 that Defendants responded only to the May 11, 2015 grievance  
19 complaint. The response was made on May 19, 2015 with the response: "Your medications are  
20 always available for you. Please be present during pill time to receive your medications."

21 Defendants cite to the Prison Litigation Reform Act of 1995 and to its provisions that  
22 require an incarcerated or detained person to exhaust his administrative remedies before  
23 bringing suit alleging a civil rights violation. Defendants refer the court to Executive Order 94-  
24 19 which sets forth Departmental Rules and Regulations in a manual governing DOC  
25 operations.

26 Under Article 16 of the Regulations, detainees/inmates are encouraged to use informal  
27 channels in remedying their complaints. If the informal process is not satisfactory, the detainee  
28 is to complete a grievance complaint and lodge it with a member of the DOC staff. The staff

1 member must respond within seven business days. The detainee must take his grievance first to  
2 a manager or supervisor, and then to the Prison Security Administrator, and then he may appeal  
3 to the Director.

4 Defendants state in their moving papers that Plaintiff lodged a number of sick call  
5 requests and grievances, as well as a remedy request. Defendants also state that Plaintiff was  
6 seen by Dr. Saad at sick call and received responses to his grievances and remedy request.  
7 Defendants further state that Plaintiff did not seek further review of his grievance complaint  
8 from the Prison Security Administrator or the Director. Thus, Defendants argue that Plaintiff  
9 has not exhausted his administrative remedies.

10 Plaintiff also seeks monetary damages from the Department and its officials who are  
11 sued in their official capacities. Defendants point out that in *Ngiraingas v. Sanchez*, 495 U.S.  
12 182 (1990), the U.S. Supreme Court ruled that the plaintiff could not sue the government of  
13 Guam or its officials for money damages under section 1983 because the Territory of Guam, and  
14 its officers acting within their official capacities are not persons within the meaning of section  
15 1983.

16 Defendants' moving papers appear to show that Plaintiff did not exhaust his  
17 administrative remedies since he did not further take his grievance complaints<sup>2</sup> to the Prison  
18 Security Administrator and from there to the Director. Defendants have presented facts in their  
19 motion to dismiss that are outside the pleadings. Plaintiff, however, has filed no opposition to  
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21 <sup>2</sup>In reviewing the Grievance Complaints filed by Plaintiff on February 13, March 9, and  
22 April 10, 2015, the court notes that DOC staff members failed to respond to each of Plaintiff's  
23 grievances within seven business days as required under Exec. Order 94-19. Furthermore, the  
24 forms by which these grievances are made fail to advise the detainee the circumstances under  
25 which he can take the grievance complaint beyond the stage of a DOC staff response to a higher  
26 level which would be the Prison Security Administrator and eventually to the Director as part of  
27 that grievance process. The grievance complaint form advises only that the detainee may  
28 forward a copy of the responded grievance up the chain of command. Is Plaintiff able to pursue a  
further review of a grievance complaint up the chain of command that has not been responded  
to? What procedures are in place to allow a detainee to seek further review? How is that  
procedure initiated? How does the grievance complaint get forwarded up the chain of command  
by a detainee?

1 the motion to dismiss and has not objected to the presentation of facts which are outside the  
2 pleadings. The facts appear to show he has not exhausted his administrative remedies because  
3 he has not taken the grievance complaint to its next level of review. Thus, in light of Plaintiff's  
4 failure to file an opposition to the motion, the court will not exclude the aforementioned facts  
5 and will treat the motion filed as including an additional motion for summary judgment.

6 Based upon the facts represented in Defendants' moving papers, it appears that Plaintiff  
7 has failed to exhaust his administrative remedies herein. The court further notes that he has  
8 filed no opposition to the motion. Likewise, based upon *Ngiraingas v. Sanchez*, 495 U.S. 182  
9 (1990), he cannot sue for monetary damages against Defendants. Thus, Plaintiff's complaint  
10 against Defendants should be dismissed.

11 **CONCLUSION**

12 Based upon all of the reasons mentioned above, the court recommends that the District  
13 Court grant Defendants' motion to dismiss the complaint filed herein by Plaintiff.

14 IT IS SO RECOMMENDED.



19 /s/ **Joaquin V.E. Manibusan, Jr.**  
20 **U.S. Magistrate Judge**  
21 **Dated: Feb 12, 2016**

22 **NOTICE: THE PARTIES HAVE FOURTEEN (14) DAYS TO FILE OBJECTIONS**  
23 **TO THE REPORT AND RECOMMENDATION**  
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