DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 570

[BOP Docket No. 1127–P]

RIN 1120–AB27

Community Confinement

AGENCY: Bureau of Prisons, Justice.

ACTION: Proposed rule.

SUMMARY: In this document, the Bureau of Prisons (Bureau) proposes new rules announcing its categorical exercise of discretion for designating inmates to community confinement when serving terms of imprisonment.

DATES: Comments are due by October 18, 2004.

ADDRESSES: Our email address is *BOPRULES@BOP.GOV*. Comments should be submitted to the Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First Street, NW., Washington, DC 20534. You may view an electronic version of this rule at *http://www.regulations.gov*. You may also comment via the Internet to BOP at *BOPRULES@BOP.GOV* or by using the *http://www.regulations.gov* comment form for this regulation. When submitting comments electronically you must include the BOP Docket No. in the subject box.

FOR FURTHER INFORMATION CONTACT: Sarah Qureshi, Office of General Counsel, Bureau of Prisons, phone (202) 307–2105.

SUPPLEMENTARY INFORMATION: The proposed rules would, as a matter of policy, limit the amount of time that inmates may spend in community confinement (including Community Corrections Centers (CCCs) and home confinement) to the last ten percent of the prison sentence being served, not to exceed six months. The only exceptions to this policy are for inmates in specific statutorily-created programs that authorize greater periods of community confinement (for example, the residential substance abuse treatment program (18 U.S.C. 3621(e)(2)(A)) or the shock incarceration program (18 U.S.C. 4046(c)). The Bureau announces these rules as a categorical exercise of discretion under 18 U.S.C. 3621(b).

Before December 2002, the Bureau operated under the theory that 18 U.S.C. 3621(b) created broad discretion to place inmates in any prison facilities, including CCCs, as the designated places to serve terms of ''imprisonment.'' Under that theory, the Bureau generally accommodated judicial recommendations for initial CCC placements of non-violent, low-risk offenders serving short prison sentences. Consequently, before December 2002, it was possible for such inmates to serve their entire terms of ''imprisonment'' in CCCs.

On December 13, 2002, the Department of Justice's Office of Legal Counsel (OLC) issued a memorandum concluding that the Bureau could not, under 18 U.S.C. 3621(b), generally designate inmates to serve terms of imprisonment in CCCs. OLC concluded that, if the Bureau designated an offender to serve a term of imprisonment in a CCC, such designation unlawfully altered the actual sentence imposed by the court, transforming a term of imprisonment into a term of community confinement. OLC concluded that such alteration of a court-imposed sentence exceeds the Bureau's authority to designate a place of imprisonment. OLC further opined that if section 3621(b) were interpreted to authorize unlimited placements in CCCs, that would render meaningless the specific time limitations in 18 U.S.C. 3624(c), which limits the amount of time an offender sentenced to imprisonment may serve in community confinement to the last ten percent of the prison sentence being served, not to exceed six months. By memorandum dated December 16, 2002, the Deputy Attorney General adopted the OLC memorandum's analysis and directed the Bureau to conform its designation policy accordingly.

Thus, effective December 20, 2002, the Bureau changed its CCC designation procedures by prohibiting Federal offenders sentenced to imprisonment from being initially placed into CCCs rather than prison facilities. The Bureau announced that, as part of its procedures change, it would no longer honor judicial recommendations to place inmates in CCCs for the imprisonment portions of their sentences. Rather, the Bureau would now limit CCC designations to pre-release programming only, during the last ten percent of the prison sentence being served, not to exceed six months, in accordance with 18 U.S.C. 3624(c).

The Bureau's change was challenged in the Federal courts. District courts addressing the legality of the Bureau's changed policy have been sharply divided. Some courts have upheld the policy, *see, e.g., Cohn* v. *Federal Bureau of Prisons*, 2004 WL 240570 (S.D.N.Y., Feb. 10, 2004); *Benton* v. *Ashcroft*, 273 F. Supp. 2d 1139 (S.D. Cal. 2003); while others have rejected it, *see, e.g., Monahan* v. *Winn*, 276 F. Supp. 2d 196 (D. Mass. 2003); *Iacoboni* v. *United States*, 251 F. Supp. 2d 1015 (D. Mass. 2003); *Byrd* v. *Moore*, 252 F. Supp. 2d 293 (W.D.N.C. 2003). The courts that disagreed with the re-interpretation concluded that 18 U.S.C. 3621(b) grants the Bureau broad discretion to designate offenders to any facility, including CCCs. *See, e.g., Iacaboni*, 251 F. Supp. 2d at 1025; *Byrd*, 252 F. Supp. 2d at 300–01. *But see Cohn*, 2004 WL 240570 at *3 (''the BOP's interpretation that a CCC is not a place of imprisonment, and therefore not subject [to] Congress' general grant of discretion to the BOP under § 3621(b), is at a minimum a permissible interpretation of the statute'').

Because various courts have held that the Bureau has discretion under 18 U.S.C. 3621(b) to place offenders sentenced to a term of imprisonment in CCCs, the Bureau considers it prudent to determine how to exercise such discretion. Accordingly, the Bureau has considered how to exercise that discretion in a manner consistent with the text of Section 3621(b), Congressional objectives reflected in related statutory provisions, and the policy determinations of the U.S. Sentencing Commission expressed in the U.S. Sentencing Guidelines. Based on those considerations, the Bureau has determined to exercise its discretion categorically to limit inmates' community confinement to the last ten percent of the prison sentence being served, not to exceed six months. This categorical exercise of discretion is permissible based on the Supreme Court's recognition that, even when a statutory scheme requires individualized determinations, the decisionmaker has authority to rely on rulemaking to resolve certain issues of general applicability (unless Congress clearly expresses an intent to withhold that authority). See *Lopez* v. *Davis*, 531 U.S. 227, 243–44 (2001); *American Hospital Association* v. *NLRB*, 499 U.S. 606, 612–13 (1991). The Bureau will continue to make a case-by-case determination of the particular prison facility (*i.e.*, non-community-confinement facility) to which it will designate each individual inmate.

Section 3621(b) authorizes the Bureau to designate as the place of a prisoner's imprisonment any available facility that meets minimum standards of health and habitability ''that the Bureau determines to be appropriate and suitable.'' 18 U.S.C. 3621(b). Section 3621(b) provides a nonexclusive list of factors that the Bureau is to consider in determining what facilities are ''appropriate and suitable,'' including (1) the resources of the facility; (2) the nature and circumstances of the offense; (3) the

history and characteristics of the prisoner; (4) any statement by the sentencing court about the purposes for which the sentence of imprisonment was determined to be warranted or recommending a type of penal or correctional facility as appropriate; and (5) any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. 994(a)(2). The statute further commands that ''there shall be no favoritism given to prisoners of high social or economic status'' in Bureau designation decisions. 18 U.S.C. 3621(b). The legislative history makes clear that, although the listed factors are ''appropriate'' for the Bureau to consider, Congress did not intend, by listing some considerations,'' ''to restrict or limit the Bureau in the exercise of its existing discretion.'' S. Rep. 225, 98th Cong., 1st Sess. 142 (1983). In addition to the listed factors, the Bureau has determined that it is appropriate to consider the policies of the Sentencing Commission reflected in Sentencing Guidelines (as well as policy statements promulgated under 28 U.S.C. 994(a)(2)) and congressional policies reflected in related statutory provisions.

In deciding to limit inmates' community confinement to the last ten percent of the prison sentence, not to exceed six months, the Bureau has carefully considered all of the statutorily-specified factors, as well as the additional considerations that it identified as pertinent. The Bureau viewed the following considerations as most significant:

- These proposed rules promote consistency in the Bureau's designation of inmates to places of confinement. Congress, in enacting 18 U.S.C. 3621(b), codified its intent that the Bureau not show favoritism in making designation decisions: ''In designating the place of imprisonment or making transfers under this subsection, there shall be no favoritism given to prisoners of high social or economic status.'' 18 U.S.C. 3621(b). Indeed, eliminating unwarranted disparities in sentencing was a primary purpose of the Sentencing Reform Act of 1984. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 52 (1983). However, the Bureau's system before December 2002, which allowed individualized CCC decisions for each inmate upon initial prison designation, created the possibility that it would unintentionally treat similar inmates differently. These differences in treatment would not only be unfair to the inmates, but they ''could invite [charges of intentional] favoritism, disunity, and inconsistency'' against the Bureau. *Lopez*, 531 U.S. at 244. These proposed rules promote Congress' goal of eliminating unwarranted disparities in the sentencing and handling of inmates and also eliminate any concern that the Bureau might use community confinement to treat specific inmates leniently.
- The proposed rules are also consistent with Section 3621(b)'s instruction that the Bureau consider facility resources in making designation determinations. 18 U.S.C. 3621(b)(1). Based on its experience, the Bureau has concluded that the resources of CCCs make them particularly well suited as placement options for the final portion of offenders' prison terms. CCCs offer increased community access and greater integration with the community. As Congress has itself recognized, those characteristics of CCCs mean that they ''afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community.'' 18 U.S.C. 3624(c). By ensuring that offenders sentenced to prison terms not be placed in CCCs except during the last ten percent of their prison sentences (not to exceed six months), the proposed rules will help ensure that CCCs remain available to serve the purposes for which their resources make them best suited.
- These proposed rules are supported by the Bureau's statutory obligation to consider ''any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).'' 18 U.S.C. 3621(b)(5). Although guidelines, which are promulgated under 28 U.S.C. 994(a)(1), are distinct from policy statements promulgated under Section 994(a)(2), the Bureau believes that both reflect sentencing policy determinations made by the Sentencing Commission and therefore that the Bureau should also take cognizance of guidelines in making placement designations. Under Sentencing Guideline 5C1.1, where a sentence of imprisonment is required for defendants whose guidelines range falls within Zones B or C of the Sentencing Table, the Guideline authorizes ''community confinement'' only as a condition of supervised release that substitutes such confinement pursuant to a schedule set forth in the Guideline (or as a condition of probation). *See* USSG § 5C1.1(c) and (d). That Guideline thus reflects the Commission's policy determination generally to restrict the availability of community confinement in lieu of imprisonment to those situations. Federal case law decisions have supported this conclusion by finding that ''imprisonment'' portions of split-sentences under USSG § 5C1.1(c) and (d) cannot be satisfied through ''community confinement.'' *See, e.g., United States* v. *Adler*, 52 F.3d 20, 21 (2d Cir. 1995); *United States* v. *Swigert*, 18 F.3d 443, 445 (7th Cir. 1994); *United States* v. *Serafini*, 233 F.3d 758, 762 n.2, and 777–78 (3d Cir. 2000). Additionally, because the term ''imprisonment'' is used without further qualifications throughout USSG § 5C1.1, the Bureau has no basis for believing that the Commission contemplated ''community confinement'' as an option in any other ''imprisonment'' sentence context. The Bureau has determined to consider the Commission's expressed distinction in this area and to make facility-designation decisions in a fashion that is consistent with, rather than frustrates, the Commission's policy determinations.
- These rules are also supported by consideration of the congressional sentencing policy as reflected in related statutory provisions. Most significant, 18 U.S.C. 3624(c) requires the Bureau to ensure that inmates spend the final portion of their prison sentences ''under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community.'' 18 U.S.C. 3624(c). Congress clearly indicated its preference that such conditions exist during the last ten percent of the prison sentence being served, not to exceed six months. *Id.* Whether or not Section 3624(c) precludes the Bureau from designating a prisoner to community confinement for longer than the lesser of the last ten percent of the sentence or six months, it is consistent with the congressional policy reflected in that section for the Bureau to exercise its discretion to decline to designate a prisoner to community confinement for longer than that time period.

In addition to furthering the sentencing policy reflected in Section 3624(c), the proposed rules further Congress' determination that one of the important purposes of sentencing is to deter criminal conduct. *See* 18 U.S.C. 3553(a)(2)(B). The Supreme Court has long sustained the theory that one purpose of criminal law is to deter future crimes. *See, e.g., U.S.* v. *Benskin*, 926 F.2d 562, 567 (6th Cir. 1991). The degree to which the facility designation could undermine the deterrent effect of imprisonment sentences is a legitimate factor for the Bureau to consider in making specific facility designations. Because of a CCC's decreased security, and increased community access, a potential offender might reasonably perceive community confinement as a more lenient punishment than designation to a prison facility. That view, in turn, could affect a potential

offender's calculus of the costs and benefits of committing a crime. Consequently, the perceived lenient treatment that may have occurred under the Bureau's system before December 2002—allowing terms of imprisonment to initially be served in CCCs—risked eroding Congress's goal of deterring criminal activity. These rules will ensure the Bureau's designation policy does not undermine the deterrent role that Congress intends Federal criminal law to serve.

Where To Send Comments

You can send written comments on this rule to the Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First Street, NW., Washington, DC 20534; or via e-mail to *BOPRULES@BOP.GOV*.

We will consider comments received during the comment period before taking final action. We will try to consider comments received after the end of the comment period.

We do not plan to have oral hearings on this rule. All the comments received remain on file for public inspection at the above address.

Executive Order 12866

This rule falls within a category of actions that the Office of Management and Budget (OMB) has determined to constitute ''significant regulatory actions'' under section 3(f) of Executive Order 12866 and, accordingly, it was reviewed by OMB.

BOP has assessed the costs and benefits of this rule as required by Executive Order 12866 section 1(b)(6) and has made a reasoned determination that the benefits of this rule justify its costs. This rule will have the benefit of eliminating confusion in the courts that has been caused by the change in the Bureau's statutory interpretation, while allowing us to continue to operate under revised statutory interpretation. There will be no new costs associated with this rulemaking.

Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, under Executive Order 13132, we determine that this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

The Director of the Bureau of Prisons, under the Regulatory Flexibility Act (5 U.S.C. 605(b)), reviewed this regulation and by approving it certifies that it will not have a significant economic impact upon a substantial number of small entities for the following reasons: This rule pertains to the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by § 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 28 CFR Part 570

Prisoners.

Harley G. Lappin,

Director, Bureau of Prisons.

Under rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a) and delegated to the Director, Bureau of Prisons, we propose to amend 28 CFR part 570 as set forth below.

Subchapter D—Community Programs and Release

PART 570—COMMUNITY PROGRAMS

1. Revise the authority citation for 28 CFR part 570 to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 751, 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4161–4166, 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

2. Amend part 570 by adding subpart B, consisting of §§ 570.20 and 570.21 to read as follows:

Subpart B—Community Confinement

Sec.

§ 570.20 What is the purpose of this subpart?

(a) This subpart provides the Bureau of Prisons' (Bureau) categorical exercise of discretion for designating inmates to community confinement. The Bureau designates inmates to community confinement only as part of pre-release custody and programming which will afford the prisoner a reasonable opportunity to adjust to and prepare for re-entry into the community.

(b) As discussed in this subpart, the term ''community confinement'' includes Community Corrections Centers (CCC) (also known as ''halfway houses'') and home confinement.

§ 570.21 When will the Bureau designate inmates to community confinement?

(a) The Bureau will designate inmates to community confinement only as part of pre-release custody and programming, during the last ten percent of the prison sentence being served, not to exceed 6 months.

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

[FR Doc. 04–18747 Filed 8–17–04; 8:45 am]

BILLING CODE 4410–05–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R05–OAR–2004–MN–0001, FRL–7794–6]

Approval and Promulgation of Air Quality Implementation Plans; Minnesota; Sulfur Dioxide; United Defense

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve a revision to Minnesota's State Implementation Plan (SIP) for Sulfur Dioxide (SO_2) for the United Defense, LP facility located in Anoka County at 4800 East River Road, Fridley, Minnesota. This revision replaces the Administrative Order, originally issued