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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 KIER KEAND'E GARDNER,

8 Plaintiff,

9 v.

10 KENTON BOYD, et al.,

11 Defendants.

NO. 4:19-CV-5238-TOR

ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT FOR FAILURE TO  
EXHAUST ADMINISTRATIVE  
REMEDIES

12  
13 BEFORE THE COURT is Defendants' Motion for Summary Judgment for  
14 Failure to Exhaust Administrative Remedies (ECF No. 29). This matter was  
15 submitted for consideration without oral argument. The Court has reviewed the  
16 record and files herein, the completed briefing, and is fully informed. For the  
17 reasons discussed below, Defendants' Motion for Summary Judgment for Failure  
18 to Exhaust Administrative Remedies (ECF No. 29) is **GRANTED**.

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ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT FOR FAILURE TO EXHAUST ADMINISTRATIVE  
REMEDIES ~ 1

1 **BACKGROUND**

2 This case concerns Plaintiff’s grievances regarding prison procedures at the  
3 Washington State Penitentiary (“WSP”). *See* ECF No. 11. Following a review of  
4 Plaintiff’s First Amended Complaint, the Court dismissed every claim except  
5 Plaintiff’s Eighth Amendment claim. *See* ECF No. 16. Defendants now seek  
6 summary judgment for Plaintiff’s failure to exhaust administrative remedies. ECF  
7 No. 29. Except where noted, the following facts are not in dispute.

8 **A. Prison Grievance Procedure**

9 The Washington State Department of Corrections (“DOC”) implemented the  
10 Offender Grievance Program in 1984 to process grievances relating to  
11 incarceration, which is managed in accordance with DOC’s grievance policy and  
12 the Offender Grievance Program Manual. ECF No. 30 at 1-2, ¶¶ 1-2. The  
13 Offender Grievance Program is widely used: over 20,000 grievances are filed per  
14 year system-wide. ECF No. 30 at 4, ¶ 6.

15 Prisoners are advised of the DOC grievance procedure upon arrival at the  
16 WSP. ECF No. 30 at 2, ¶ 3. The policy, manual, and grievance forms are  
17 available in the prison’s law library. ECF No. 30 at 2-3, ¶ 3. Prisoners may file a  
18 grievance complaint by submitting a sealed complaint in a locked grievance box.  
19 ECF No. 30 at 3, ¶ 3. The grievance manual requires that the grievance include the  
20 prisoner’s signature, unless the prisoner does not know how to write, to ensure

1 security and validation. ECF No. 30 at 4, ¶ 7; ECF No. 30 at 5, ¶ 8. Prisoners  
2 must also file within twenty working days from the date of the alleged incident  
3 unless there is a valid reason for delay. ECF No. 30 at 4, ¶ 5.

4       Once received, prison grievance coordinators process complaints based on  
5 four levels of review. ECF No. 30 at 3, ¶ 4. On Level 0, the prison grievance  
6 coordinator pursues informal resolution of written complaints. *Id.* The grievance  
7 coordinator may return the complaint for rewriting, request additional information,  
8 or accept the complaint as a formal grievance. *Id.* Notably, if the complaint lacks  
9 a signature with the prisoner's committed name, the complaint will be returned.  
10 ECF No. 30 at 4, ¶ 7. On Level I, the local grievance coordinator reviews  
11 grievances regarding policy, procedure, or other prisoners. ECF No. 30 at 3, ¶ 4.  
12 On Level II, the prison superintendent investigates appeals from Level I and  
13 reviews grievances regarding staff conduct. *Id.* On Level III, DOC administrators  
14 review appeals from Level II. *Id.* Prisoners may not appeal a decision made at  
15 Level III. ECF No. 30 at 4, ¶ 5.

## 16       **B. Plaintiff's Claims**

17       Plaintiff is a prison inmate at the WSP. ECF No. 29 at 1; ECF No. 34 at 1-2.  
18 On September 4, 2019, the WSP grievance office received Plaintiff's complaint  
19 that alleged staff were not announcing mainline during meal times in violation of  
20 WSP policy, causing him to miss three meals. ECF No. 30 at 5, ¶ 10. Plaintiff

1 alleges that this occurred because DOC staff did not like Plaintiff's refusal to go by  
2 his committed last name and wanted to give him "shit." ECF No. 34 at 2. Plaintiff  
3 signed the complaint in part with his middle name, "Keand'e RCW 62A.1-308  
4 under protest." *Id.* Plaintiff's committed name is Kier Keand'e Gardner. *See* ECF  
5 No. 11. The grievance coordinator returned the complaint to Plaintiff on the  
6 grounds that Plaintiff failed to properly sign the form. *Id.* at 6.

7 Defendants claim that Plaintiff did not appeal the request that he sign his  
8 committed name nor did Plaintiff file a new grievance with the requested signature.  
9 *Id.* Plaintiff relies on his own declaration to claim that he submitted an appeal that  
10 was never filed nor acknowledged by DOC. ECF No. 34 at 7. Plaintiff concedes  
11 that no copies or records exist of this appeal. *Id.*

## 12 DISCUSSION

### 13 A. Summary Judgment Standard

14 The Court may grant summary judgment in favor of a moving party who  
15 demonstrates "that there is no genuine dispute as to any material fact and that the  
16 movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In ruling  
17 on a motion for summary judgment, the court must only consider admissible  
18 evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764 (9th Cir. 2002). The  
19 party moving for summary judgment bears the initial burden of showing the  
20 absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S.

1 317, 323 (1986). The burden then shifts to the non-moving party to identify  
2 specific facts showing there is a genuine issue of material fact. *See Anderson v.*  
3 *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). “The mere existence of a scintilla  
4 of evidence in support of the plaintiff’s position will be insufficient; there must be  
5 evidence on which the jury could reasonably find for the plaintiff.” *Id.* at 252.

6 For purposes of summary judgment, a fact is “material” if it might affect the  
7 outcome of the suit under the governing law. *Id.* at 248. Further, a material fact is  
8 “genuine” only where the evidence is such that a reasonable jury could find in  
9 favor of the non-moving party. *Id.* The Court views the facts, and all rational  
10 inferences therefrom, in the light most favorable to the non-moving party. *Scott v.*  
11 *Harris*, 550 U.S. 372, 378 (2007). Summary judgment will thus be granted  
12 “against a party who fails to make a showing sufficient to establish the existence of  
13 an element essential to that party’s case, and on which that party will bear the  
14 burden of proof at trial.” *Celotex*, 477 U.S. at 322.

15 “Courts should construe liberally motion papers and pleadings filed  
16 by *pro se* inmates and should avoid applying summary judgment rules  
17 strictly.” *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010). “This rule  
18 exempts *pro se* inmates from *strict* compliance with the summary judgment rules,  
19 but it does not exempt them from *all* compliance.” *Soto v. Unknown Sweetman*,  
20 882 F.3d 865, 872 (9th Cir. 2018) (emphasis in original).

1        **B. Failure to Exhaust Administrative Remedies**

2        1. *The Prison Litigation Reform Act*

3            Under the Prison Litigation Reform Act (“PLRA”) of 1995, “[n]o action  
4 shall be brought with respect to prison conditions under section 1983 of this title,  
5 or any other Federal law, by a prisoner confined in any jail, prison, or other  
6 correctional facility until such administrative remedies as are available, are  
7 exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is a mandatory prerequisite to  
8 filing suit in federal court. *Jones v. Bock*, 549 U.S. 199, 211 (2007); *Woodford v.*  
9 *Ngo*, 548 U.S. 81, 85 (2006). “[T]o properly exhaust administrative remedies  
10 prisoners must ‘complete the administrative review process in accordance with  
11 applicable procedural rules’” defined by the specific prison grievance process in  
12 question. *Jones*, 549 U.S. at 218 (quoting *Woodford*, 548 U.S. at 88).

13            In the Ninth Circuit, a motion for summary judgment is generally  
14 appropriate for raising the plaintiff’s failure to exhaust administrative remedies.  
15 *Albino v. Baca*, 747 F.3d 1162, 1170-71 (9th Cir. 2014). The burden is on the  
16 defendant to prove that there was an available administrative remedy that the  
17 plaintiff failed to exhaust. *Id.* at 1172. The burden then shifts to the prisoner to  
18 produce evidence showing “that there is something in his particular case that made  
19 the existing and generally available administrative remedies effectively unavailable

1 to him.” *Id.* Unavailable remedies include those that: (1) “operate[] as a simple  
2 dead end—with officers unable or consistently unwilling to provide any relief to  
3 aggrieved inmates,” (2) are opaque and incapable of use, or (3) “thwart inmates  
4 from taking advantage of a grievance process through machination,  
5 misrepresentation, or intimidation.” *Ross v. Blake*, 136 S. Ct. 1850, 1859-60  
6 (2016); *Fuqua v. Ryan*, 890 F.3d 838, 850 (9th Cir. 2018). The ultimate burden of  
7 proof remains with the defendant. *Albino*, 747 F.3d at 1172.

## 8 2. *Exhaustion under WSP’s Grievance Process*

9 Defendants have demonstrated that an available administrative remedy  
10 exists through the WSP Offender Grievance Program, which consists of four levels  
11 of review. *See* ECF No. 30 at 1-5, ¶¶ 1-9. Plaintiff initiated the grievance process  
12 when he submitted a complaint. ECF No. 30 at 5, ¶ 10. The grievance coordinator  
13 returned the complaint for failure to sign his committed name with instruction to  
14 appeal or file a new grievance with committed signature. ECF No. 30 at 5-6, ¶ 10.  
15 Defendants assert that Plaintiff failed to exhaust his remedies because he did not  
16 appeal or file a new grievance with committed signature. ECF No. 29 at 6.

17 Plaintiff argues that this administrative remedy was effectively unavailable  
18 to him due to “interference, improper screening and misrepresentation” on the  
19 grounds (1) that DOC policy does not require a committed signature and DOC staff  
20 have previously accepted his middle name signature, and (2) that he did file an

1 appeal of the rejection. ECF No. 34 at 6-7. Plaintiff does not dispute that he failed  
2 to file a new grievance with his committed signature. *See* ECF No. 34.

3 First, Plaintiff disputes the required committed signature, arguing that the  
4 manual only specifies a “signature.” *See* ECF No. 34 at 5. However, the  
5 requirement of a committed signature on a grievance form is proper pursuant to the  
6 WSP policy which Plaintiff had access to in the prison library. *See* ECF No. 30 at  
7 2-3, ¶ 3; ECF No. 31-1 at 15 (Manual requires signature); ECF No. 31-2 at 4 (“An  
8 individual ... must use the name under which s/he was committed to the  
9 Department for [a]ny written or verbal communication with employees, contract  
10 staff, and volunteers.”). The grievance coordinator also alerted Plaintiff to this  
11 policy. ECF No. 35 at 10. Moreover, DOC’s past acceptance of Plaintiff’s  
12 preferred signature is not dispositive. The rejection of Plaintiff’s grievance did not  
13 create a dead end, opaque terms incapable of use, or thwart the process through  
14 machination, misrepresentation, or intimidation. Thus, the administrative remedy  
15 was not rendered unavailable; the choice not to sign with the committed name was  
16 of Plaintiff’s own volition.

17 Second, Plaintiff’s dispute that he did file an appeal relies only on his own  
18 declaration. ECF No. 34 at 7. Indeed, Plaintiff acknowledges that no copies or  
19 records exist. *Id.* Even construed liberally in favor of Plaintiff, Plaintiff’s bare  
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1 assertion, without more, does not create a genuine issue of material fact in dispute.

2 Therefore, summary judgment is appropriate.

3 *3. Defendants' request to issue dismissal with prejudice*

4 Defendants argue that Plaintiff's case should be dismissed with prejudice.  
5 ECF No. 29 at 3-5. If a prisoner fails to exhaust available administrative remedies,  
6 the proper disposition is generally dismissal without prejudice. *Wyatt v. Terhune*,  
7 315 F.3d 1108, 1120 (9th Cir. 2003), *overruled on other grounds by Albino v.*  
8 *Baca*, 747 F.3d 1162 (9th Cir. 2014); *McKinney v. Carey*, 311 F.3d 1198, 1199  
9 (9th Cir. 2002) (per curiam). Defendants' use of cases outside of the Ninth Circuit  
10 is not persuasive. In *Williams v. Comstock*, prejudice is not discussed in a case  
11 where a prisoner waited nearly two years to file his grievance that required filing  
12 within fourteen days of the date of incident. 425 F.3d 175, 177 (2d Cir. 2005). In  
13 *Graves v. Norris*, the court expressly did not reach the issue of whether dismissal  
14 without prejudice was improper when administrative remedies were exhausted.  
15 218 F.3d 884, 885–86 (8th Cir. 2000). Therefore, the Court declines to adopt the  
16 approach urged by Defendants.

1 **ACCORDINGLY, IT IS HEREBY ORDERED:**

2 1. Defendants' Motion for Summary Judgment for Failure to Exhaust

3 Administrative Remedies (ECF No. 29) is **GRANTED**.

4 2. This matter is **DISMISSED** without prejudice.

5 The District Court Executive is directed to enter this Order and Judgment  
6 accordingly, furnish copies to the parties, and **CLOSE** the file.

7 **DATED** August 28, 2020.



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*Thomas O. Rice*  
THOMAS O. RICE  
United States District Judge