IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MUMIA ABU-JAMAL, et al.,	:	
Plaintiffs	:	Civil Action No. 3:15-CV-00967
	:	
v.	:	(Judge Mariani)
	:	
JOHN KERESTES, GEISINGER MEDICAL CENTER	:	(Magistrate Judge Mehalchick)
	:	
Defendants	:	FILED ELECTRONICALLY

DEFENDANTS' REPLY TO PLAINTIFF'S OBJECTIONS TO REPORT AND RECOMMENDATION

Defendants hereby reply to Plaintiff's objections to the Report and Recommendation ("Report") (doc. 39). In the Report, issued September 18, 2015, the Magistrate Judge found that Plaintiff failed to exhaust his administrative remedies and failed to establish a likelihood of success on the merits. Accordingly, it was recommended that Plaintiff's motion for a preliminary injunction be denied.

Plaintiff filed objections to the Report on October 7, 2015, objecting to the findings and recommendation and submitting additional declaration and exhibits in support of his motion. (Doc. 42.) This reply is timely submitted under M.D. Pa. L.R. 72.2 and 72.3.

ARGUMENT

Where objections to a magistrate judge's report and recommendation are filed, the court must perform a *de novo* review of the contested portions of the report. *Sample v. Diecks*, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989) (citing 28 U.S.C. § 636(b)(1)(C)). Local Rule 72.3 provides, in part:

> A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

M.D. Pa. LR 72.3.

A preliminary injunction is an extraordinary remedy which is not granted as a matter of right. *Kershner v. Mazurkiewicz*, 670 F.2d 440, 443 (3d Cir. 1982). The moving party must clearly establish the right to relief. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). To establish the right, the moving party must show: (1) a reasonable probability of success on the merits; (2) that the movant will be irreparably injured by denial of the relief, (3) that granting the relief will not result in even greater harm to the nonmoving party; and (4) that granting the preliminary relief will not adversely affect the public interest. *Gerardi v. Pelullo*, 16 F.3d 1363, 1373 (3d Cir. 1994). Thus, for an inmate to establish a right to a preliminary

injunction, he must demonstrate *both* a reasonable likelihood of success on the merits, and that he will be irreparably harmed if the requested relief is not granted. *Abu-Jamal v. Price*, 154 F.3d 128, 133 (3d Cir. 1998); *Kershner*, 670 F.2d at 443. If he fails to carry this burden on either of these elements, the motion should be denied. *Id.*; *see also Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989) (quoting *Morton v. Beyer*, 822 F.2d 364 (3d Cir. 1987)).

"[T]he irreparable harm must be actual and imminent, not merely speculative." *Angstadt ex rel. Angstadt v. Midd-West Sch.*, 182 F. Supp. 2d 435, 437 (M.D. Pa. 2002). An injunction is not issued "simply to eliminate the possibility of a remote future injury." *Acierno v. New Castle County*, 40 F.3d 645, 655 (3d Cir. 1994).

"[W]hen the preliminary injunction is directed not merely at preserving the status quo but . . . at providing mandatory relief, the burden on the moving party is particularly heavy." *Punnett v. Carter*, 621 F.2d 578, 582 (3d Cir. 1980). Mandatory injunctions should be used sparingly and, where sought in the prison context, "must always be viewed with great caution because judicial restraint is especially called for in dealing with the complex and intractable problems of prison administration." *Goff v. Harper*, 60 F.3d 518 (3d Cir. 1995). In the prison context, preliminary injunctive relief "must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the

least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity…."18 U.S.C § 3626(a)(2).

I. THE REPORT PROPERLY FOUND THAT PLAINTIFF FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES.

Section 1997e(a) provides that "[n]o action shall be brought with respect to prison conditions under . . . [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." The exhaustion requirement of § 1997e(a) is a mandatory precondition to filing suit that may not be waived by the courts. *Porter v. Nussle*, 534 U.S. 516, 524 (2002). This requirement "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Id*. at 532.

Inmates seeking redress for such claims must exhaust their administrative remedies regardless of whether the administrative process can provide the inmate-plaintiff with the relief he subsequently seeks in his federal action. *Booth v. Churner*, 532 U.S. 731, 741 (2001). Prison grievance procedures provide the guidelines against which administrative exhaustion is measured for purposes of §1997e(a), and an inmate procedurally defaults on his claims when he fails to

follow the established procedures. *Woodford v. Ngo*, 548 U.S. 81, 93 (2006); *Spruill v. Gillis*, 372 F.3d 218, 231 (3d Cir. 2004). Exhaustion of administrative remedies is an affirmative defense that must be pled and proven by the defendant. *Jones v. Bock*, 549 U.S. 199, 216 (2007).

The administrative remedies for inmate grievances are provided for in Department policy DC-ADM 804, which establishes a three-tiered grievance system. (Doc. 118, SMF ¶ 5,7.) Pursuant to this system, the first step in the inmate grievance process is the initial review. (*Id*. ¶ 8.) Grievances must be filed within 15 working days of the event on which the grievance is based, and the grievance must be filed at the institution where the incident occurred. (*Id*. ¶¶ 8-9.) An inmate who is dissatisfied with the initial review decision is permitted to appeal to the Superintendent. (*Id*. ¶ 12.) An appeal to final review may be sought through the Secretary's Office of Inmate Grievances and Appeals ("SOIGA") by filing an appeal to that office within 15 working days of the Superintendent's decision. (*Id*. ¶ 15.)

In his objections, Plaintiff does not assert that he completed the grievance process prior to initiating the instant action, or even prior to filing his motion for preliminary injunction. Rather, Plaintiff argues that his one grievance, which raised only medical care for Plaintiff's diabetes, "is exhausted" because the

Department allegedly failed to issue a timely decision on his appeal to SOIGA for final review. Plaintiff's argument fails for several reasons.

1. Exhaustion Is Not Excused For Minor Administrative Delays

It is well settled that, for purposes of § 1997e(a), the administrative "remedies need not meet federal standards, nor must they be 'plain, speedy, and effective.'" *See* 42 U.S.C. § 1997e(a); *Nussle*, 534 U.S. at 524; *Spruill*, 372 F.3d at 227. Third Circuit has recognized only one, narrowly defined exception: If the actions of prison officials directly caused the inmate's procedural default on a grievance, the inmate will not be held to strict compliance with this exhaustion requirement. *See Camp v. Brennan*, 219 F.3d 279 (3d Cir. 2000). However, case law recognizes a clear "reluctance to invoke equitable reasons to excuse [an inmate's] failure to exhaust as the statute requires." *Davis v. Warman*, 49 F. App'x 365, 368 (3d Cir. 2002). Thus, an inmate's failure to exhaust will only be excused "under certain limited circumstances", *Harris v. Armstrong*, 149 F. App'x 58, 59 (3d Cir. 2005), and an inmate can defeat a claim of failure to exhaust only by showing "he was misled or that there was some extraordinary reason he was prevented from complying with the statutory mandate." *Davis v. Warman*, 49 F. App'x at 368.

Plaintiff cites to cases from several other circuits which have held that an unreasonable delay or total failure by prison officials in responding to an inmate grievance can render the administrative remedy unavailable. It is noteworthy that

Plaintiff cites to no cases from this jurisdiction. In fact, the Third Circuit has recognized a limited exception to the exhaustion requirement on grievance responses *only where no grievance or appeal decision has been issued*. *Small v. Camden Cty.*, 728 F.3d 265 (3d Cir. 2013). However, that is clearly not the case in the instant matter. Plaintiff asserts, in essence, that he has substantially complied with the exhaustion requirement because he had to wait for his final review decision for a slightly lengthier time than he would have preferred. Neither existing caselaw nor the clear language of § 1997e(a) affords such an exception to the exhaustion requirement.

B. Plaintiff Received Timely Grievance Decisions

In fact, contrary to Plaintiff's assertion that he should be deemed to have exhausted administrative remedies due to untimely decisions, it is clear that the grievance decision deadlines in this matter were met. The Department's grievance policy provides for an initial review decision within 15 working days from the date the grievance is entered into the inmate grievance tracking system. (Doc. 38 Ex. 1 p. 1-6.) The inmate is to be notified of the Superintendent's decision within 15 working days of receipt of the appeal. (*Id*. at p. 2-2.) A final review decision is to be issued within 30 working days of receipt, unless otherwise extended. (*Id*. at p. 2-7.) That deadline may be extended for an additional 10 working days where the appeal is under investigation. (*Id*.) The grievance in this matter was received on

April 13, 2015 (well after Plaintiff initiated the instant action) and the initial review decision was issued on April 28, 2015. (Doc. 38 Ex. 1-C.) Plaintiff filed his appeal to the Superintendent on May 19, 2015. (Doc. 38 Ex. 2-A.) The Superintendent's decision was issued on May 26, 2015. (*Id*.) Plaintiff's appeal to final review was received on July 6, 2015. (Doc. 38 Ex. 1 ¶ 16.) A notice extending the final review deadline was issued on August 13, 2015. (Doc. 42-6.) Thus, it is clear that the applicable deadlines were met. To the extent that Plaintiff may have experienced some slight delay in receiving the decisions, those minor delays were not prohibited by the applicable policy and resulted in no prejudice to Plaintiff.

Thus, because it is clear that Plaintiff's grievance, which clearly raised only his diabetes condition, was not filed until after the instant action was initiated and Plaintiff failed to complete the grievance process until after he initiated the instant action ***and*** after he filed the instant motion for preliminary injunctive relief, Plaintiff's motion must be dismissed for failure to exhaust administrative remedies.

II. THE REPORT PROPERLY FOUND THAT THE MOTION OTHERWISE FAILED TO ESTABLISH A PROBABILITY OF SUCCESS ON THE MERITS.

Plaintiff's motion, as well as his underlying complaint, set forth nothing more than disagreements between medical staff over the appropriate course and order of treatment for Plaintiff's conditions. It is clear that such disagreements do

not rise to the constitutional proportions. *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326, 346 (3d Cir. 1987); *Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir. 2004) (citations omitted). Plaintiff is not entitled to dictate and direct the course and method of his treatment. Plaintiff does not dispute that he has been examined by medical staff and provided treatment. The fact that the particular course of treatment is not what he wishes is not sufficient to establish a right to mandatory injunctive relief.

CONCLUSION

For the foregoing reasons, the Defendants request that the Court reject the Report and Recommendation and grant their partial summary judgment motion.

Respectfully submitted,
Office of General Counsel

Dated: October 21, 2015

by /s/ Laura J. Neal

Laura J. Neal
PA 81070
Pa. Department of Corrections
1920 Technology Parkway
Mechanicsburg, PA 17050
Tel: (717) 728-7763
lneal@pa.gov

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the foregoing document upon the following person(s) in the manner indicated below.

Served Via ECF:

For Defendant Geisinger Medical Center:	For Plaintiffs:
Daniel T. Brier, Esq. dbrier@mbklaw.com **John B. Dempsey, Esq.** jdempsey@mbklaw.com **Suzanne Conaboy, Esq.** sconaboy@mbklaw.com	**Bret D. Grote, Esq.** bretgrote@abolitionistlawcenter.org **Robert J. Boyle, Esq.** rjboyle55@gmail.com

s/ Laura J. Neal
Laura J. Neal
Assistant Counsel

PA Dept. of Corrections
Office of Chief Counsel
1920 Technology Parkway
Mechanicsburg, PA 17050
Tel: (717) 728-7763
Dated: October 26, 2015