

2005 WL 283614 (N.D.Tex.)

Only the Westlaw citation is currently available.

United States District Court,
N.D. Texas, Fort Worth Division.
Gewahna OWENS, Petitioner,

v.

Ginny VAN BUREN, Warden, Federal Medical Center-Carswell, Respondent.

No. Civ.A. 404CV774Y.

Feb. 7, 2005.

*FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE
AND NOTICE AND ORDER*

[BLEIL](#), Magistrate J.

* 1 This cause of action was referred to the United States Magistrate Judge pursuant to the provisions of [28 U.S.C. § 636\(b\)](#), as implemented by an order of the United States District Court for the Northern District of Texas. The Findings, Conclusions and Recommendation of the United States Magistrate Judge are as follows:

I. FINDINGS AND CONCLUSIONS

A. NATURE OF THE CASE

This is a petition for writ of habeas corpus by a federal prisoner pursuant to [28 U.S.C. § 2241](#).

B. PARTIES

Petitioner Gewahna Owens, Reg. 31054-013, is a federal prisoner incarcerated in the Federal Medical Center-Carswell in Fort Worth, Texas.

Respondent Ginny Van Buren is Warden of the Federal Medical Center-Carswell.

C. PROCEDURAL HISTORY

Owens is serving a 37-month term of imprisonment for possession with intent to distribute cocaine base in violation of [18 U.S.C. §§ 841\(A\)\(1\) and \(B\)\(1\)\(B\)](#). (Resp't Appendix at 1.) She is presently expected to be released with good conduct time on November 21, 2005. See U.S. Department of Justice, Federal Bureau of Prisons/Inmate Locator, available at <http://www.bop.gov>. During her incarceration, Owens completed a 500-hour drug abuse treatment program sponsored by the Bureau of Prisons (the Bureau) in an effort to obtain early release under [18 U.S.C. § 3621\(e\)\(2\)\(B\)](#). The Bureau denied early release to Owens under the statute however because she received a two-point sentence enhancement for possessing a weapon during commission of her offense. (Resp't Appendix at 5, 7, 9.) The Bureau's denial of early release is the subject of this petition. The government has filed a response and motion to dismiss the petition with supporting documentary exhibits, to which Owen filed a traverse.

D. ISSUES

In three grounds for relief, Owens raises the following issues:

- (1) Whether the Bureau failed to comply with § 552 of the APA;
- (2) Whether she is entitled to one year off her sentence for completion of a drug abuse treatment program under [18 U.S.C. § 3621\(e\)\(2\)\(B\)](#); and
- (3) Whether she has to exhaust administrative remedies before seeking habeas relief under [§ 2241](#). (Petition at 4-5.)

E. EXHAUSTION

Owens contends that she has fully exhausted her administrative remedies as to her claims or, in the alternative, that she does not need to exhaust. (Petition at 5.) Generally, federal prisoners are required to exhaust available administrative remedies through the Bureau before seeking habeas corpus relief under [§ 2241](#). See *Rourke v. Thompson*, 11 F.3d 47, 50 (5th Cir.1993). An administrative remedy procedure for federal prisoners is provided at [28 C.F.R. §§ 542.10-542.19](#). Under this administrative procedure, an inmate is advised to seek informal discussion and resolution of their complaint with prison staff. (Resp't Appendix at 2.) If informal resolution fails, the inmate must pursue a three-level process within the prescribed time intervals. (*Id.*) The inmate may formally appeal to the Warden, via a form commonly referred to as a BP-9; then to the Regional Director, via a form commonly referred to as a BP-10; and finally to the Office of General Counsel, via a form commonly referred to as a BP-11. (*Id.*) Administrative remedies have not been exhausted until the inmate's claim has been filed at all levels and has been denied at all levels. See [28 C.F.R. § 542.15](#);

[Rourke](#), 11 F.3d at 49.

*2 At the time Owens filed the instant petition, her BP-11, the third and final step in the administrative appeals process, had not been decided. Since that time, however, her BP-11 was denied. (Resp't Appendix at 9.) Thus, because Owens has fully exhausted her administrative remedies as to her remaining claims, her third issue is moot.

F. DISCUSSION

[Title 18 U.S.C. § 3621\(e\)\(2\)\(B\)](#) allows the Bureau to reduce the sentence of a prisoner convicted of a nonviolent felony offense by up to one year upon successful completion of a drug abuse treatment program. [18 U.S.C. § 3621\(e\)\(2\)\(B\)](#); see also [28 C.F.R. §§ 550.50-550.60](#); Programs Statement 5330.10. The Bureau is afforded considerable discretion to determine which prisoners may participate in the treatment programs and which prisoners are eligible for sentence reductions. See [Lopez v. Davis](#), 531 U.S. 230, 231 (2001); [Wottlin v. Fleming](#), 136 F.3d 1032, 1035 (5th Cir.1998); [Venegas v. Henman](#), 126 F.3d 760, 762 (5th Cir.1997). Toward that end, the Bureau published regulations and policies categorically excluding prisoners from consideration for early release if the current offense is a felony that involved the carrying, possession, or use of a firearm. [28 C.F.R. § 550.58\(a\)\(1\)\(vi\)\(B\)](#). By way of Program Statement 5162.04, the Bureau also delineated offenses "with a specific offense characteristic enhancement" that, at the Bureau's discretion, precluded early release eligibility under [§ 3621\(e\)](#). (Resp't Appendix at 21-22.) Those offenses include a drug trafficking conviction under [21 U.S.C. § 841](#) if the offender received a two-level sentence enhancement under the sentencing guidelines for possessing a dangerous weapon during commission of the offense. (*Id.*)

Owens asserts that the Bureau failed to comply with the notice requirements for agency rulemaking set forth in the Administrative Procedure Act (the APA) before implementing an interim version of [§ 550.58\(a\)\(1\)\(vi\)\(B\)](#) and Program Statement 5162.04 in 1997. (Pet'r Memorandum at 2.) [5 U.S.C. § 553\(d\)](#). As such, she contends the regulation and program statement are an invalid basis upon which to deny her early release under [§ 3621](#).

Initially, it is noted that a program statement is an internal agency guideline not subject to the notice and comment requirements of the APA. See [Royal v. Tombone](#), 141 F.3d 596, 600 (5th Cir.1998). Further, in support of her argument that the interim regulation is invalid, Owens relies on [Bohner v. Daniels](#), 243 F.Supp.2d 1171, 1174-77 (D.Ore.2003). See also [Lopez v. Davis](#), 531 U.S. 230, 244 n. 6 (2001) (declining to address procedural challenge to interim regulation based on violation of APA notice and comment requirements while upholding regulation against substantive challenge to eligibility exclusions). The APA issues relating to the interim regulation are not, however, relevant here because, as the government notes, the interim regulation was finalized on December 22, 2000, see [65 Fed.Reg. 80745](#), before Owens 2003 conviction and sentence. Thus, application of the Bureau's regulation to Owens after December 2000 is valid. See [Lopez](#), 531 U.S. at 238-44; [Warren v. Miles](#), 230 F.3d 688, 693-94 (5th Cir.2000); [Venegas](#), 126 F.3d at 762-64; [Cadena v. Tombone](#), 11 F.Supp.2d 889, 892-93 (E.D.Tex.1998).

*3 Owens also requests that the court "drop her gun enhancement" pursuant to the recent Supreme Court decision in [United States v. Booker](#), 125 S.Ct. 738 (2004), thereby entitling her to immediate release. This claim, asserted for the first time in the traverse, is not properly before the court. The instructions to the parties included in the undersigned's order issued October 25, 2004, provided that petitioner may file a reply to respondent's answer, but specified that each paragraph of the reply brief must specify the precise paragraph or part of respondent's brief to which reply is being made, and that such is limited to a reply to respondent's argument. The order then states "[u]nder no circumstances will any statement or argument set forth in a reply brief be considered as part of the pleadings so as to advance new grounds for relief or to supplement any ground or supporting facts set out in the petition." Therefore, to the extent Owens seeks, by her traverse, to amend her petition and/or provide additional grounds in support of her petition for writ of habeas corpus, she may not do so. A petitioner is not entitled to amend his or her petition after answer, without leave of the court. Further, the specifics of the October 25 order prohibit the assertion of new grounds.

II. RECOMMENDATION

The government's motion to dismiss should be granted to the extent that Owens's petition for writ of habeas corpus be denied.

III. NOTICE OF RIGHT TO OBJECT TO PROPOSED FINDINGS, CONCLUSIONS AND RECOMMENDATION AND CONSEQUENCES OF FAILURE TO OBJECT

Under [28 U.S.C. § 636\(b\)\(1\)](#), each party to this action has the right to serve and file specific written objections in the United States District Court to the United States Magistrate Judge's proposed

findings, conclusions, and recommendation within ten (10) days after the party has been served with a copy of this document. The court is extending the deadline within which to file specific written objections to the United States Magistrate Judge's proposed findings, conclusions, and recommendation until February 28, 2005. The United States District Judge need only make a *de novo* determination of those portions of the United States Magistrate Judge's proposed findings, conclusions, and recommendation to which specific objection is timely made. See [28 U.S.C. § 636\(B\)\(1\)](#). Failure to file by the date stated above a specific written objection to a proposed factual finding or legal conclusion will bar a party, except upon grounds of plain error or manifest injustice, from attacking on appeal any such proposed factual finding or legal conclusion accepted by the United States District Judge. See [Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1428-29 \(5th Cir.1996\)](#) (en banc op. on reh'g); [Carter v. Collins, 918 F.2d 1198, 1203 \(5th Cir.1990\)](#).

IV. ORDER

Under [28 U.S.C. § 636](#), it is ORDERED that each party is granted until February 28, 2005, to serve and file written objections to the United States Magistrate Judge's proposed findings, conclusions, and recommendation. It is further ORDERED that if objections are filed and the opposing party chooses to file a response, a response shall be filed within seven (7) days of the filing date of the objections. *4 It is further ORDERED that the above-styled and numbered action, previously referred to the United States Magistrate Judge for findings, conclusions, and recommendation, be and hereby is returned to the docket of the United States District Judge.

N.D.Tex., 2005.

Owens v. Van Buren

2005 WL 283614 (N.D.Tex.)

END OF DOCUMENT

(C) 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.