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

JOHN TC YEH,	:	**Civil No. 3:18-cv-943**
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Plaintiff	:	**(Judge Munley)**
	:	
v.	:	**(Magistrate Judge Carlson)**
	:	
UNITED STATES BUREAU	:	
OF PRISONS, et al.,	:	
	:	
Defendants	:	

REPORT AND RECOMMENDATION

I. Factual Background

This case, which brings claims under the Rehabilitation Act, 29 U.S.C. § 794, on behalf of a deaf federal inmate, comes before the court for resolution of a pending motion for preliminary injunction filed by the plaintiff, John TC Yeh. (Doc. 2.) By way of background, Yeh is a federal prisoner who is currently housed at the Federal Correctional Institution (FCI) Schuylkill, where he is serving a 108-month sentence following his conviction on federal fraud offenses. Yeh's current projected release date from federal custody is in October of 2019.

Yeh has been profoundly deaf from birth, and his primary language is American Sign Language (ASL). He cannot discriminate sounds to understand

speech and therefore cannot use a standard telephone in the same way as a hearing person. Given this physical impairment, in order to communicate with his attorneys, family, and friends outside of FCI Schuylkill, Yeh requested a videophone, a form of technology which enables persons whose primary language is ASL to efficiently communicate with others. That request was initially denied by prison officials because the prison had an alternate technology, text-telephone services (TTY), available to Yeh at FCI Schuylkill.

The denial of this request, in turn, led to prolonged administrative hearings and proceedings, proceedings which ultimately concluded with a decision by the Department of Justice that Yeh was entitled to access to videophone technology. These proceedings commenced on September 24, 2015, when Yeh filed a complaint with the Equal Employment Opportunity ("EEO") to the Department of Justice Civil Rights Division alleging that FCI Schuylkill violated Section 504 of the Rehabilitation Act and its attendant regulations when it failed to honor his request for videophone technology to accommodate his telephone needs as a deaf person.

Initially Yeh's efforts to secure this relief were unavailing. Thus, on March 24, 2016, Yeh received a letter of findings from EEO which determined that the text-telephone services (TTY) provided to him were sufficient and appropriate. On April 14, 2016, Yeh appealed these EEO findings pursuant to 28 C.F.R. § 170(i) and

requested a hearing on the matter. Following administrative hearings, on April 10, 2017, the Administrative Law Judge (ALJ) issued a recommended decision sustaining the EEO's finding that the TTY services provided to Yeh were appropriate.

On April 24, 2017, Yeh lodged a Letter of Exceptions to this ALJ decision with the Department of Justice Complaint Adjudication Officer ("CAO"). On February 5, 2018, the CAO then issued his decision finding that Yeh's "current access to TTY does not provide him with equal participation opportunities in [Schuylkill]" and that the BOP failed to provide evidence that videophones cause any undue administrative or financial hardships. As the CAO found:

> On the issue of videophone use, this decision finds that complainant's current access to TTY' does not provide him with equal participation opportunities in TCP. Complainant has requested videophone access and has provided sufficient evidence to establish that videophones will provide him with significantly greater participation opportunities in TCP. This decision further concludes that BOP has not provided evidence that videophone usage will significantly alter TCP or undermine the BOP mission by generating undue administrative or financial hardships. That said, BOP does have legitimate security concerns which, while not meeting the regulatory standard of establishing "fundamental alteration or undue burden," must be taken into account in installing videophone access. If complainant or BOP can identify another device that permits complainant to communicate with a hearing impaired individual using ASL but also provides more of the security safeguards that BOP insists upon, the parties are strongly encouraged to explore the implementation of such a device.

> If videophone is the only solution, complainant is cautioned that the actual implementation of videophone use will likely require significant patience and adjustment. BOP has significant responsibilities for assessing the available budget in the present and coming fiscal year, for determining the feasibility of installing dedicated lines at FCI Schuylkill or at another institution, and for coordinating a waiver from authorities at the Department of Justice. These and other attendant matters may take some time.

(Doc.3, Ex. A, p.21.)

Following this decision by the CAO, and his admonition to Yeh that "the actual implementation of videophone use will likely require significant patience" since these "matters may take some time", three months passed before Yeh filed his complaint in federal court on May 3, 2018, alleging that the continuing failure to install videophone technology at FCI Schuylkill violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. (Doc. 1.) Along with this complaint, Yeh filed a motion for preliminary injunction which sought a specific form of relief, an order directing that the defendants "must immediately install a videophone at FCI Schuylkill." (Doc. 2, p. 16.)

This case was then referred to the undersigned. Recognizing the gravity of this matter for all concerned, we entered a series of orders aimed at permitting an expedited development of the factual record as it related to Yeh's request for a preliminary injunction, (Docs. 15, 20), and conducted a hearing on this motion for preliminary injunction on August 10, 2018. (Docs. 28, 29.)

That hearing confirmed that, as the CAO had observed, these "matters may take some time." Specifically, the hearing disclosed that there were at least six steps which needed to be accomplished in order to complete installation of videophone technology at FCI Schuylkill. These steps included: (1) completion of infrastructure work on-site at the prison; (2) arranging internet access through an internet service provider; (3) scheduling the equipment installation and training contemplated under the BOP's contract with yet another private contractor; (4) clarifying whether implementation of this technology also requires the services of another VRS system provider, and scheduling that component of this work, if needed; (5) ensuring that security protocols were in place to allow this system to go on-line; and (6) confirming that the system has the peer-to-peer capabilities sought and described by the plaintiff. Moreover, many aspects of this installation process were dependent upon third-party contractors, Internet service providers and VRS system providers, none of whom were parties to this litigation. Recognizing that the essential involvement of non-party contractors in this process would make issuance of a preliminary injunction problematic, we held this motion under advisement but instituted a rigorous program of reporting and case management, designed to ensure that the preliminary injunctive relief sought by Yeh, installation of a videophone,

would be accomplished in a timely fashion. (Docs. 32, 34, 36-8, 40-4, 45-54.)[1] As a result of these efforts, by December 4, 2018, it was reported that:

> On November 28, 2018, Plaintiff John TC Yeh made a phone call using a Videophone by the Video Relay Service installed at the Federal Correctional Institution in Minersville, Pennsylvania (FCI Schuylkill). During the first call, there was an internet connection issue, where the call "froze" for several seconds, but this problem has not recurred since that first phone call. Mr. Yeh asked that numerous phone numbers be installed into the VRS system for him to call, and the staff at FCI Schuylkill complied with that request. Since November 28, 2018, Mr. Yeh has made a total of 44 calls, totaling 182 minutes of time.
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> (Doc. 54.)

It is against this factual backdrop that we now further consider Yeh's motion for preliminary injunction which sought a specific form of relief, an order directing that the defendants "must immediately install a videophone at FCI Schuylkill." (Doc. 2, p. 16.) For the reasons set forth below, we recommend that this motion be denied,

[1] We have also attempted to take steps to address merits litigation beyond this preliminary injunction, by soliciting from counsel a status report on what further steps are necessary in this case given the installation of the videophone technology at FCU Schuylkill. (Doc. 53.) The parties' response to this instruction reveals that they have vastly different views regarding how any remaining merits issues should be addressed. (Doc. 55.) Accordingly, we have set a case-management schedule and are scheduling a case-management conference in this matter, to complete merits litigation in this case. Thus, it should be emphasized that this Report and Recommendation deals only with the narrow issue of Yeh's current entitlement to a preliminary injunction directing the installation of a videophone at FCI Schuylkill. It is not intended and should not be construed as addressing any other merits issues in this litigation.

at this time, without prejudice to renewal if the specific relief sought, videophone access at FCI Schuylkill, was terminated or unreasonably curtailed.

II. Discussion

A. Preliminary Injunction Rule 65– The Legal Standard.

The issuance of preliminary injunctions is governed by Rule 65 of the Federal Rules of Civil Procedure, which sets exacting legal standards for such relief. As the United States Court of Appeals for the Third Circuit has explained: "Four factors govern a district court's decision whether to issue a preliminary injunction: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief, (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest." Gerardi v. Pelullo, 16 F.3d 1363, 1373 (3d Cir. 1994) (quoting SI Handling Systems, Inc. v. Heisley, 753 F.2d 1244, 1254 (3d Cir. 1985)). See also Highmark, Inc. v. UPMC Health Plan, Inc., 276 F.3d 160, 170-71 (3d Cir. 2001); Emile v. SCI-Pittsburgh, No. 04-974, 2006 WL 2773261, *6 (W.D.Pa. Sept. 24, 2006)(denying inmate preliminary injunction).

Thus, a preliminary injunction is not granted as a matter of right. Kerschner v. Mazurkewicz, 670 F.2d 440, 443 (3d Cir. 1982) (affirming denial of prisoner motion

for preliminary injunction seeking greater access to legal materials). It is an extraordinary remedy. Given the extraordinary nature of this form of relief, a motion for preliminary injunction places precise burdens on the moving party.

Accordingly, for an inmate to sustain his burden of proof that he is entitled to a preliminary injunction under Fed.R.Civ.P. 65, 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 the movant fails to carry this burden on either of these elements, the motion should be denied since a party seeking such relief must "demonstrate *both* a likelihood of success on the merits and the probability of irreparable harm if relief is not granted." Hohe v. Casey, 868 F.2d 69, 72 (3d Cir. 1989)(emphasis in original), (quoting Morton v. Beyer, 822 F.2d 364 (3d Cir. 1987)).

Furthermore, several other basic legal tenets guide our discretion in this particular case, where an inmate seeks to enjoin a wide array of non-parties. An injunction against non-parties, like the preliminary injunction sought here which would have mandated particular action by non-party private contractors, requires a specific legal showing. To the extent that Yeh sought to enjoin non-parties in this litigation to immediately provide various technical services it is clear that: "[a] non-party cannot be bound by the terms of an injunction unless the non-party is found to be acting 'in active concert or participation' with the party against whom injunctive relief is sought. Fed.R.Civ.P. 65(d)." Elliott v. Kiesewetter, 98 F.3d 47, 56 (3d Cir. 1996). Further, where the requested 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).

A necessary corollary flows from these exacting legal standards for a preliminary injunction. If intervening events have taken place which have addressed the immediate presenting concern which caused an inmate to seek a preliminary injunction, then courts are often justified in disposing of the motion as moot. See e.g., Sutton v. Rasheed, 323 F.3d 236, 248 (3d Cir. 2003); Abdul-Akbar v. Watson, 4 F.3d 195, 206 (3d Cir.1993)(inmate transfer renders injunction moot). For example, "this court has held on numerous occasions that when the event sought to be enjoined in a preliminary injunction has occurred, an appeal from the order denying the preliminary injunction is moot. See, e.g., In re Cantwell, 639 F.2d 1050, 1054 (3d Cir.1981)." Scattergood v. Perelman, 945 F.2d 618, 621 (3d Cir. 1991).

Guided by these principles, we recommend that this motion for preliminary injunction be denied at this time, without prejudice, as the parties complete their merits litigation.

B. This Motion for Preliminary Injunction Should Be Denied Without Prejudice as the Parties Complete Their Merits Litigation

In considering the instant motion for preliminary injunction, it is important at the outset to focus on the particular preliminary injunctive relief sought by the motion. That motion demanded a specific form of relief which went beyond simply maintaining the *status quo*. Instead, it requested an order directing that the defendants "must immediately install a videophone at FCI Schuylkill." (Doc. 2, p. 16.) Since the preliminary injunction sought here was intended to provide some additional "mandatory relief, the burden on the moving party is particularly heavy." Punnett v. Carter, 621 F.2d 578, 582 (3d Cir. 1980). Moreover, the relief sought here, immediate installation of a videophone at FCI Schuylkill, went beyond the relief granted by the Department of Justice CAO at the time of the CAO's favorable resolution of Yeh's administrative appeal in February of 2018. That February 2018 CAO decision called for installation of videophone technology at FCI Schuylkill, but specifically warned that:

> If videophone is the only solution, complainant is cautioned that the actual implementation of videophone use will likely require significant patience and adjustment. BOP has significant responsibilities for assessing the available budget in the present and coming fiscal year, for determining the feasibility of installing dedicated lines at FCI Schuylkill or at another institution, and for coordinating a waiver from authorities at the Department of Justice. These and other attendant matters may take some time.
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> (Doc.3, Ex. A, p.21.)

Thus, the agency decision which Yeh sought to enforce in this lawsuit did not call for the relief requested in this motion, the immediate installation of a videophone. Rather, that decision recognized that implementing this technology in a correctional setting "may take some time."

Furthermore, the evidence adduced at the preliminary injunction hearing conducted by this court revealed that installation of this technology was a multi-step process which entailed not only actions by the Bureau of Prisons, a party to this lawsuit, but also cooperation and completion of essential tasks by non-party private contractors. The fact that successful videophone installation was entirely dependent action by non-parties made the issuance of a preliminary injunction compelling immediate completion of this task particularly problematic as to those persons who were not parties before the court. See Elliott v. Kiesewetter, 98 F.3d 47, 56 (3d Cir. 1996).

In any event, by adopting the course which we followed and instituting a rigorous program of reporting and case management designed to ensure that the preliminary injunctive relief sought by Yeh, installation of a videophone, would be accomplished in a timely fashion, (Docs. 32, 34, 36-8, 40-4, 45-54) we have achieved that result: A videophone is now installed at FCI Schuylkill and it is reported that Yeh has extensive access to that communication facility. Therefore,

since the videophone is installed, the relief sought in this motion, "install[ation of] a videophone at FCI Schuylkill," (Doc. 2, p. 16), has been attained. Simply put, no further action is needed at this time to achieve the preliminary relief sought by Yeh.

In short, Yeh's motion sought a particularly compelling form of preliminary injunction, some new form of additional mandatory relief where "the burden on the moving party is particularly heavy." Punnett v. Carter, 621 F.2d 578, 582 (3d Cir. 1980). Further, granting Yeh the specific relief he sought, immediate installation of videophone technology at FCI Schuylkill, would have been particularly problematic since we would have had to, in effect, enjoin affirmative actions by private persons who were not parties to this litigation. Notwithstanding these legal impediments, we have achieved the goal sought by the plaintiff in this motion: a videophone is now installed at FCI Schuylkill and available for use by Yeh. Accordingly, upon consideration of these factors, all of which caution against the necessity of further preliminary injunctive relief at this time, it is now recommended that this court deny the motion for preliminary injunction without prejudice to renewal if the specific relief sought, videophone access at FCI Schuylkill, is improperly terminated or unreasonably curtailed.

III. Recommendation

Accordingly, IT IS RECOMMENDED that the plaintiff's motion for preliminary injunction, (Doc. 2), be DENIED without prejudice to renewal if the specific relief sought, videophone access at FCI Schuylkill, is improperly terminated or unreasonably curtailed.

The parties are placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. 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.

Submitted this 12th day of December, 2018.

/s/ *Martin C. Carlson*
Martin C. Carlson
United States Magistrate Judge