

I. Relevant Facts And Procedural History

The Plaintiff, Mumia Abu-Jamal, currently an inmate at SCI Mahanoy, commenced this action on May 18, 2015 naming, *inter alia*, SCI Mahanoy Superintendent John Kerestes as a defendant in his individual and official capacities. On August 3, 2016, plaintiff filed a motion for leave to file an amended and supplemental complaint that added former Pennsylvania Department of Corrections (DOC) Director of Bureau of Health Care Services (BHCS) Christopher Oppman as a defendant in his individual and official capacities. Doc 57. The DOC website describes the BHCS as being “responsible for supervising and monitoring the delivery of all medical/dental care services and food services throughout the state correctional system”.¹ SCI Mahanoy Corrections Health Care Administrator John Steinhart was also sued in both capacities. Doc. 21. Defendant Steinhart subsequently testified that his office is responsible for the overall delivery of medical and dental services to inmates at SCI Mahanoy. V2, 168.² Both defendant Steinhart and defendant Kerestes have the power to determine medical grievances. They denied the grievance filed by plaintiff in this case that requested, *inter alia*, a treatment plan to determine the

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<http://www.cor.pa.gov/About%20Us/Pages/Executive%20Staff.aspx#.V9BRUJgrKM8>.

² Numerals preceded by “V” refer to the transcript of the December 2015 preliminary injunction hearing. “Hearing Pl. Exhibit ” refers to the Exhibits introduced at that hearing. “Pl. Exhibit ” refers to the Exhibits filed in support of this motion.

underlying cause of his medical problems. See Grievance and Responses, attached as Pl. Exhibit 1 and V2, 170.

On August 24, 2015, plaintiff filed a motion for a preliminary injunction. Doc. 23-27. That motion requested, *inter alia*, an order requiring that plaintiff be administered anti-viral medication for his hepatitis C. In their brief in opposition, the defendants did not argue that the motion should be denied on the ground that the named defendants were not proper parties for injunctive relief. Doc. 38.

On December 18, 2015, December 21, 2015, and December 22, 2015, this Court conducted an evidentiary hearing on plaintiff's motion. Disclosed at the hearing was the existence of the DOC's then Interim Hepatitis C protocol. Hearing: Plaintiff's Exhibit 30. The protocol is included as Appendix 16-B of the DOC "Access to Health Care Procedures Manual". Hearing: Pl. Ex. 30. That Manual has been issued under the authority of the DOC Secretary. Pl. Exhibit 2.

Among the witnesses called by the defendants at the hearing were defendants John Steinhart and Dr. Paul Noel. Simultaneous post-hearing briefs were filed by the parties on March 11, 2016. Docs. 111 and 112. The DOC defendants did not argue that the defendants Kerestes, Steinhart and/or Oppman, in their official capacities, were not the proper parties for injunctive relief. Doc. 113. The record on the preliminary injunction motion was thereafter supplemented by the parties. Docs. 119, 120, 127-139.

On August 17, 2016, Plaintiff filed a motion for leave to file a Third Amended Complaint. Doc. 179. That complaint seeks to add BHCS Chief of Clinical Services Paul Noel, M.D. as a defendant in his individual and official capacities and DOC Secretary John Wetzel in his individual and official capacities. Doc. 179-1.

On August 31, 2016, this Court issued a Memorandum Opinion denying plaintiff's preliminary injunction motion. Doc. 191. This Court found that the failure to provide the plaintiff with the anti-viral medication constituted deliberate indifference to a serious medical need. However, this Court denied injunctive relief, holding that the parties before it had an insufficient connection to the constitutional violation and/or could not carry out the terms of any injunction. By the instant motion, plaintiff respectfully requests reconsideration of that order.

II. LEGAL ARGUMENT

Question One: Should this Court reconsider its decision denying Plaintiff's Motion for a Preliminary Injunction and hold that the proper official capacity parties are being sued?

Suggested Answer: Yes.

Question Two: Alternatively, should this Court forthwith grant Plaintiff's pending motion to file a Third Amended Complaint adding Dr. Paul Noel, BHCS Chief of Clinical Services and DOC Secretary John Wetzel as defendants in their official capacities and grant the preliminary injunction motion?

Suggested Answer: Yes.

1. The Reconsideration Standard

The purpose of a motion for reconsideration "is to correct manifest errors of law or facts or to present newly discovered evidence." *Max's Seafood Café ex rel Lou-*

Ann Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999). Such motions are also appropriate where the court has made a decision “outside the adversarial issues presented by the parties...” *Robrbach v. AT & T Nassau Metals Corp.*, 902 F.Supp. 523, 527 (M.D. Pa. 1995).

In its August 31, 2016 Memorandum Opinion, Doc. 191, this Court found that the named DOC defendants, former Bureau of Health Care Services Director Christopher Oppman, former SCI Mahanoy Superintendent John Kerestes and SCI Mahanoy Health Administrator John Steinhart did not have a sufficient connection to the hepatitis C protocol. Accordingly, this Court concluded, injunctive relief would be barred by the Eleventh Amendment. Doc. 191, p. 27-29. This Court alternatively concluded that these same defendants would, in any event, lack the authority to implement any injunction. Doc. 191, p. 29-30.

Reconsideration is appropriate because at no point in the litigation of the preliminary injunction motion did the DOC defendants argue that the named defendants and/or their offices were not proper parties for purposes of injunctive relief. Doc. 38, 113. Accordingly, plaintiff never addressed that issue and seeks to do so on this motion for reconsideration.

2. Defendants Oppman, Kerestes and Steinhart And Their Successors Are Proper Parties For Purposes Of Injunctive Relief.

As this Court recognized, the Eleventh Amendment does not bar suits against state officials in their official capacities to enjoin an unconstitutional practice so long

as they have “some connection” to the constitutional violation. (Doc. 191, p. 27, quoting *Ex Parte Young*, 209 U.S. 123, 157 (1908)). It concluded, however, that because the named defendants were not members of the so-called Hepatitis C Treatment Committee, do not appear to have been involved in the formulation of the hepatitis C protocol. and/or possess the power to alter it, they lacked the “connection” required by *Young*.

It is respectfully submitted that the Court’s conclusion was erroneous. Personal involvement by the official in either the commission of the unconstitutional act or the formulation of an unconstitutional policy is not a necessary prerequisite for the issuance of prospective injunctive relief. *Colwell v. Bannister*, 763 F.3d 1060, 1070 (9th Cir. 2014); *Luckey v. Harris*, 860 F.2d 1012, 1015 (11th Cir. 1988); *Chester v. Beard*, 657 F.Supp.2d 534, 545 (M.D.Pa. 2009); *Davidson v. Scully*, 148 F.Supp.2d 249, 254 (S.D.N.Y. 2001). Under *Young*, the official’s connection to the violation may simply arise out of general law or a specific act or regulation. *Young* at 157.

That connection can be established in several ways. For example, where a superior gives illegal directions to a subordinate, the latter may be restrained without joinder of the former. *Woods v. Wright*, 334 F.2d 369, 374 (5th Cir. 1964) (citing *State of Colorado v. Toll*, 268 U.S., 230 (1925) (action to restrain state officer from enforcing government policy need not join superior officers or the United States itself)). See also *Missouri v. Holland*, 252 U.S. 416, 431 (1920) (appropriate to sue game warden for his attempt to enforce the Migratory Bird Act). Thus, where an official enforces the

unconstitutional policy or regulation, he or she may properly be enjoined. *Colwell*, at 1070; *Chester* at 545; *Davidson*, at 254; *Schallop v. N.Y.S. Dept. of Law*, 20 F.Supp.2d 384, 391 (N.D.N.Y. 1998); *Marshall v. Switzer*, 900 F.Supp. 604, 615 (N.D.N.Y. 1995). In this case the officials need not have been on the hepatitis C committee or have the power to re-write the protocol. It is sufficient that they, or their subordinates or agents, have the authority to provide the plaintiff with the anti-viral medication. Fed.R.Civ.P. 65(d)(2)(A) and (B).

Alternatively and in addition, where, as here, it can be shown that the official participated in at least a portion of the unlawful conduct, the official can be properly named in an injunction even where he lacks the specific power to carry out its terms. *Savarese v. Agriss*, 883 F.2d 1194, 1209 (3d Cir. 1989) (counsel for Monroe County Transportation Authority who took steps that contributed to improper discharge of employee properly named in injunction requiring reinstatement even though he lacked legal authority to carry out the order).

Once properly issued, the injunction binds not only the parties before the Court but their officers, agents, servants, employees and attorneys. Fed.R.Civ.P. 65(d)(2)(A) and (B). Also bound are any persons who act in concert or participate with the parties and/or any of the persons listed in Fed.R.Civ.P. 65(d)(2)(B). *Matsbak v. Treadwell*, 595 F.3d 478, 486-487 (3d Cir. 2009). Application of these principles makes clear that the offices of the named DOC defendants are among those who are proper parties for injunctive relief.

i. Director, Bureau of Health Services (Defendants Oppman and Silva)

The First Amended Complaint named former DOC Director of Bureau of Health Services (BHCS) Christopher Oppman as a defendant in his individual and official capacities. Doc. 57, ¶ 3. The “official capacity” claim is directed to the Director of the BHCS. *Id.* The Second Amended Complaint names the current Director of the BHCS, Joseph Silva, as a defendant in his official capacity. Doc. 178, ¶ 9. The “official capacity” claims against both Christopher Oppman and Joseph Silva are, in essence, a suit against their office, i.e. the Director of the BHCS. “As long as the government entity received notice and an opportunity to respond, an official capacity suit is, in all respects other than name, to be treated as a suit against the entity.” *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). *See also Hafer v. Melo*, 502 U.S. 21, 25 (1991).³

The Director of the BHCS has the requisite “connection” under *Young*. First, according to the DOC website the BHCS is responsible for “supervising and monitoring the delivery of all medical/dental services...throughout the state correctional system.”

³This Court noted that Mr. Oppman was named DOC Acting Secretary for Administration in April 2015. (Doc 191, p. 28, n.3). That has no legal significance to the claims against his former office, the Director of Bureau of Health Care Services. To the extent that the complaint seeks injunctive relief it is, under *Graham* and *Hafer*, a suit against the *office* of the Director of the Bureau of Health Services, not former Director Oppman personally. That is the entity described in the complaint. Doc. 57 ¶ 3. For injunctive relief purposes, Mr. Oppman need not even have been named in the Complaint. Fed.R.Civ.P. 17(d). The complaints and motion for preliminary injunction were served on the entity through its Counsel’s Office. Thus, the Director of the BHCS had a complete opportunity to respond.

<http://www.cor.pa.gov/About%20Us/Pages/Executive%20Staff.aspx#.V9BRUJgrK>

M8. Thus, that Bureau is responsible for seeing to it that the plaintiff receive health care in accordance with the Constitution.

Second, that the Director of the BHCS does not sit on the hepatitis C committee is of no moment. The hepatitis C protocol is part of that Bureau's Health care regulations. The hepatitis C protocol was added as Appendix 16-B to the Access to Health Care Procedures Manual of the Department of Corrections. Hearing, Pl. Ex. 30. It is part of the DOC Policy Statement 13.1.1 entitled "Management and Administration of Health Care". Pl. Ex. 2. It is that protocol that created the so-called hepatitis C committee. Hearing, Pl. Ex. 30, p. 7 ¶ 1. It is only through delegation of authority from the Secretary and BHCS Director that the hepatitis C committee even exists and has the authority to recommend, or not recommend, treatment with anti-viral medication.

Third, at least three of the Director's subordinates sit on the hepatitis C committee: the BHCS Chief of Clinical Services, the BHCS Infectious Control Nurse and the BHCS Assistant Medical Director. Hearing, Pl. Ex. 30, p. 7. As his subordinates sit on the hepatitis C committee, the BHCS Director plays a supervisory role in its work. He would clearly have the authority to enforce an order requiring that medication be administered. *Cobwell*, 763 F.3d at 1070 (Director of the Department of Corrections with overall responsibility was proper party in claim for injunctive relief notwithstanding his non-participation in formulation of

unconstitutional medical policy); *Koehl v. Dalsheim*, 85 F.3d 86, 89 (2d Cir. 1996) (warden who had overall responsibility for inmates' health care properly named in claim for injunctive relief); *Chester v. Beard*, 657 F.Supp.2d at 545 (warden proper party for injunctive relief in suit challenging method of lethal injection notwithstanding non-involvement in fashioning the protocol); *Project Release v. Prevost*, 463 F.Supp. 1033, 1037 (E.D.N.Y. 1978) ("Although defendant may not have been directly involved in acts pursuant to the alleged unconstitutional scheme, he may be held responsible for acts of his subordinates for purposes of injunctive and declaratory relief.").

Should the Director of the BHCS be named in an injunction, it would not be a "nullity", as this Court found, because the hepatitis C committee and/or its members would themselves be bound by it. As set forth *supra.*, three of the committee's members are the subordinates, employees and/or agents of their superior, the BHCS Director. They would therefore be bound under Fed.R.Civ.P. 65(d)(2)(B). Indeed, the hepatitis C Committee would also be bound even if the Director of BHCS is deemed "subordinate" to members of the committee. *State of Colorado*, 268 U.S at 230; *Missouri*, 252 U.S. at 431.

Finally, Mr. Oppman's current office, the Secretary for Administration, would also be an appropriate defendant for injunctive relief. According to the DOC press release, the Secretary for Administration is responsible for the administrative operations, including fiscal ones, for the entire DOC. The Secretary oversees the

administration of, among other things, Health Care Services.⁴ Thus he, or his subordinates, would clearly have the authority to authorize the purchase of anti-viral medication for plaintiff.

ii. Superintendent SCI Mahanoy (John Kerestes/Theresa Delbalso)

The Amended Complaint names former SCI Mahanoy Superintendent John Kerestes as a defendant in his individual and official capacities. Current Superintendent Theresa Delbalso has been substituted for John Kerestes pursuant to Fed.R.Civ.P. 25(d).

The Superintendent of SCI Mahanoy (the “office” that is being sued) is a proper party for injunctive relief. Irrespective of whether the warden participates in medical decisions, he or she is responsible for the well-being and safety of inmates, and a proper party for injunctive relief. *Cobwell*, 763 F.3d at 1070; *Koehl*, 85 F.3d at 89; *Chester*, 657 F.Supp.2d at 545. In *Chester*, the prisoner sought to enjoin Pennsylvania’s lethal injection protocol. The Superintendent of SCI Rockview moved to dismiss on the ground that he had no role in the development or implementation of that protocol and could therefore not carry out any injunction. The court denied the motion. It reasoned that the warden’s supervision of the execution established the requisite connection and, accordingly authority to carry out any injunction’s terms. Likewise, the Superintendent of SCI Mahanoy, the “supervisor” over whatever

⁴ <http://www.prnewswire.com/news-releases/christopher-oppman-named-department-of-corrections-deputy-secretary-for-administration-300293897.html>

happens in the prison, would have the authority to see to it that the Plaintiff receives necessary medication.

Notwithstanding the foregoing, in this case, the Superintendent of Mahanoy played a direct role in denying Plaintiff hepatitis C treatment, thereby establishing the requisite “connection” under *Young*. In 2015, Plaintiff filed a grievance requesting, *inter alia*, a treatment plan that would determine the underlying cause of his health issues. Pl. Ex. 1. As defendant Steinhart testified at the evidentiary hearing, the individual answering the grievance has the authority to grant the sought-after relief. V2 at 170:12-22 (testifying that he would provide relief sought by an inmate if he found a grievance valid). The Superintendent of SCI Mahanoy, then the defendant Kerestes, affirmed Steinhart’s denial of the grievance, determining that plaintiff’s health care was appropriate. (Pl. Ex. 1). Clearly, if the Superintendent had the authority under DOC regulations to deny a grievance concerning health care, he would have the authority to grant such a grievance and provide a remedy, just as defendant Steinhart testified. Thus, both would have the power to implement an injunction requiring health care. *Colwell*, 763 F.3d at 1070; *Koehl*, 85 F.3d at 89; *Chester*, 657 F.Supp.2d at 545. By denying the grievance defendant Kerestes, in his role as Superintendent, played an active role in unconstitutionally depriving the plaintiff of health care. He acted as the agent of the Hepatitis C committee thereby establishing the requisite connection for injunctive relief. *Savarese*, 883 F.2d at 1209.

The hepatitis C subcommittee would be bound by any injunction issued to the Superintendent of Mahanoy whether the Superintendent is considered the superior of members of the committee or their subordinate. *State of Colorado*, 268 U.S. at 230; *Missouri*, 252 U.S. at 431.

iii. John Steinhart/Corrections Health Care Administrator SCI Mahanoy

As he testified at the preliminary injunction hearing, in his official capacity as Corrections Health Care Administrator at SCI Mahanoy, defendant John Steinhart is the facility staff member “responsible for overseeing delivery of medical [and] mental health services to the inmate population via the medical vendor and department staff.” V2, p. 168. That role alone is sufficient to make him a proper party for injunctive relief. *Cobwell*, 763 F.3d at 1070; *Koehl*, 85 F.3d at 89; *Chester*, 657 F.Supp.2d at 545. Defendant Steinhart, as CHCA, also has a specified role in the DOC’s hepatitis C protocol, which requires the CHCA to perform the “first level of screening for patients with anti-viral medications.” Hearing: Pl. Ex. 30 at § F(6). If the patient does not have any “exclusionary indications” the CHCA forwards the treatment referral form to one of the individuals who sits on the hepatitis C treatment committee “for further evaluation, possible recommendations for further testing, and final determination.” *Id.* at § F(8). Thus, in facilitating the assessment of the hepatitis C treatment committee and abiding by its “final determination” there is some connection between the official capacity suit against CHCA Steinhart and the implementation of the unconstitutional hepatitis C protocol. Further, as stated *supra.*,

Steinhart testified at the December 2015 evidentiary hearing, that he had the power to grant a medical grievance if it was valid. V2 at 170:12-22.

Defendant Steinhart played an active role in denying plaintiff health care. He denied Plaintiff's grievance that requested an adequate health care plan to address the underlying causes of his myriad of health issues. Pl. Ex. 1. In July 2016, plaintiff submitted a new grievance to defendant Steinhart. He advised him that following an ultraviolet light treatment, he suffered a first degree burn. As part of the remedy, plaintiff requested that the underlying cause of the skin condition – hepatitis C – be treated with the anti-viral medication. Defendant Steinhart himself denied the grievance, finding it to be “frivolous”. See Pl Exhibit 3 (plaintiff's “request to be provided with specific medications outside the protocol is denied”). As defendant Steinhart was acting as the agent, or subordinate, of the hepatitis C treatment committee he is a proper party for injunctive relief. *Savarese*, 883 F.2d at 1209; *State of Colorado*, 268 U.S at 230; *Missouri*, 252 U.S. at 431; *Cf. Chimenti v. Pennsylvania Department of Corrections*, 2016 WL 1125580, *6 (E.D.Pa. 2016) (denying motions to dismiss of two CHCAs based on their “responsibility for the oversight of health care” and grievances requesting hepatitis C treatment).

3. Leave To Add Defendants Paul Noel and John Wetzel In Their Official Capacities Should Be Granted.

On August 17, 2016, Plaintiff filed a motion to file a Third Amended Complaint seeking leave to add DOC Secretary John Wetzel and BHCS Chief of

Clinical Services Paul Noel as defendants in their individual and official capacities. Doc. 179-1, ¶¶ 7, 12. That motion is *sub judice*. Should this Court adhere to its determination concerning the existing defendants, it is respectfully requested that it grant forthwith plaintiff's motion to add Dr. Noel and Secretary John Wetzel in their official capacities. Upon the filing and service of that complaint, it is requested that this Court issue the requested injunction without further evidentiary submissions.

The record has established that as Chief of Clinical Services Dr. Noel is responsible for administering the provision of clinical services to all inmates in DOC custody. Doc. 38-3, ¶ 3. Dr. Noel was among those who developed the hepatitis C protocol and sits on the Hepatitis C Committee V3, 105, 129. It was he who determined that Plaintiff should not be administered anti-viral medication. Doc. 137, ¶6; V3, 109, 118, 120. The Chief of Clinical Services received actual notice of the instant motion through service of all litigation papers on DOC Counsel. It was at DOC Counsel's request that Dr. Noel filed two declarations opposing the preliminary injunction and testified for the defense at the hearing. Doc. 38, 137; Hearing V3, 87-156. That Office would suffer no prejudice if named in an injunction on the basis of the current record. *Cf. Brown v. Georgia Dept. of Revenue*, 881 F.2d 1018, 1023 (11th Cir. 1989) (because defendants sued in their official capacity could only assert defenses available to state agencies, service on state Attorney General constituted actual notice of the proceedings.)

The hepatitis C protocol was adopted under Secretary Wetzel's authority as Secretary, Pl. Ex. 2, thereby rendering that office liable. *Barros v. Wetzel* 2015 WL 5785746, at *2, *4 (M.D. Pa. Sept. 29, 2015); *Cook v. Corbett*, 2015 WL 4111692, at *13 (E.D.Pa. July 8, 2015); *Stokes v. Riskus*, 2015 WL 1326200, at *4 (W.D.Pa. Mar. 24, 2015); *Hampton v. Wetzel*, 2014 WL 1312013, at *14 (M.D.Pa. Mar. 31, 2014). He would therefore have the power to carry out any injunction. His office would suffer no prejudice since its attorney – DOC Counsel – represented its interests during all of the proceedings.

CONCLUSION

WHEREFORE, this Court should issue an order 1) granting reconsideration 2) granting Plaintiff's motion for a preliminary injunction and 3) granting such other and further relief as this Court deems just and proper.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this Brief in Support Plaintiff's Motion For Reconsideration upon each defendant in the following manner:

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