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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VERONICA RIVERA, No. C 07-2420 CW
Petitioner,
v. ORDER GRANTING
PETITION FOR WRIT
OF HABEAS CORPUS
SCHELIA A. CLARK, Warden,
Respondent.

_____ /

Petitioner Veronica Rivera brings this action seeking a writ of habeas corpus under 28 U.S.C. § 2241. Respondent Schelia A. Clark opposes the petition. The matter was taken under submission on the papers. Having considered all of the papers submitted by the parties, the Court grants the petition.

BACKGROUND

Petitioner is currently serving a term of twenty-four months of imprisonment on a conviction for conspiracy to commit honest services mail fraud. She is incarcerated at the Federal Prison Camp in Dublin, California, where Respondent is warden. She filed this petition challenging a federal Bureau of Prisons (BOP) regulation, 28 C.F.R. § 570.21, that denies inmates placement in a

1 residential reentry center (RRC)¹ until the last ten percent or six
2 months of their sentence, whichever is shorter. Petitioner claims
3 that this policy is contrary to 18 U.S.C. § 3621(b), which governs
4 the placement of inmates in BOP custody.

5 Pursuant to the challenged regulation, Petitioner has been
6 scheduled for transfer to an RRC on March 25, 2008, the beginning
7 of the last ten percent of her sentence. Petitioner challenged the
8 BOP's placement decision by filing a request for an administrative
9 remedy. In this request, she argued that a consideration of the
10 factors set forth in § 3621(b) militates in favor of her transfer
11 to an RRC at the earliest possible date. Respondent denied
12 Petitioner's request, stating, "Our procedures indicate that the
13 length of placement requested for a Residential Re-entry Center is
14 limited to the last 10 percent of the inmate's term to be served or
15 six months, whichever is less." Burke Decl. Ex. 1.

16 Petitioner appealed Respondent's decision to the BOP Regional
17 Office. The Regional Director denied the appeal, stating:

18 Federal Regulation 28 CFR § 570.20 outlines the Bureau's
19 authority to designate inmates to community confinement.
20 If eligible, the Bureau may designate inmates to
21 community confinement during their last ten percent of
22 the prison sentence being served, not to exceed six
23 months. In addition, a review of your request was
24 conducted without consideration of any time limitation,
25 and the Unit Team determined that based on your ability
26 to secure employment and reestablish family and community
27 ties, a 60 day RRC placement was appropriate to assist
28 with your prerelease needs.

24 Id.

25 Petitioner appealed this intermediate-level decision to the
26 _____

27 ¹RRCs are commonly known as halfway houses. The term,
28 "community corrections center" (CCC) is also used by other courts
to refer to the same type of institutional setting.

1 BOP's Central Office. The Central Office denied the appeal,
2 stating:

3 Recommending [RRC] placement and the length involves the
4 review of several factors, including an inmate's current
5 offense, institutional adjustment, individual needs,
6 public safety, and existing community resources.
7 Ordinarily, inmates with shorter sentences do not require
8 maximum RRC placement due to reduced transition needs.
9 . . . All available information in your case was reviewed
10 and records indicate that you have been approved for RRC
11 placement on March 25, 2008. We concur with this
12 decision, find it appropriate, and in compliance with
13 policy.

14 Id.

15 Petitioner now challenges the BOP's decision, seeking an order
16 requiring Respondent to consider her appropriateness for transfer
17 to an RRC in light of the factors set forth in 18 U.S.C. § 3621(b),
18 notwithstanding the time limits imposed by 28 C.F.R. § 570.21.

19 STANDARD OF REVIEW

20 Under Chevron U.S.A., Inc. v. Natural Resources Defense
21 Council, Inc., 467 U.S. 837 (1984), a two-pronged framework exists
22 for judicial review of an administrative agency's interpretation of
23 the statutes and regulations that it administers:

24 If congressional intent is clear, both the court and the
25 agency must give effect to the unambiguously expressed
26 intent of Congress. If, however, Congress has not
27 directly addressed the exact issue in question, a
28 reviewing court must defer to the agency's construction
of the statute so long as it is reasonable. In other
words, unless an agency's statutory interpretation is
arbitrary, capricious, or manifestly contrary to the
statute, the agency is accorded Chevron deference, and
the court must adopt the agency's view.

Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1011-1012 (9th Cir.
2006) (internal quotation marks and citations omitted).

DISCUSSION

Title 18 U.S.C. § 3621(b) provides in relevant part:

1 The Bureau of Prisons shall designate the place of the
2 prisoner's imprisonment. The Bureau may designate any
3 available penal or correctional facility . . . that the
Bureau determines to be appropriate and suitable,
considering--

- 4 (1) the resources of the facility contemplated;
5 (2) the nature and circumstances of the offense;
6 (3) the history and characteristics of the prisoner;
7 (4) any statement by the court that imposed the
8 sentence--

9 (A) concerning the purposes for which the
10 sentence to imprisonment was determined to be
warranted; or

11 (B) recommending a type of penal or
correctional facility as appropriate; and

12 (5) any pertinent policy statement issued by the
13 Sentencing Commission pursuant to section 994(a)(2)
of title 28.

14 . . . The Bureau may at any time, having regard for the
15 same matters, direct the transfer of a prisoner from one
penal or correctional facility to another.

16 18 U.S.C. § 3621(b).

17 Section 3624(c), in turn, provides:

18 The Bureau of Prisons shall, to the extent practicable,
19 assure that a prisoner serving a term of imprisonment
20 spends a reasonable part, not to exceed six months, of
21 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.

22 18 U.S.C. § 3624(c).

23 Prior to December, 2002, the BOP had a longstanding policy of
24 allowing inmates to spend the last six months of their
25 incarceration in an RRC, regardless of the portion of their
26 sentence this six-month period constituted. Elwood v. Jeter, 386
27 F.3d 842, 844 (8th Cir. 2004). In December, 2002, however, the
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1 Department of Justice Office of Legal Counsel issued a memo opining
2 that § 3624(c) limits the BOP's authority to place an inmate in an
3 RRC. The memo concluded that an inmate's residence in an RRC may
4 not exceed the lesser of ten percent of the total sentence or six
5 months. Id. at 844-45; Goldings v. Winn, 383 F.3d 17, 19-20 (1st
6 Cir. 2004). The BOP adopted this interpretation of its statutory
7 authority and changed its policy accordingly. Goldings, 383 F.3d
8 at 20.

9 The new BOP policy was challenged in court, where it was
10 invalidated by the First and Eighth Circuits. These courts held
11 that § 3621(b) granted the BOP the discretion to transfer an inmate
12 to an RRC at any time during the inmate's sentence, even prior to
13 the last six months or ten percent of the sentence. Goldings, 383
14 F.3d at 28-29; Jeter, 386 F.3d at 847.

15 In response to these court decisions, in 2005, the BOP
16 promulgated regulations interpreting the above statutes. In doing
17 so, the BOP stated that it was engaging in what it characterized
18 as a "categorical exercise of [the] discretion" given to it by
19 § 3621(b). 28 C.F.R. § 570.20(a). It relied on this discretion to
20 impose an across-the-board limit on the time inmates may spend in
21 an RRC:

22 (a) The Bureau will designate inmates to community
23 confinement only as part of pre-release custody and
24 programming, during the last ten percent of the prison
sentence being served, not to exceed six months.

25 (b) We may exceed these time-frames only when specific
26 Bureau programs allow greater periods of community
27 confinement, as provided by separate statutory authority
(for example, residential substance abuse treatment
28 program (18 U.S.C. 3621(e)(2)(A)), or shock incarceration
program (18 U.S.C. 4046(c)).

1 28 C.F.R. § 570.21.

2 Petitioner claims that this regulation is contrary to
3 § 3621(b) because it does not provide for an individualized
4 evaluation of each inmate's suitability for placement in an RRC
5 prior to the last ten percent or six months of his or her sentence.
6 Petitioner maintains that, rather than limiting the BOP's
7 discretion to place inmates in an RRC prior to the last ten percent
8 of their sentence, § 3624(c) imposes minimum requirements on the
9 BOP with respect to RRC placements. Respondent counters that the
10 BOP regulation is a valid interpretation of § 3624(c) considered in
11 conjunction with § 3621(b), and thus should be accorded Chevron
12 deference.

13 The Ninth Circuit has not yet addressed the validity of 28
14 C.F.R. § 570.21. However, all four of the courts of appeals that
15 have addressed the issue have held that the regulation is contrary
16 to the plain meaning of the statutes. Wedelstedt v. Wiley, 477
17 F.3d 1160 (10th Cir. 2007); Levine v. Apker, 455 F.3d 71 (2d Cir.
18 2006); Fults v. Sanders, 442 F.3d 1088 (8th Cir. 2006); Woodall v.
19 Fed. Bureau of Prisons, 432 F.3d 235 (3d Cir. 2005). The Court
20 agrees with these decisions and adopts their reasoning.

21 Section 3621(b) gives the BOP wide discretion to assign an
22 inmate to any "appropriate and suitable" facility, but directs the
23 agency to consider five enumerated factors when making its
24 determination. Because several of these factors refer to
25 information that is particular to each inmate, the statute clearly
26 contemplates individualized placement determinations. The statute
27 permits the BOP to transfer an inmate to any facility, including an
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1 RRC or similar facility, "at any time," provided that the five
2 factors support such a placement.²

3 Section 3624(c) places an additional duty on the BOP with
4 respect to inmate placements. It requires the agency to assure
5 that, to the extent practicable, a reasonable portion of the last
6 ten percent of an inmate's sentence is spent in a setting such as
7 an RRC. The qualifier, "not to exceed six months" is set off by
8 commas and modifies only the phrase, "a reasonable portion." Thus,
9 the BOP is not required by § 3624(c) to designate a period of RRC
10 placement exceeding six months, even if the last ten percent of an
11 inmate's sentence is greater than six months. Put another way, the
12 statute defines six months as the upper boundary of the "reasonable
13 portion" requirement. Accord Elwood, 386 F.3d at 847 ("[Under
14 § 3624(c),] the BOP is required to place prisoners in conditions
15 that will afford them a reasonable opportunity to adjust to and
16 prepare for the prisoner's re-entry into the community during a
17 reasonable part of the last ten percent of the prisoner's term, to
18 the extent practicable. This duty shall not extend beyond the last
19 six months of the prisoner's sentence.") (internal quotation marks
20 and brackets omitted).

21 Fundamentally, § 3624(c) imposes a requirement on the BOP
22 independently of § 3621(b). Nothing in § 3624(c) can be
23 interpreted as limiting the BOP's discretion under § 3621(b) to
24 place inmates in an RRC prior to the last ten percent of their
25 sentence. Accord Wedelstedt, 447 F.3d at 1166 ("Although § 3624(c)

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28 ²See Levine, 455 F.3d at 80-82, and Woodall, 432 F.3d at 245-
46, for a more thorough analysis of the text of § 3621(b).

1 surely imposes an affirmative obligation on the BOP, whenever
2 practicable, to place an inmate in a CCC or other form of community
3 confinement as the inmate's release date nears, § 3624(c) has no
4 bearing on whether a CCC may be considered as a place of
5 imprisonment at some earlier point in a prisoner's period of
6 incarceration."); Woodall, 432 F.3d at 250 ("[Section] 3624 does
7 not determine when the BOP should consider CCC placement, but when
8 it must provide it."); Elwood v. Jeter, 386 F.3d 842, 847 (8th Cir.
9 2004) ("Under § 3621(b), the BOP may place a prisoner in a CCC for
10 six months, or more. Under § 3624(c) the BOP must formulate a plan
11 of pre-release conditions. This plan may include CCC placement,
12 home confinement, drug or alcohol treatment, or any other plan that
13 meets the obligation of a plan that addresses the prisoner's
14 re-entry into the community.") (emphasis added). Thus, § 3624(c)
15 establishes a "floor," not a "ceiling." Respondent is simply
16 incorrect in asserting that § 3624(c) "specifically states that a
17 prisoner should not spend more than the lesser of 10% of his
18 sentence or six months in a facility where he can re-enter the
19 community." Resp.'s Br. at 7. This interpretation finds no
20 support in the statute's text, and therefore is not entitled to
21 Chevron deference.

22 Respondent argues that, even if § 3621(b) gives the BOP the
23 discretion to transfer inmates to an RRC prior to the last ten
24 percent of their sentence, the agency may categorically exercise
25 this discretion, considering RRC placement to be appropriate only
26 during the last ten percent of an inmate's sentence. In passing 28
27 C.F.R. §§ 570.20 and 570.21, Respondent argues, the BOP validly
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1 exercised this discretion. However, such an approach to inmate
2 placement is contrary to the clear language of § 3621(b), which
3 requires the BOP to conduct an individualized placement assessment
4 for each inmate. In making this assessment, the agency must
5 consider specific enumerated factors, some of which are unique to
6 individual inmates. The BOP is entitled to conclude that,
7 considering these factors and the needs of a particular inmate, RRC
8 placement would not be appropriate until that inmate has served a
9 certain portion of his or her sentence. However, it is contrary to
10 the directive of § 3621(b) for the BOP to make this decision
11 categorically, without regard to the circumstances of individual
12 inmates.

13 While the BOP may be able to make categorical rules to fill
14 gaps in the statutes it administers, it may not make such rules
15 when doing so would be inconsistent with congressional
16 instructions. See Lopez v. Davis, 531 U.S. 230, 243-44 (2001). In
17 other words, the BOP "may not promulgate categorical rules that do
18 not take account of the categories that are made significant by
19 Congress." Levine, 455 F.3d at 85. Here, the BOP regulation pays
20 no regard to the factors set out in § 3621(b). Instead, it
21 withdraws eligibility for RRC placement from inmates who have not
22 yet begun the last ten percent of their sentence, regardless of
23 whether the factors in § 3621(b) would support such a placement at
24 an earlier time. Accordingly, the regulation is not a valid
25 exercise of the agency's discretion.

26 Respondent also argues that an RRC is not a "place of
27 imprisonment," and thus is excluded from the scope of § 3621(b).

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1 She bases this argument on United States v. Sullivan, 504 F.3d 969
2 (9th Cir. 2007). In that case, the defendant had been sentenced in
3 1998 by a federal court to a term of eighteen months in prison
4 followed by three years of supervised release. The defendant
5 served this sentence concurrently with a separate sentence issued
6 by a Montana state court. In 2001, the defendant was transferred
7 from a Montana state prison into a Montana state pre-release
8 center. While the Sullivan decision is not clear on this point,
9 the defendant presumably had completed his federal term of
10 imprisonment by the time he was transferred.

11 The Ninth Circuit found that, for the purposes of crediting
12 time served toward the defendant's sentence of federal supervised
13 release, he began serving this sentence when he was transferred to
14 the Montana pre-release center. The court held that the
15 defendant's time in the pre-release center did not qualify as
16 "imprisonment" under 18 U.S.C. § 3624(e), which relates to
17 supervised release and provides, "The term of supervised release
18 commences on the day the person is released from imprisonment."
19 Id. at 972.

20 Sullivan's holding is limited to the set of facts at issue
21 there. Whatever the meaning of the term, "imprisonment" in
22 § 3624(e), § 3624(c) clearly contemplates that when an inmate is
23 transferred from a federal prison to a federal RRC, he or she
24 remains "imprisoned" in all respects relevant here -- the statute
25 provides that an inmate should spend a reasonable portion of the
26 last ten percent of his or her "term of imprisonment" in a setting
27 such as an RRC. If a particular inmate was sentenced to a term of
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1 supervised release in addition to a term of imprisonment, the term
2 of supervised release would commence after he or she was released
3 from the RRC. If Sullivan were to compel the conclusion that such
4 an inmate began his or her term of supervised release upon transfer
5 to the RRC, the inmate would never complete his or her term of
6 imprisonment.

7 Moreover, Sullivan focused on the fact that, while at the
8 Montana pre-release center, the defendant was not "not subject to
9 the control of the Bureau of Prisons." Id. at 971. Here, in
10 contrast, the BOP would maintain control over Petitioner even after
11 she was transferred to an RRC; the agency could exercise its
12 discretion to transfer her back to a traditional prison setting at
13 any time, assuming it considered the factors in § 3621(b) prior to
14 making such a transfer. Underlining this point, Kim Beakey, a BOP
15 official, has submitted a declaration that states, "Moving an
16 inmate to a RRC is no different than transferring an inmate from
17 one BOP location to another." Beakey Dec. ¶ 6. This is contrary
18 to Respondent's argument that transfers to an RRC are not
19 encompassed by § 3621(b).

20 Finally, Respondent argues that the petition is moot because
21 the BOP Regional Director reviewed Petitioner's request for RRC
22 placement "without consideration of any time limitation."
23 Nonetheless, it is clear that the initial decision to limit
24 Petitioner's placement in an RRC to sixty days was based on the
25 restrictions imposed by the challenged regulation. In affirming
26 this decision, the Regional Director expressed his view that the
27 length of Petitioner's RRC term was limited by the regulation. In
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United States District Court
For the Northern District of California

1 addition, contrary to the Regional Director's assertion, there is
2 no evidence that Petitioner's unit team, which issued the original
3 RRC recommendation, considered Petitioner's "ability to secure
4 employment and reestablish family and community ties" when making
5 its decision. See Beakey Decl. Ex. 3. Nor does the administrative
6 review of Petitioner's placement decision contain any substantive
7 discussion of the factors specified in § 3621(b). Accordingly, the
8 Court cannot conclude that the BOP's placement decision would
9 remain undisturbed if the agency did not consider itself bound by
10 the ten-percent limitation, and the petition thus is not moot.

11 CONCLUSION

12 For the foregoing reasons, the Court GRANTS Petitioner's
13 petition for a writ of habeas corpus. Respondent shall consider
14 the appropriateness of placing Petitioner in an RRC during any
15 portion of the remainder of her sentence, without regard for the
16 ten-percent time limit imposed by 18 C.F.R. § 570.21. When making
17 her decision, Respondent shall take into account Petitioner's
18 particularized pre-release needs and the factors set forth in
19 § 3621(b). The decision shall issue within fourteen days of this
20 order. The clerk shall enter judgment and close the file. Each
21 party shall bear her own costs.

22 IT IS SO ORDERED.

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24 Dated: 2/5/08



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CLAUDIA WILKEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

RIVERA et al,

Case Number: CV07-02420 CW

Plaintiff,

CERTIFICATE OF SERVICE

v.

CLARK et al,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on February 5, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Dennis Matthew Wong
U.S. Attorney's Office
450 Golden Gate Avenue
San Francisco, CA 94102

Veronica Rivera 97659-011
Federal Prison Camp, Dublin
5675 8th Street
Camp Parks
Dublin, CA 94568

Dated: February 5, 2008

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk

United States District Court
For the Northern District of California

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