STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of HAMILCAR BARCA,

Petitioner,

-against-

LUCIEN J. LECLAIRE, JR., Acting Commissioner,

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-ST7377 Index No. 9069-06

Appearances: Hamilcar Barca
Inmate No. 89-A-8926
Petitioner, Pro Se
Wende Correctional Facility
Wende Rd., P.O. Box 1187
Alden, NY 14004-1187

Eliot Spitzer
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Bridget E. Holahan
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Wende Correctional Facility, has commenced the instant CPLR Article 78 proceeding to expunge all references in his record to a disciplinary proceeding held in August 2006 in which all charges were dismissed, and to challenge certain changes in his programming. As a part of the latter relief, the petitioner seeks to be restored to a program he had participated in prior to the disciplinary hearing.

Prior to August 31, 2006 the petitioner had been employed in the Mobility Aide Program. On August 17, 2006 the petitioner was issued a misbehavior report accusing him of violating prison rules, including extortion and making threats. The charges were dismissed by the hearing officer on August 31, 2006. On the same day however, the petitioner received notification that his program had been changed from A.M. Rec-Aide and P.M. Mobility Aide to Evening Sign Language Interpreter. He alleges that because these events occurred on the same date, the change in programming was in retaliation for having received a favorable determination in the disciplinary proceeding. Thereafter, on September 12, 2006, the petitioner received a memorandum from the Program Committee advising him that his program had been changed to P.M.. C-Block Porter and Evening Sign Language. On September 13, 2006 the petitioner filed a grievance with respect to his programming (Grievance # 25296-06). In a determination dated October 11, 2006 the Inmate Grievance Resolution Committee ("IGRC") stated the following:

> "IGRC investigation reveals that grievant's program as Mobility Aide was changed for security reasons. Grievant's program was changed to C-block Porter without grievant appearing before the

> Program Committee. Grievant's program has since been changed to Recreation Aide (a.m.) and sign language (p.m.). IGRC recommends that prisoners be scheduled to appear before the Program Committee before program changed [sic] are made, in accordance with Wende P&P # 4005 V, which states 'It is the policy of this facility to ensure that General Population inmates are afforded opportunity to appear before the Program Committee to be assigned or reassigned to work assignments and/or programs...'"

On November 1, 2006 the petitioner signed a statement reciting that "this grievance was previously addressed." Of great significance here, the petitioner did not file an administrative appeal.

The petitioner alleges that thereafter he was advised by Wende Corrections Facility Captain Kearney, and subsequently by Wende Sign Language Instructor Chris Zaluski, that he would be restored to the Mobility Aide Program. On November 3, 2006 the petitioner was informed that he would be placed in a full time sign language program rather than the Mobility Aide Program. Petitioner then filed a second grievance with respect to programming (Grievance #25613-06). The IGRC issued the following determination on November 28, 2006:

> "IGRC investigation reveals that grievant has had his program changed several times in recent months without grievant appearing before the Program Committee, as required by Wende P&P #4005. Grievant has indicated that Capt. Kearney has agreed to allow grievant to be reassigned to Mobility Aide. No response has been made by TMC Chris Zaluski regarding his statement to grievant that grievant would be allowed to keep his Gym Rec program despite program change. This conversation was witnessed by SCC Scubis. IGRC recommends that grievant be seen by the Program Committee prior to any change in

> program as required by Wende P&P #4005, and that, if approved by Capt. Kearney, be reassigned to the former program of Gym Rec, and Mobility Aide. Grievance granted in part."

The petitioner appealed the determination of IGRC. Upon review of the IGRC determination the Wende Correctional Facility Superintendent issued the following decision:

> "Per investigation Grievant signed the agreement to become mobility aide am and pm. Inmate may request a change of program after his 90 days is completed. Inmate must take responsibility for this actions (sic) and abide by the rules of the program committee.
>
> "No findings of merit to the grievance.
>
> "Grievance Appeal is denied."

Upon appeal, the Central Office Review Committee ("CORC") issued the following determination:

> "Upon full hearing of the facts and circumstances in the instant case, the action requested herein is hereby denied. CORC upholds the determination of the Superintendent for the reasons stated.
>
> "CORC upholds the discretion of the facility administration and Program Committee to make top level decisions when necessary in determining the appropriateness of a particular assignment for a particular inmate. The administration must make a judgment call based on experience and available information to prevent possible difficulties.
>
> "Contrary to the grievant's assertions, CORC asserts that the grievant was paid 40 hours ($0.2416 x 40 hours = $9.66) for the sign language interpreter/trainee program.
>
> "CORC notes that Directive #4040, Section 701.1, states, in part, that the grievance program is not intended to support an

adversary process."

Turning to Grievance # 25296-06 the Court notes that the rules of the Department of Correctional Services provide for a three step administrative review process with respect to inmate grievances (see, 7 NYCRR 701.5). The inmate must first file a complaint (id., subd [a]), which is thereafter reviewed by the inmate grievance resolution committee (id., subd [b]). If the if the inmate is dissatisfied with the determination of the inmate grievance resolution committee, the inmate may then appeal to the superintendent (id., subd. [c]). If the inmate is not satisfied with the superintendent's decision he may then appeal to CORC (see, 7 NYCRR 701.5 [d]). In this instance, as noted, the petitioner concluded the grievance process by signing a statement on November 1, 2006 which recited "this grievance was previously addressed" and by failing to file an appeal with the Superintendent. The Court finds that the petitioner failed to exhaust his administrative remedies with respect to this grievance (see Boddie v Goord, 307 AD2d 555, 555 [3rd Dept., 2003]).

With regard to Grievance #25613-06, the Superintendent found (supra) that the petitioner had signed an agreement with respect to programming, and that this could not be changed for a period of ninety days. Annexed to the determination of CORC is a memorandum dated October 24, 2006 which purports to have the petitioner's signature affixed thereto, and which recites that he be assigned as Sign Language Interpreter am/pm. The memorandum also recites "inmates will complete a minimum of 90 days in an assigned

program."[1] Grievance # 25613-06 is dated November 8, 2006. Under such circumstances, the Court is of the view that the determination, in finding that petitioner's grievance was premature, had a rational basis, and was not arbitrary and capricious.

With regard to the favorable disciplinary determination dated August 31, 2006, the petitioner has presented no evidence that references to said disciplinary proceeding have not been expunged from his institutional record. In addition, the petitioner failed to present evidence to substantiate his otherwise conclusory assertion that he has been the victim of retaliation (see Matter of Encarnacion v Goord, 34 AD3d 1175 [3rd Dept., 2006]; Matter of Daum v Goord, 270 AD2d 745, 746 [3rd Dept., 2000]).

To the extent that the petitioner is attempting in this CPLR Article 78 proceeding to expunge from his institutional record references to old extortion charges arising from prior disciplinary proceedings respondent's objection in point of law, which alleges that the petitioner failed to exhaust his administrative remedies, is applicable. The procedure for correcting an inmate's institutional record is contained in 7 NYCRR 5.50. In this instance the petitioner does not allege, nor does he demonstrate, that this was ever accomplished. Any such claim must therefore be dismissed.

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit.

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[1]Although the Superintendent incorrectly made reference to "Mobility Aide" in his determination, this mistatement was not material to the decision in that the Superintendent's point was that the petitioner should remain in the existing program for a minimum of ninety days.

The Court concludes that the petition must be dismissed.

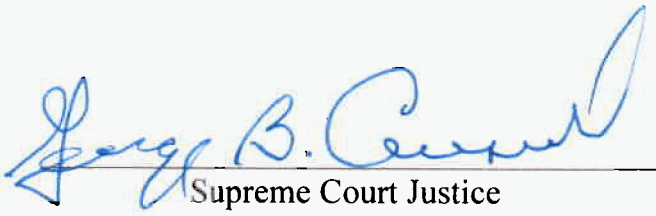
Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

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: June 28, 2007
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated January 9, 2007, Petition, Supporting Papers and Exhibits
2. Answer dated April 6, 2007, Supporting Papers and Exhibits
3. Affirmation of Bridget E. Holahan, Esq., dated April 6, 2007
4. Petitioner's Reply Affirmation dated April 13, 2007