

# United States District Court District of Massachusetts

JOHN M. CICILLINE,  
REG. NO. 26346-038,  
Petitioner,

v.

CIVIL ACTION NO. 2009-11614-JLT

JEFFREY GRONDOLSKY,  
WARDEN, FMC DEVENS,  
Respondent.

## *REPORT AND RECOMMENDATION ON MOTION TO DISMISS (#8)*

COLLINGS, U.S.M.J.

John M. Cicilline (“Cicilline”) is an inmate at FMC Devens who is serving a federal prison sentence. In his Petition, Etc., (#3), he alleges that he “... applied to his unit team for early placement in a residential re-entry center, under the Second Chance Act, alleging unusual family and residential needs.” (#3, p. 1) However, the respondent granted Cicilline only forty-one days of

placement in a residential re-entry center; the placement is scheduled to begin on December 29, 2009.<sup>1</sup>

On this basis, Cicilline prays that this Court “terminate [his] unlawful incarceration” for the following reasons set forth in paragraphs 16 and 17 of his Petition, i.e.

- 16) That the respondent warden’s decision to accord the petitioner only 41 days of placement in a residential re-entry program is insufficient to accomplish the purposes set out in the Second Chance Act of 2007, to provide the greatest likelihood of successful re integration [sic] in the community.
- 17) That the 41 day placement decision violates 18 USC 3624 [sic], and is an arbitrary, unreasonable and categorical allocation of time in that it does not take into account the petitioners [sic] unusual family circumstances and does not provide a time frame that would ensure the greatest likelihood of successful integration into the community.

Petition, Etc., #3, p. 2.

The respondent has moved to dismiss the Petition “...for lack of subject matter jurisdiction and/or for failure to state a claim.” (#8) Under the law as

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Due to the fact that December 29<sup>th</sup> is fast approaching, the within Report and Recommendation is purposely brief. The Court assumes that the petitioner would prefer that a decision be issued in short order.

limned by the First Circuit and district judges in the District of Massachusetts, the respondent's motion is meritorious.

In making the determination as to whether and to what extent to permit an inmate to spend the later portion of his or her sentence in a residential re-entry center, the Warden is required to consider the five factors listed in 18 U.S.C. § 3621(b). So long as he does so, he "...has virtually unlimited discretion to place inmates wherever [he] deems appropriate." *Muniz v. Sabol*, 517 F.3d 29, 40 (1 Cir.), *cert denied sub nom. Gonzalez v. Sabol*, 129 S.Ct. 115 (2008). The *Muniz* holding has been followed by two district judges in Massachusetts. *See Swan v. Sabol*, 08cv40151-NMG (Memorandum & Order by Judge Gorton dated August 19, 2009); *Mares v. Sabol*, 08cv30199-MAP (Memorandum and Order Regarding Respondent's Motion to Dismiss for Lack of Jurisdiction by Judge Ponsor entered March 11, 2009).

In the *Swan* case, petitioner argued that there was a failure to make an individualized determination as required by the statute. In response, Judge Gorton wrote:

...[I]t is clear from the "Residential Re-entry Center Consideration" memorandum that the [respondent] did undertake such an individualized determination. The fact that [the respondent] did not solicit information

from Swan does not alter that conclusion because nothing in the Second Chance Act (or any other statute or regulation of which this Court is aware) requires such treatment.

*Swan, supra* at p. 4 (slip opinion).

Cicilline is in precisely the same situation. The two documents entitled “Residential Re-Entry Center Consideration” dated February 12, 2009 and June 26, 2009 (##9-2, 9-3) specifically state that the five required factors were considered. A further elucidation is not required. *Miller v. Whitehead*, 527 F.3d 752, 758 (8 Cir., 2008).

Accordingly, I RECOMMEND that the Motion to Dismiss (#8) be ALLOWED and that Final Judgment enter dismissing the Petition.

The parties are hereby advised that pursuant to Rule 72, Fed. R. Civ. P., any party who objects to this recommendation must file a specific written objection thereto with the Clerk of this Court within 10 days of the party’s receipt of this Report and Recommendation. The written objections must specifically identify the portion of the recommendation, or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with Rule 72(b), Fed. R. Civ. P., shall preclude

further appellate review. See *Keating v. Secretary of Health and Human Services*, 848 F.2d 271 (1 Cir., 1988); *United States v. Emiliano Valencia-Copete*, 792 F.2d 4 (1 Cir., 1986); *Scott v. Schweiker*, 702 F.2d 13, 14 (1 Cir., 1983); *United States v. Vega*, 678 F.2d 376, 378-379 (1 Cir., 1982); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603 (1 Cir., 1980); see also *Thomas v. Arn*, 474 U.S. 140 (1985).

*/s/ Robert B. Collings*

ROBERT B. COLLINGS  
United States Magistrate Judge

November 23, 2009.