IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

GREGORY E. PALOIAN,

Plaintiff,

OPINION and ORDER

04-C-858-C

v.

JOSEPH SCIBANA,
Warden of Oxford Prison Camp,

Defendant.

- -

This is a proposed civil action for declaratory and injunctive relief under the Administrative Procedure Act. Plaintiff Gregory Paloian, an inmate at the Oxford Prison Camp in Oxford, Wisconsin, is challenging a change in policy implemented by the Bureau of Prisons regarding halfway house placement. Plaintiff originally filed his challenge to the bureau's policy under the habeas statute, 28 U.S.C. § 2241. That petition was dismissed after the Court of Appeals for the Seventh Circuit issued its decision in Richmond v. Scibana, 387 F.3d 602 (7th Cir. 2004) (habeas corpus not proper vehicle to challenge bureau's halfway house policy).

Plaintiff has paid the $150 filing fee. Nevertheless, because he is a prisoner, he is

subject to the 1996 Prison Litigation Reform Act. Under the act, plaintiff cannot proceed with this action unless the court grants him permission to proceed after screening his complaint pursuant to 28 U.S.C. § 1915A. The act requires the court to deny leave to proceed if the complaint frivolous or malicious, fails to state a claim on which relief may be granted or seeks monetary relief against a defendant who is immune from such relief. This court will not dismiss plaintiff's case on its own motion for lack of administrative exhaustion, but if defendant believes that plaintiff has not exhausted the remedies available to him as required by § 1997e(a), he may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

On March 11, 2002, plaintiff pleaded guilty to charges of money laundering and racketeering in the United States District Court for the Northern District of Illinois. On July 10, 2002, plaintiff was sentenced to a term of forty-one months' imprisonment. He began serving his sentence on August 27, 2002 at the Federal Medical Center in Lexington, Kentucky. At that time, plaintiff was given a printout of his sentence computation

indicating that his term of imprisonment would end in January 2006 and that his release date, factoring in good time credit, could be as early as August 18, 2005. Staff at the Federal Medical Center informed plaintiff that, under 18 U.S.C. § 3621(b), the Bureau of Prisons followed a policy of recommending that inmates who received no incident reports be allowed to serve the final six months of their sentences in a halfway house. Pursuant to this policy, plaintiff was told that he would be eligible for halfway house placement as early as February 18, 2005, assuming he did not forfeit good time through disciplinary proceedings.

On December 13, 2002, the United States Department of Justice Office of Legal Counsel issued an opinion that declared unlawful the bureau's practice of placing inmates in halfway houses for the last six months of their sentences. The Office of Legal Counsel stated that the bureau had no authority under § 3621(b) to place inmates in halfway houses; rather, that authority came from (and was limited by) 18 U.S.C. § 3624(c), which requires the bureau to "assure that a prisoner . . . spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community." On December 20, 2002, the bureau sent a memorandum to its chief executive officers explaining the bureau's new policy with respect to halfway house placement. Effective immediately, the bureau's practice would be changed to fit with the conclusions reached in the Department of Justice opinion; therefore, the bureau would limit

halfway house placements to the last ten percent of an inmate's term of imprisonment, not to exceed six months.

That same day, the warden at the Federal Medical Center posted a notice announcing the new interpretation of the existing statutes governing halfway house placements. This change in the bureau's practice was implemented without public notice and comment. Under the Department of Justice's interpretation, plaintiff will not be eligible for halfway house placement until April 17, 2005. Because of his earned good conduct and excellent work record, plaintiff was transferred to the Federal Prison Camp in Oxford, Wisconsin, in November 2003. Staff at the camp informed plaintiff that he would not be eligible for halfway house placement until the last ten percent of his term, despite his dire family circumstances.

Defendant Scibana is the warden at the Oxford Prison Camp.

DISCUSSION

Since December 2002, inmates across the country have filed lawsuits challenging the bureau's policy change regarding halfway house placement. A number of courts in other jurisdictions have granted habeas petitions or preliminary injunctions on the ground that the Office of Legal Counsel erred in reaching the opinion that the Bureau of Prisons has no authority under 18 U.S.C. § 3621(b) to place inmates in halfway houses for more than the

last 10% of their sentences up to six months. E.g., Goldings v. Wynn, 383 F.3d 17, 28 (1st Cir. 2004); Monahan v. Winn, 276 F. Supp. 2d 196, 206-07 (D. Mass. 2003); Iacaboni v. United States, 251 F. Supp. 2d 1015, 1017-18 (D. Mass. 2003). These courts have held that § 3621(b) gives the bureau discretion to place inmates in halfway houses anytime before their 10% dates. See Goldings, 383 F.3d at 28. Recently, in response to these decisions, the bureau has proposed new rules governing the use of that discretion. 69 Fed. Reg. 51213 (proposed August 18, 2004) (to be codified at 28 C.F.R. §§ 570.20-570.21). Under these rules, the bureau exercises its discretion categorically under § 3621(b) "to limit inmates' community confinement to the last ten percent of the prison sentence being served, not to exceed six months." Id. The only exceptions to this rule will be "when specific Bureau pre-release programs allow greater periods of community confinement, as provided by separate statutory authority." Id. Although the proposed rules have not yet gone into effect formally, they do provide a strong indication of the bureau's intent with respect to future halfway house placements.

In this case, plaintiff alleges that the Office of Legal Counsel erred in its interpretation of the Bureau of Prisons' authority under 18 U.S.C. §§ 3621(b) and 3624(c) to place inmates in halfway houses. Even if I agreed that the bureau's post-December 2002 interpretation of its authority under §§ 3621(b) and 3624(c) was incorrect, the only relief to which plaintiff would be entitled is an order directing defendant to exercise his discretion

to consider plaintiff for halfway house placement before his 10% date. The proposed new rule makes clear that even if I were to enter such an order, defendant would exercise his discretion to deny plaintiff halfway house placement before his 10% date. In other words, plaintiff will be unable to prove that he suffered any injury in fact from defendant's reliance on the Department of Justice's interpretation of 18 U.S.C. § 3621(b).

No one can sue in federal court unless he has incurred an injury in fact (or is at risk of incurring one) that is fairly traceable to the actions of the defendant and likely to be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U. S. 555, 560-61 (1992). Otherwise, the plaintiff is in the position of asking the court to give an advisory opinion rather than adjudicate a live controversy, which runs afoul of the "case or controversy" requirement of Article III of the United States Constitution. Hoover v. Wagner, 47 F.3d 845, 847 (7th Cir. 1995); Monsanto Co. v. Environmental Protection Agency, 19 F.3d 1201, 1203-04 (7th Cir. 1994) (citing Flast v. Cohen, 392 U.S. 83, 96 (1968)). To satisfy the injury-in-fact requirement, plaintiff "must establish that he has sustained or is immediately in danger of sustaining some direct injury." Tobin for Governor v. Ill. State Bd. of Elections, 268 F.3d 517, 528 (7th Cir. 2001). Although plaintiff was *affected* by the change in the way the bureau calculated his projected halfway house date, he was not *injured* by the change. Plaintiff never had a right to halfway house placement before his 10% date. At all times, his release to a halfway house has rested in the sound discretion

of the bureau. Nothing has changed except the way in which the bureau has chosen to exercise its discretion. Because plaintiff has not incurred an injury, there is no case or controversy under Article III and therefore this court lacks jurisdiction.

ORDER

IT IS ORDERED that plaintiff Gregory E. Paloian's request for leave to proceed against defendant Joseph Scibana is DENIED for want of jurisdiction. The clerk of court is directed to close the file.

Entered this 21st day of December, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge