IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOSHUA G. BELK,

Plaintiff, OPINION AND ORDER

v. 07-C-301-C

FEDERAL BUREAU OF PRISONS,

Defendant.

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This is a civil action for injunctive relief brought pursuant to the Administrative Procedures Act, 5 U.S.C. §§701-706. Plaintiff Joshua Belk, a federal prisoner, contends that defendant Federal Bureau of Prisons has violated 18 U.S.C. § 3621(b) by refusing to consider him for placement in a halfway house because he has not yet reached the final 10% of his sentence, in accordance with 28 C.F.R. §§ 570.20 and 570.21. He has moved for a preliminary injunction directing defendants to make a good faith determination considering him for a placement in a halfway house. That motion is now ripe for review.

Plaintiff raises the same claim raised in Tristano v. Federal Bureau of Prisons, No. 07-C-189-C, 2004 WL 5284511 (W.D. Wis. April 17, 2007), in which I granted a preliminary injunction to a prisoner arguing that 28 C.F.R. §§ 570.20 and 570.21 were

invalid and that 18 U.S.C. § 3621(b) entitled him to immediate consideration for transfer to a halfway house. (A copy of the decision in Tristano was sent to the parties with the order granting plaintiff Belk leave to proceed in this action.) Since I decided Tristano in April, the legal landscape has not changed significantly. The Court of Appeals for the Seventh Circuit has still not yet had the opportunity to consider the validity of 28 C.F.R. §§ 570.20 and 570.21. However, the number of district courts around the country that have invalidated the regulations is proliferating. E.g., Yonker v. Palmquist, 2007 WL 2713028, *1 (W.D. Wash. 2007); Williams v. Pettiford, 2007 WL 2688561, *9 (D.S.C. 2007); Weirup v. Eichenlaub, 2007 WL 2300715, *5 (E.D. Mich. 2007); Slater v. Smith, 2007 WL 1725664, *1 (E.D. Cal. 2007); Jaworski v. Gutierrez, 2007 WL 2443543, *10 (N.D.W. Va. 2007). But see Fauntleroy v. Patton, 2007 WL 2461625, *5 (E.D. Ky. 2007) (concluding that §§ 570.20 and 570.21 were not invalid under § 3621(b)).

This continues what is currently the uniform trend among circuit courts. Thus far, each court of appeals to consider the question has concluded that the "10% rule" of §§ 570.20 and 570.21 is contrary to 18 U.S.C. § 3621(b) because the statute prohibits the bureau from making categorical determinations regarding halfway house placement and instead requires it to consider five factors listed in the statute, including the resources of the facility contemplated, the nature and circumstances of the offense, the history and characteristics of the prisoner, statements by the sentencing court and any policy statements

issued by the Sentencing Commission. Wedelstedt v. Wiley, 477 F.3d 1160, 1168 (10th Cir. 2007); Levine v. Apker, 455 F.3d 71, 81 (2d Cir. 2006); Fults v. Sanders, 442 F.3d 1088, 1090-91 (8th Cir. 2006); Woodall v. Federal Bureau of Prisons, 432 F.3d 235, 244 (3d Cir. 2005).

Defendant acknowledges that the "issues in this case are identical to those" in Tristano. Dkt. #8, at 3. It raises no new arguments regarding the correct interpretation of § 3621(b). The only difference asserted by defendant is a factual one, which is that plaintiff's release date is not imminent. But defendant has not explained why that factual difference suggests a different result and I cannot conclude that it does. The question I considered in Tristano was not related to the prisoner's expected release date. Rather, it was whether defendant had erred by categorically excluding halfway houses from the facilities at which a prisoner could be placed. The answer to this question is the same, regardless of the amount of time a prisoner has yet to serve.

In accordance with Tristano, I will grant plaintiff's motion for a preliminary injunction and order defendant to consider in good faith whether plaintiff should be transferred to a halfway house. In addition to seeking consideration for transfer to a halfway house, plaintiff requests an order directing defendant to refrain from applying 28 C.F.R. §§ 570.20 and 570.21 to *any* prisoner, not just him. This request exceeds the proper scope of the lawsuit. Plaintiff brought the case on his own behalf only; it is not a class action.

Because courts do not have authority to declare the rights of persons who are not parties to the lawsuit, I cannot consider this request.

One further matter requires comment. Ordinarily, when a motion for preliminary injunctive relief is granted in a plaintiff's favor, the lawsuit does not end. Instead, the ruling simply reflects the court's conclusion that the plaintiff has made a showing of a likelihood of success on the merits, but the defendant remains free to overcome this showing on a motion for summary judgment or at trial. However, in this case as in Tristano, the only relief to which plaintiff is entitled is the injunctive relief I am ordering today. This means that as soon as the government provides plaintiff with it, the case will become moot. Therefore, I will give defendant a deadline within which to consider plaintiff for transfer to a halfway house using the criteria listed in 18 U.S.C. § 3621(b). In addition, I will direct plaintiff to advise the court within ten days of that date why this case should not be dismissed as moot.

ORDER

IT IS ORDERED that

Plaintiff Joshua Belk's motion for a preliminary injunction is GRANTED. Defendant Federal Bureau of Prisons may have until October 22, 2007 in which to consider plaintiff for transfer to a halfway house, using the criteria listed in 18 U.S.C. § 3621(b). Plaintiff

may have until November 1, 2007, in which to show cause why this case should not be dismissed as moot. If, by November 1, plaintiff has not made such a showing, I will then dismiss the case.

Entered this 24th day of September, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge