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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 GABRIEL ECKARD,

9 Plaintiff,

10 v.

11 GREGORY SCHALLER,

12 Defendant.

CASE NO. C15-5296 BHS

ORDER ADOPTING REPORT
AND RECOMMENDATION

13 This matter comes before the Court on the Report and Recommendation (“R&R”)
14 of the Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 19), and
15 Plaintiff Gabriel Eckard’s (“Eckard”) objections to the R&R (Dkt. 20).

16 On May 6, 2015, Eckard filed a 42 U.S.C. § 1983 complaint against Washington
17 State Department of Corrections Physician Gregory Schaller (“Dr. Schaller”). Dkt. 5
18 (“Comp.”). Eckard alleges that Dr. Schaller failed to provide him with medical treatment
19 for fibromyalgia in violation of the Eighth Amendment. *Id.*

20 On June 17, 2015, Dr. Schaller moved for summary judgment, arguing that Eckard
21 failed to fully exhaust his administrative remedies. Dkt. 10. On August 31, 2015, Judge
22 Strombom issued the R&R recommending that the Court grant Dr. Schaller’s motion and

1 dismiss Eckard's suit without prejudice. Dkt. 19. Judge Strombom determined that
2 Eckard failed to raise a genuine issue of material fact with his unsupported assertion that
3 paper restrictions kept him from either filing a Level III appeal or from seeking a waiver
4 of the five-day time restriction to do so. *Id.* at 7. On September 14, 2015, Eckard filed
5 objections. Dkt. 20. Dr. Schaller did not file a response.

6 Federal Rule of Civil Procedure 72(b) governs objections to a magistrate judge's
7 recommended disposition. Rule 72(b) provides:

8 The district judge must determine de novo any part of the magistrate
9 judge's disposition that has been properly objected to. The district judge
10 may accept, reject, or modify the recommended disposition; receive further
11 evidence; or return the matter to the magistrate judge with instructions.

12 Fed. R. Civ. P. 72(b)(3).

13 For the first time, Eckard submits evidence regarding his assertion that paper
14 restrictions prevented him from exhausting his administrative remedies for Grievance
15 Log ID 14557217. *See* Dkt. 20, Ex. A. Although Judge Strombom did not have the
16 benefit of considering this evidence when the R&R was issued, Eckard's evidence does
17 not alter Judge Strombom's conclusion that Eckard failed to exhaust his administrative
18 remedies.

19 Eckard's evidence shows that he was placed on a pen and paper restriction from
20 April 1, 2014 to April 8, 2014. *Id.* Eckard has not provided any evidence that this pen
21 and paper restriction continued past April 8, 2014. Superintendent Pat Glebe ("Glebe")
22 provided a response to Eckard's Level II grievance for Grievance Log ID 14557217 on
April 9, 2014. Dkt. 11, Declaration of Dale Caldwell ("Caldwell Dec.") ¶ 12; Dkt. 20,

1 Ex. B. Based on the evidence in the record, Eckard's pen and paper restriction had ended
2 by the time Glebe responded to Eckard's grievance. Eckard, however, did not appeal the
3 Level II response within the applicable time frame. Caldwell Dec. ¶ 12; Dkt. 20, Ex. C.

4 In sum, Eckard has still failed to raise a genuine issue of material fact that paper
5 restrictions kept him from exhausting his available administrative remedies. Therefore,
6 the Court having considered the R&R, Eckard's objections, and the remaining record,
7 does hereby find and order as follows:

- 8 (1) The R&R is **ADOPTED**; and
9 (2) This action is **DISMISSED without prejudice**.

10 Dated this 21st day of October, 2015.

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BENJAMIN H. SETTLE
13 United States District Judge