STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of JAMES R. BELTER,

Petitioner,

-against-

BRIAN FISCHER, Commissioner, NYS DOCS,

Respondents,

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 No. 01-07-ST8065 Index No. 4908-07

Appearances: James R. Belter
Inmate No. 05-A-4592
Petitioner, Pro Se
Franklin Correctional Facility
P.O. Box 10
Malone, NY 12953

Andrew M. Cuomo
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Kelly L. Munkwitz,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Franklin Correctional Facility, has commenced the instant

CPLR Article 78 proceeding to review a determination which denied his grievance with regard to respondent's recommendation that he participate in the Sex Offender Program and the Alcohol and Substance Abuse Treatment Program. The offense for which he is currently incarcerated, to which he pled guilty, is attempted rape in the first degree. He now maintains his innocence and indicates that he is in the process of attempting to have his plea vacated. In view of the foregoing, he asserts that he should not be required to participate in the recommended programs. He argues that he is caught in a dilemma from the standpoint that he only has two options. The first is to participate in the recommended programming, which requires him to acknowledge his culpability for the crime he committed[1]. Any such acknowledgment would, in his view, undermine his position in criminal court that he is innocent of the charge; and might even be used against him at trial, if he were successful in re-opening his case. If he refuses to participate in recommended programming, he argues that the refusals may operate to his detriment with respect to credit for good time allowances, in seeking to obtain a certificate of earned eligibility, or in applying for transfer to another facility. He maintains that this circumstance violates his rights under the fifth, sixth and fourteenth amendments of the federal constitution. In his view, the programming recommendation should be held in abeyance until his application to vacate his plea of guilty is finally determined. He requests that programming recommendations be placed in "deferred status", to permit him to receive the same favorable actions as those inmates who

[1]The petitioner indicates that the registration form for the Sex Offender Program requires that he admit to having a sexually deviant behavior which requires correction.

actively participate in such programs.

Separate and apart from the foregoing, the petitioner maintains that there is nothing in his criminal history to suggest that he requires alcohol and substance abuse treatment. While he admits that he consumed alcohol at the time of the incident for which he is currently incarcerated, he maintains that there is no evidence that he abused alcohol. He acknowledges that his presentence investigation report suggests that his victim was "plied" with alcohol. He indicates, however, that his attorney protested the inclusion of this statement in the presentence investigation report during the sentencing, arguing that the victim was in her early thirties and was a heavy drinker[2].

The petitioner filed a grievance with regard to the foregoing programming recommendations. The Inmate Grievance Review Committee issued the following determination:

> "Per guidance unit, the grievant's participation in ASAT and SO are part of his programming needs for his earned eligibility plan. They are consistent with the pre-sentence report. Grievant has been counseled by the guidance unit on 12/11/06 about any refusals of programs. The grievant may sign a refusal at his own risk of EEP."

On January 5, 2007 the Superintendent affirmed the determination of the Inmate Grievance Review Committee, stating:

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[2]The Court notes that the sentencing judge responded by indicating that the comment that the victim was "plied" with alcohol would remain unchanged in the presentence investigation report. Thus, while his attorney timely raised the objection, the trial judge, in his discretion, found that the comment should not be revised or deleted.

> "The grievant states that he is appealing his conviction and does not want to participate in SOP as admitting to the offense may compromise his appeal. He also states that he does have an alcohol problem and should not be required to participate in ASAT.
>
> "The investigation reveals the grievant pled guilty to the charge of Att. Rape 1. The Pre-Sentence Report indicates that he was drinking heavily on the day of the offense. The referrals for participation in SOP and ASAT Program are appropriate and warranted.
>
> "The investigation and all available information reveal that the grievance has no merit. The grievance is denied."

Petitioner appealed the Superintendent's determination to the Central Office Review Committee ("CORC"). On March 7, 2007 CORC issued the following determination:

> "Upon full hearing of the facts and circumstances in the instant case, the action requested herein is hereby denied with clarification. CORC upholds the determination of the Superintendent for the reason stated.
>
> "CORC notes that participation in the Sex Offender Counseling Program does not require the inmate to admit guilt to a particular crime. The program addresses sexually offending behavior, whether or not that behavior ultimately resulted in conviction of a Penal Law Sex Offense. CORC asserts that participation in the Sex Offender Counseling Program is not improper despite grievant's efforts to have his judgment of conviction vacated under Criminal Procedure Law § 440.10. . . . Participants can discuss the behavior in general terms without admitting to the violation of specific sections of the Penal Law.
>
> "With respect to the ASAT referral, CORC notes, that upon recommendation of the Department's Counsel, all objections to the contents of the Pre-Sentence Investigation Report must be raised at the time of the sentencing or they are waived. While

> the grievant objects to the characterization in his PSR that his alcohol use at the time of the offense was heavy, he admits to drinking. Thus, the referral to ASAT was consistent with program eligibility criteria."

"Judicial review of administrative decisions denying inmate grievances is limited to a determination of whether the challenged determination is irrational, arbitrary or capricious" (Matter of Harty v Goord, 3 AD2d 701, 702 [3rd Dept., 2004] quoting Matter of Cliff v Brady, 290 AD2d 895 [2002], lv denied, lv dismissed 98 NY2d 642 [2002]; Matter of Cliff v Eagen, 272 AD2d 687 [2000]). Given the nature of the crime to which the petitioner pleaded guilty, the Court finds that the recommendation that the petitioner participate in the Sexual Offense Program was rational and appropriate (see Matter of Rizzuto v Goord, 34 AD3d 1164, 1164-1165 [3rd Dept., 2006]). Similarly, because the presentence investigation report mentioned that alcoholic beverages were used by the petitioner in the furtherance of his crime (and such comment was not stricken from the presentence investigation report by the sentencing judge), there was a rational basis upon which the respondent could conclude that alcohol and substance abuse treatment was necessary.

The Court discerns no violation of petitioner's constitutional rights. Inmates are free to make their own decision with regard to whether they wish to participate in recommended programming. While convicted sex offenders, if they elect to enter the Sex Offender Program, are required to acknowledge their problems, and the circumstances of these problems, there is no requirement that they admit their guilt to specific crimes.

The Court has reviewed and considered petitioner's remaining arguments and

contentions and finds them to be without merit.

The Court finds that the determination was not made in violation of lawful procedure; is not affected by an error of law; and is not irrational, arbitrary and capricious, or an abuse of discretion. The Court concludes that the petition must be dismissed.

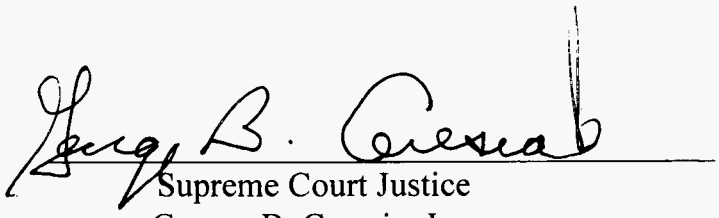
Accordingly it is

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: January 25, 2008
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show cause dated June 28, 2007, Amended Order To Show Cause dated August 3, 2007, Petition, Supporting Papers and Exhibits
2. Petitioner's Letter dated October 22, 2007
3. Answer dated October 29, 2007 and Exhibits
4. Affirmation of Kelly L. Munkwitz, Esq., dated October 29, 2007