STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of MIKE HENRIQUEZ,

Petitioner,

-against-

THE DEPARTMENT OF CORRECTIONS,

Respondent,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-07-ST7428 Index No. 868-07

Appearances: Mike Henriquez
Inmate No. 96-A-2731
Petitioner, Pro Se
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821

Andrew M. Cuomo
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Jaime I. Roth
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Great Meadow Correctional Facility, has commenced the

instant CPLR Article 78 proceeding seeking back pay in the sum of $1,003.00 and reinstatement to a 4.2 pay grade, by reason of having an adverse disciplinary determination vacated and expunged.

Turning first to respondent's defense predicated on petitioner's alleged failure to exhaust his administrative remedies, "it is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (Watergate v Buffalo Sewer, 46 NY2d 52, 57 [1978], citing, Young Men's Christian Assn. v Rochester Pure Waters Dist., 37 NY2d 371, 375). "This doctrine furthers the salutory goals of relieving the courts of the burden of deciding questions entrusted to an agency (see, 1 NY Jur, Administrative Law, §5 pp 303-304), preventing premature judicial interference with the administrators' efforts to develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its 'expertise and judgement'" (Watergate v Buffalo Sewer, supra, citing, Matter of Fisher [Levine], 36 NY2d, 146, 150, and 24 Carmody-Wait 2d, NY Prac, §145:346). This principle has been applied with consistency in dealing with administrative determinations involving inmates (see, Matter of Hakeem v Wong, 223 AD2d 765, 765 [3rd Dept., 1996]; Matter of Banks v Recore, 245 AD2d 906, 907 [3rd Dept., 1997]; People ex rel. King v Lacy, 252 AD2d 701, 701-702 [3rd Dept., 1998]; Matter of Archie Clarke v Senkowski, 255 AD2d 848, 849 [3rd Dept., 1998]).

The respondent maintains that there is no evidence that the petitioner filed a grievance in which he specifically sought reinstatement to his 4.2 pay grade. The petitioner, in reply papers, has submitted a copy of a grievance dated September 1, 2006 that he allegedly filed which specifically requested reinstatement to the 4.2 pay grade. He maintains that respondent frequently engages in a practice whereby it consolidates grievances; and that this is what the respondent did with this grievance, in order to avoid addressing the issue. He contends that the grievance, in his words, "disappeared", and that he never received a response, despite repeated requests.

The Court is of the view, even accepting petitioner's argument as true, that absent prior administrative review of the grievance, the issue is not yet ripe for judicial review. The petitioner has a remedy available to him where the respondent has failed to entertain a grievance. The remedy would be a CPLR Article 78 proceeding in the nature of mandamus to compel, to require the respondent to address the grievance. Inasmuch as there has been no administrative review of petitioner's request to be reinstated to his former 4.2 pay grade, the Court finds that the petitioner has failed to exhaust his administrative remedies. The Court concludes that this portion of the petition must be dismissed.

Turning to the issue concerning back pay, Department of Correctional Services Directive 4802 § III (C) (4) (d) recites as follows:

> "If an inmate was suspended or confined to his or her cell or to special housing (SHU) pursuant to a disciplinary hearing, and subsequently found innocent, or if the disciplinary hearing is subsequently reversed for procedural error, the inmate will be

> reimbursed at the unemployed rate for six hours per day, concluding weekends and holidays, for all time served while in keeplock or SHU status; if the inmate was in the interim transferred to another facility, the facility at which the inmate is currently housed shall be responsible for the payment." (Directive 4802 § III [C] [4] [d]).

The petitioner was confined from October 25, 2005 to approximately August 29, 2006, that is, roughly 221 weekdays (not accounting for holidays). The respondent, in its determination dated September 7, 2006, awarded the petitioner $36.45 days for 81 days at the unemployed rate of $0.45 per day. The 81 days ran from October 25, 2005 to February 19, 2006. The same determination recites that the petitioner received a time cut at Southport Correctional Facility effective February 8, 2006, and that he was returned to the unemployment payroll effective February 20, 2006. Thus, according to the respondent, although the petitioner continued to reside in special housing until approximately August 29, 2006, once he was transferred to unemployed status (effective February 20, 2006) his compensation under Directive 4802 ceased.

Respondent advances the argument that the petitioner, in seeking back pay, is actually seeking money damages, which can only be sought in the New York State Court of Claims (see Corrections Law § 24; Matter of Gross v Perales, 72 NY2d 231 [1988]; Olsen v New York State Department of Environmental Conservation, 307 AD2d 595 [3rd Dept., 2003], lv to app denied 1 NY3d 502; Cepeda v Coughlin, 128 AD2d 995 [3rd Dept., lv to app denied, 70 NY2d 602). Notably, in a number of instances Supreme Court has entertained actions against the State where the primary relief sought was something other than money

damages (see e.g., Shields v Katz, 143 AD2d 743, 744-745 Dept., 1988] [declaratory and injunctive relief]; Cavaioli v Board of Trustees of the State University, 116 AD2d 689 [2nd Dept., 1986][declaratory and injunctive relief]; Wausau Insurance Companies v Feldman, 213 AD2d 179 [1st Dept., 1995] [declaratory relief]). In differentiating between Court of Claims jurisdiction and that of Supreme Court, "the question [] is `[w]hether the essential nature of the claim is to recover money, or whether the monetary relief is incidental to the primary claim'" (Ozanam Hall of Queens Nursing Home Inc. v State, 241 AD2d 670, 671 [3rd Dept., 1997], quoting Matter of Gross v Perales, 72 NY2d 231, 235 [1988], at p. 236). The Court is of the view that the primary relief sought here is a review of the administrative determination dated September 7, 2006 which computed petitioner's claim for compensation by reason of the favorable termination of his disciplinary proceeding. The Court therefore finds that the proceeding was properly commenced in Supreme Court in the form of a CPLR Article 78 proceeding.

The petitioner advances the argument that Directive 4802 was not filed with the New York State Secretary of State as allegedly required under the State Administrative Procedure Act ("SAPA") § 102 (2). He takes the position that Directive 4802 is therefore ineffective, and does not apply in the instant situation. As the Court understands the petitioner's argument, in the absence of Directive 4802, he believes he is entitled to compensation at the grade 4.2 level pay rate, as if he had been fully employed during the entire period of time he was in the special housing unit. He has submitted computations, based upon his average

weekly compensation, to substantiate the $966.55 which he claims is owed to him.

In the Court's view, simply put, the petitioner's argument does not operate to his benefit. Without Directive 4802, the petitioner would be entitled to no compensation whatever. This is so because in the absence of a contract, statute or other binding provision (none of which are present here), a worker is not entitled to be compensated for work she or he did not perform, even under the circumstances similar to those present here. By way of example, hourly workers very commonly do not get paid for hours they do not work, no matter what the reason for not working. Even those employees who are fortunate enough to be covered by a collective bargaining agreement or other contractual protection are only entitled to the compensated leave set forth in the agreement. When they exhaust their paid leave, they simply do not get paid when they are absent from work. Thus, in this instance, in the absence of Directive 4802, the petitioner would not be entitled to any compensation for the time he did not work. This is so even though the failure to work was through no fault of his own.

The Court finds it is unnecessary to render a determination with regard to SAPA. The respondent is bound by its determination that the petitioner is entitled to compensation under Directive 4802.

The Court further finds, however, that the matter must be remanded to the respondent for re-computation of the benefit under Directive 4802. Respondent never presented evidence with regard to why the inmate's employment status would have any bearing on the

compensation the inmate would receive under Directive 4802. The Directive itself makes no mention of a change in employment status as effecting the benefit. Moreover, the compensation authorized under said Directive is at the *unemployed* rate. No evidence or rationale is presented as to why a change in an inmate's employment status would have any bearing on the compensation he or she would receive under Directive 4802. For this reason, the Court is of the view that the respondent erred in terminating compensation as of February 20, 2006, rather than continuing it to the date of petitioner's release from special housing.

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit. The Court will grant the petition to the limited extent of remanding the matter to the respondent for a re-computation of petitioner's benefit under Directive 4802.

Accordingly it is

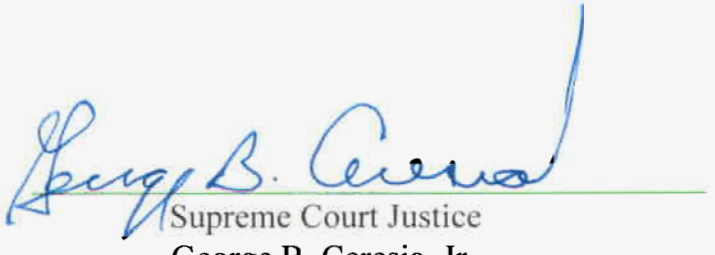
ORDERED and ADJUDGED, that the petition is granted to the limited extent set forth herein, but is otherwise denied; and it is

ORDERED, that the matter is remanded to the respondent for a re-computation of petitioner's benefit under Directive 4802.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the Respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

ENTER

Dated: July 5, 2007
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated February 1, 2007, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated April 2, 2007, Supporting Papers and Exhibits
3. Petitioner's Reply sworn to February 26, 2007, Supporting Papers and Exhibits
4. Petitioner's Letter sworn to April 10, 2007 and Exhibits