STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
RODNEY ELLIOTT, #99-A-1945,
Petitioner,

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

DECISION AND ORDER
RJI #44-1-2008-0681.60
INDEX #128794
ORI # NY044015J

-against-

KENNETH PERLMAN, Deputy Commissioner,
New York State Department of Correctional Services,
Respondent,

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Rodney Elliott, verified on September 25, 2008, and filed in the St. Lawrence County Clerk's office on October 1, 2008. Petitioner, who is an inmate at the Riverview Correctional Facility, challenged the determination recommending his participation in the DOCS Alcohol and Substance Abuse Treatment (ASAT) program. The Court issued an Order to Show Cause on October 7, 2008, and received and reviewed respondent's Answer and Return, verified on November 26, 2008. The Court also received and reviewed petitioner's Reply thereto, filed in the St. Lawrence County Clerk's office on December 15, 2008, Petitioner's "Suppliment [sic]" Reply, filed in the St. Lawrence County Clerk's office on January 6, 2009, and additional correspondence from petitioner filed in the St. Lawrence County Clerk's office on February 3, 2009, February 10, 2009, and February 17, 2009.

By Letter Order dated June 12, 2009, respondent was directed to supplement the record by submitting copies of Parole Violation Charges 1, 2, and 3 in connection with the 1998 revocation of petitioner's parole as well as a copy of the transcript of the July 24,

2008, final parole revocation hearing. The Court next received and reviewed additional correspondence from the petitioner, filed in the St. Lawrence County Clerk's office on June 18, 2009, as well as additional materials filed by respondent in the St. Lawrence County Clerk's office on July 10, 2009.[1] The Court received still more materials from the petitioner filed in the St. Lawrence County Clerk's office on July 13, 2009, and July 20, 2009.

By Decision and Judgment dated September 30, 2009, the petition was dismissed. The Court next received and reviewed correspondence from the petitioner dated October 7, 2009, and filed on October 9, 2009. In that correspondence petitioner pointed out several alleged inaccuracies and other shortcomings in the Decision and Judgment of September 30, 2009. Despite the fact that petitioner called upon the Court to issue a revised Decision and Judgment there was nothing in his October 7, 2009, correspondence to indicate that copies thereof had been provided to counsel for the respondent. By Letter Order dated October 27, 2009, the Court advised both parties that it intended to treat petitioner's correspondence of October 7, 2009, as a motion for re-argument and/or renewal of argument[2], returnable on November 20, 2009. The Letter Order also directed petitioner to supplement a certain aspect of his correspondence. The Court has since received and reviewed additional correspondence from petitioner dated October 29, 2009, filed in the St. Lawrence County Clerk's office on November 2, 2009, and October 31,

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[1] Although the respondent did supply the Court with a copy of Parole Violation Charges 1, 2, and 3, he reported that the Division of Parole was unable to produce a transcript of the 11 year old final revocation hearing.

[2] CPLR §2221(e) provides, in relevant part, that "[a] motion for leave to renew . . . shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and . . . shall contain reasonable justification for the failure to present such facts on the prior motion." Since petitioner's motion papers do not allege any such new facts or justification for the failure to present such facts in the original petition, it is clear that the motion currently before the Court constitutes a motion for leave to reargue pursuant to CPLR §2221(d).

2009, received directly in chambers on November 5, 2009. The Court has also received and reviewed the Affirmation of Deanna R. Nelson, Esq., Assistant Attorney General, dated November 12, 2009, submitted in opposition to petitioner's motion for re-argument. Finally, the Court has received and reviewed petitioner's Reply, dated November 18, 2009, and filed in the St. Lawrence County Clerk's office on November 20, 2009.

"A motion for leave to reargue . . . shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court . . ." CPLR §2221(d)(2). Such a motion is directed to the sound discretion of the Court. *See Loris v. S&W Realty Corp*, 16 AD3d 729. Despite the statutory nomenclature, "[r]eargument is not designed to afford the unsuccessful party successive of opportunities to reargue issues previously decided . . ." *William P. Pahl Equipment Corp v. Kassis*, 182 AD2d 22, 27 (citation omitted).

In this Decision and Order the Court will not re-state all of the findings of fact set forth in the Decision and Judgment of September 30, 2009. Only such findings of fact as are relevant to the arguments advanced by petitioner in his application for reargument will be set forth herein. For a full statement of the underlying findings of fact one is referred to the Decision and Judgment of September 30, 2009.

In paragraph 12 of the petition filed in the St. Lawrence County Clerk's office on October 1, 2008, it is alleged that after petitioner was released from DOCS custody to parole supervision (in November of 1996) " . . . parole officials only referred the petitioner to a substance free out patient therapeutic counseling program which the petitioner attended between four or five months. They found no basis to put the petitioner into a substance abuse . . . treatment program, because the petitioner was not using a substance." On page five of the Decision and Judgment of September 30, 2009, the Court

found as follows: " Although petitioner maintains that he participated in a community-based substance abuse counseling program for a period of four to five months following his release from DOCS custody to parole supervision in November of 1996, he has provided no evidentiary details with respect to the nature/scope of the program, nor does he document, or even allege, that he successfully completed the program." In response to the Court's findings on this point, petitioner asserts in paragraph seven of his motion papers that " . . . it is clearly detailed in the petition, that he the petitioner attended the program referred to above for four a [sic] five weeks after he was granted parole, and after that completion had presented a certificate of completion to his Parole officer." (Emphasis in original).

Immediately upon receipt of petitioner's motion papers the Court re-reviewed the original petition and supporting documents in order to ascertain whether or not it had somehow missed "clearly detailed" allegations that petitioner had completed the program in question and presented a certificate of completion to his parole officer. Unable to locate any such allegations, the Court, as a part of its Letter Order of October 27, 2009, directed petitioner to provide a specific reference as to where in his petition such "clearly detailed" allegations appear. In response thereto petitioner merely states that if he had not completed the program such non-completion surely would have been the subject of a parole violation charge. It should be noted that in its Decision and Judgment of September 30, 2009, the Court did, in fact, find that " ' MANDATORY PARTICIPATION IN SUBSTANCE ABUSE COUNSELING' " was a condition of petitioner's parole release and that the parole violation charges lodged against petitioner did not include a charge that petitioner failed to participate in mandated counseling. Accordingly, the Court finds that it did not overlook or misapprehend any facts when it found that petitioner

" . . . provided no evidentiary details with respect to the nature/scope of the program, nor does he document, or even allege, that he successfully completed the program."

In paragraph eight of his motion papers petitioner argues " . . . that the court is confused and has misconstrued the fact that it was the Petitioner who proceeded with the Article 78, requesting that the respondent 'show cause' why he is require [sic] to participate in a substance program, when respondent is unable to show any recent substance abuse or involvement. The court has shift that obligation to being that of the petitioner!" (Emphasis in original). The Court, however, is not persuaded by petitioner's argument on this point. Notwithstanding the fact that an order to show cause was issued at the outset of this proceeding, petitioner carried a heavy burden of demonstrating that the final CORC determination of August 20, 2008, was irrational or arbitrary and capricious. *See Frejomil v. Fischer*, ____ AD3d ____, 2009 WL 4841083, 2009 NY Slip Op 09330. *See also Mosher v. Ward*, 218 AD2d 626 at 627 and *Grace Plaza of Great Neck v. Axelrod*, 157 AD2d 953 at 954.

In paragraph 15 of his motion papers petitioner argues that "[t]he Court's decision further reflect that the petitioner had plead guilty to [parole violation] charge 6, however no-where in that violation release report is it reflected that such a guilty plea had occurred on such a statement by the court clearly contradicts that the violation . . . report reflects See page 8 at charges C (*) which clearly shows that charge 6 was indeed withdrawn." Although the Court, quite frankly, is unable to make sense of the "See Page 8 at charges C (*)" reference, a re-review of the record in this proceeding convinces the Court that it has not overlooked or misapprehended any matters of fact related to the revocation of petitioner's parole on July 24, 1998. Parole Violation Charge #6, as set forth in Supplementary Violation of Release Report #2 (part of Exhibit E annexed to respondent's Answer and Return) reads as follows: "Rodney Elliott violated Rule # 2 of the Rules

Governing Parole, in that he failed to make his office report on 5/13/98, and thereafter, as instructed by his parole officer on 5/6/98." The Parole Revocation Decision Notice of July 24, 1998 (also part of Exhibit E attached to respondent's Answer and Return), moreover, clearly indicates that Parole Violation Charge #6 was sustained based upon petitioner's plea of guilty while Parole Violation Charge #1 was "not approved by the Board for prosecution" and Parole Violation Charges #2, 3, 4, 5, 7, and 8 were withdrawn.[3]

Finally, at least with respect to the ASAT program, the petitioner appears to take issue with the Court's finding " . . . that DOCS has considerable discretion in determining the program needs of inmate's [sic]." According to petitioner, the ASAT program is subject to the provisions of Article 22 of the Mental Hygiene Law (MHL), which allegedly requires ". . . that before a person is adjudged a substance abuser, he or she must be given an examination by a qualified license [sic] substance or medical provider, which had never taken place in the petitioner's case." (Emphasis in original). The petitioner's motion papers do not specify where such alleged provision is located within Article 22. For the reasons set forth below the Court finds nothing in MHL Article 22 barring the recommendation of DOCS officials that petitioner participate in the ASAT program.

First of all, nothing in Article 22 of the MHL provides for the adjudication of any individual as a "substances abuser." Notwithstanding the emergency hospitalization provisions of MHL §22.09(c) and (e), which are not relevant to this proceeding, admissions to chemical dependence programs under Article 22 are voluntary. Thus, " . . . the director of any chemical dependence program . . . may receive therein as a patient any person found by such director can be suitable for, and in need of, such care and

[3] Although the record suggest that a total of 11 parole violation charges were filed against petitioner, there is nothing in the Parole Revocation Decision Notice with respect to the disposition of Parole Violation Charges #9, 10 and 11.

treatment and requesting admission thereto . . ." MHL §22.07. In the case at bar DOCS staff have, in effect, recommended that petitioner voluntarily enter the ASAT program. Obviously, however, there would be negative repercussions if a DOCS inmate were to ignore such a recommendation. Nevertheless, nothing in MHL Article 22, or any other statute of which the Court is aware, mandates that any particular type of examination be performed before ASAT participation can be recommended for a DOCS inmate. Such an inmate can, like petitioner, challenge the ASAT recommendation in the context of an inmate grievance proceeding and, ultimately, seek judicial review if dissatisfied with the final results thereof. Upon judicial review, as alluded to previously, it is incumbent upon the petitioning inmate to demonstrate that the ASAT program recommendation was arbitrary and capricious. *See McKethan v. Kafka*, 31 AD3d 1078 *and Matos v. Goord*, 27 AD3d 940. In the Decision and Judgment of September 30, 2009, this Court ultimately determined that the recommendation requiring petitioner's participation in the ASAT program was not arbitrary and capricious or without a rational basis. Accordingly, the underlying petition was dismissed. The Court finds nothing in petitioner's motion papers warranting any change.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ORDERED, that petitioner's motion is denied.

Dated: January 25, 2010, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice