IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GREGORY E. PALOIAN,

Petitioner,

v.

JOSEPH SCIBANA,
Warden of Oxford Prison Camp,

Respondent.

ORDER

No. 04-C-0536-C

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In Hendershot v. Scibana, No. 04-C-0291-C, I concluded that the Bureau of Prisons' refusal to consider three inmates for placement in a community corrections center or halfway house until they reach the last 10% of their sentence was based on an erroneous interpretation of 18 U.S.C. §§ 3621(b) and 3624(c). I granted the petitions for writs of habeas corpus under 28 U.S.C. § 2241 and ordered the warden to consider petitioners for transfer to a halfway house or other transitional program as early as six months before their projected release date. Having granted relief under the habeas statute, I declined to reach petitioners' claim that the change in the bureau's policy violated the Administrative Procedure Act. Judgment in Hendershot was entered on October 19, 2004.

That same day, the Court of Appeals for the Seventh Circuit issued its opinion in Richmond v. Scibana, No. 04-2264, 2004 WL 2339763 (7th Cir. Oct. 19, 2004). In that case, the court reviewed the same claim on which I granted relief in Hendershot, a § 2241 challenge to the Bureau of Prisons' post-December 2002 interpretation of 18 U.S.C. §§ 3621(b) and 3624(c). The court of appeals held that "§ 2241 does not furnish the appropriate means to contest the Bureau's understanding of § 3624(c)." Richmond, 2004 WL 2339763 at *4. Instead, the court ruled that a challenge to the bureau's interpretation of the statutes must be brought under the Administrative Procedure Act. Id. at *3.

Petitioner Gregory Paloian is an inmate at the Oxford Prison Camp. His petition under § 2241 raises the same issue as that in Hendershot: he alleges that he will not be considered for halfway house placement until the final ten percent of his sentence because of the bureau's erroneous interpretation of §§ 3621(b) and 3624(c). In addition, petitioner argues that the change in the bureau's policy violates the Administrative Procedure Act. Documentation submitted with petitioner's petition indicates that on July 10, 2002, the United States District Court for the Northern District of Illinois sentenced petitioner to a 41-month term of imprisonment. Petitioner's projected release date is August 8, 2005, and he is scheduled to begin pre-release preparation on April 17, 2005.

In Hendershot, I determined that petitioners properly framed their request for relief as a petition for a writ of habeas corpus under § 2241 and that exhaustion of administrative

remedies was not required because respondent and the bureau have predetermined the issue. Richmond indicates that this determination was erroneous. Although petitioner argues that the bureau's current policy was adopted in violation of the Administrative Procedure Act, I cannot convert the petition for habeas corpus into a civil action under the APA *sua sponte*. Richmond, 2004 WL 2339763, at *4. Therefore, the petition in this case must be dismissed. If petitioner wishes to challenge to the bureau's new policy regarding halfway house placement, he must do so in a civil action using the general federal jurisdiction statute, 28 U.S.C. § 1331.

Should petitioner wish to challenge the bureau's policy under § 1331, he will have to either pay the full docketing fee ($150) for a civil action or seek leave to proceed with the action in forma pauperis. In the latter event, petitioner will need to submit a six month trust fund account statement that the court will use to determine his eligibility to proceed in forma pauperis. If the court finds that petitioner is eligible to proceed in forma pauperis, he will be assessed an initial partial payment which must be paid before his complaint will be screened under 28 U.S.C. § 1915(e)(2). In either event, petitioner's lawsuit will be subject to the administrative exhaustion requirements under 42 U.S.C. § 1997e(a), see 28 C.F.R. §§ 542.13-542.15. (The court has received petitioner's letter dated October 26, 2004. The documentation accompanying that letter appears to indicate that petitioner has exhausted his administrative remedies.)

Before deciding whether to commit $150 to another lawsuit, petitioner should consider the limited relief available to him. In Hendershot, I noted that my ruling

> requires respondent only to *consider* petitioners for transfer to a halfway house for the last six months of their sentences. Section 3624(c) does not *require* halfway house transfers for the last six months of a sentence; it merely encourages such transfers to the extent they are practicable. The only requirement in the section is that prisoners be prepared for release for "a reasonable part" of the last 10% of their sentence.

Even if petitioner was successful in challenging the bureau's new policy in a new lawsuit, petitioner would not be *entitled* to halfway house placement for the last six months of his sentence. The best petitioner could hope for from this court is an order directing respondent to consider petitioner for halfway house placement in the exercise of his discretion. But this outcome may not result in the relief petitioner seeks. The court in Richmond noted that the Department of Justice "has decided not to exercise in prisoners' favor whatever dispensing power it possesses. It has proposed a rule that inmates will be placed in community or home confinement only during the last 10% of their sentences" as an exercise of its discretion under § 3621(b). Richmond, 2004 WL 2339763, at *3. Petitioner should consider the likelihood that a favorable decision will not result in halfway house placement before his 10% date.

ORDER

IT IS ORDERED that petitioner Gregory Paloian's petition for a writ of habeas corpus under 28 U.S.C. § 2241 is DISMISSED.

Entered this 1st day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge