

**Matter of Calderon v Fischer**

2008 NY Slip Op 31440(U)

May 23, 2008

Supreme Court, Albany County

Docket Number: 0003032/0081

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

IN THE MATTER OF THE APPLICATION OF  
VICTOR CALDERON, 02-R-5806

Petitioner,

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

**DECISION and ORDER**  
**INDEX NO. 303-08**  
**RJI NO. 01-08-ST8623**

-against-

B. FISCHER, COMMISSIONER, NYS  
DEPT. OF CORRECTIONS,

Respondent.

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Supreme Court of Albany County All purpose Term, May 9, 2008  
assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Victor Calderon, #02-R-5806  
Petitioner Pro Se.  
Upstate Correctional Facility  
309 Bare Hill Road  
P.O. Box 2000  
Malone, New York 12953

Andrew M. Cuomo, Esq.  
Attorney General of the State of New York  
Attorney for Respondent  
(Aaron M. Baldwin, Esq., AAG).  
The Capitol  
Albany, New York 12224

**TERESI, J.:**

The petitioner commenced the instant CPLR Article 78 proceeding challenging a

determination by respondents' Time Allowance Committee (TAC) for withholding three years of good time allowance for his poor disciplinary record and his lack of program participation.

Respondent seeks the dismissal of the petition pursuant to CPLR 3211(a)(7) for failure to state a cause of action. The petitioner also moves to amend the Order to Show Cause.

Petitioner was denied good time credit by the TAC on August 21, 2007. The Decision of the TAC was affirmed by the Superintendent on September 28, 2007. Petitioner commenced this Article 78 proceeding on January 9, 2008.

Since petitioner's incarceration he alleges he has sustained extensive medical ailments and uses a wheelchair. Petitioner has been found guilty of several Tier II and III violations resulting in sentencing in the Special Housing Unit. While in custody of DOCS, it was recommended that petitioner enroll and complete Educational Services, Vocational Services or Substance Abuse Counseling and ASAT. Respondent alleges the petitioner has not completed the programs due to his disciplinary problems which resulted with incarceration in the SHU. Petitioner failed to complete the required programs. As a result, petitioner's good time credits were withheld.

Petitioner alleges he was "never interviewed by a designated employee (of DOCS) or offered an opportunity to seek assistance or present evidence in his favor." Respondent alleges the petitioner acknowledged in writing that he was notified of the TAC hearing date and he selected five counselors to assist him prior to the TAC hearing.

It is well established that a very limited standard which governs judicial review of administrative determinations pursuant to Article 78 is whether the determination was arbitrary and capricious, and that a reviewing court is therefore restricted to an assessment of whether the

action in question was taken “without sound basis in reason and...without regard to the facts.” (Matter of Pell v. Board of Education, 34 NY 2d 222 (1974)). The test usually applied in deciding whether a determination is arbitrary and capricious, or an abuse of discretion, is whether the determination has a rational or adequate basis. (Heintz v. Brown, 80 NY 2d 998 (1992)). “When the judgment of the agency involves factual evaluations in the area of the agency’s expertise and is supported by the record, such judgment must be accorded great weight and judicial deference.” (Matter of Flacke v. Onondaga Landfill System, 69 NY 2d 873 (1987)).

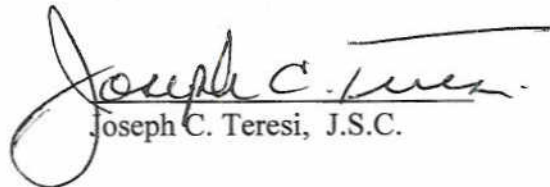
A decision to withhold good time allowances which is made in accordance with the law is not subject to judicial review. (See, Correction Law § 803(4); Matter of Coleman v. Boyle, 270 AD2 739 (3<sup>rd</sup> Dept. 2000); lv denied 95 NY 2d 758 (2000)). Good time may be withheld on the reasonable ground that petitioner failed to participate in programs designed to rehabilitate the very behavior that led to his imprisonment. (See, Correction Law § 803(1); Matter of Staples v. Goord, 263 AD 2d 943 (3<sup>rd</sup> Dept. 1999); lv denied 94 NY 2d 755 (1999)). Given petitioner’s failure to receive adequate treatment for the behavior that resulted in his incarceration, the determination to withhold his good time allowance is by no means irrational. (Matter of Ferry v. Goord, 268 AD 2d 720 (3<sup>rd</sup> Dept. 2000); lv denied 94 NY 2d 763 (2000)). The denial of good time was not irrational, arbitrary or capricious as petitioner failed to successfully complete the required programs.

Petitioner’s remaining complaints are denied as he was advised by the TAC of his hearing date and he was given the opportunity to select an assistant and received the assistance requested. In addition, petitioner’s motion to amend the Order to Show Cause is denied as he failed to submit an Affidavit of Service demonstrating service upon the respondents.

Accordingly, the Article 78 petition is dismissed and the motion is denied. All papers, including this Decision and Order are being returned to the attorneys for the respondent. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provision of that section respecting to filing, entry and notice of entry.

SO ORDERED

Dated: Albany, New York  
May 23, 2008

  
Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Order to Show Cause dated January 31, 2008;
2. Verified Petition undated with attached exhibits 1-45;
3. Verified Answer dated April 30, 2008 with attached exhibits A-F;
4. Affirmation of Aaron M. Baldwin, Esq. dated April 30, 2008;
5. Notice of Motion undated;
6. Affidavit of Victor Calderon undated.