STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
CALE CARPENTER,#05-A-4589,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2009-0587.119
INDEX # 2009-1544
ORI #NY016015J

BRIAN FISCHER, Commissioner,
NYS 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 Cale Carpenter, verified on September 25, 2009, and filed in the Franklin County Clerk's office on November 19, 2009. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the June 12, 2009 decision of the commissioner's designee affirming the May 27, 2009 recommendation of the Time Allowance Committee at the Franklin Correctional Facility (TAC) to withhold all of his potentially available good time. The Court issued an Order to Show Cause on December 1, 2009, and has received and reviewed respondent's Answer, including Confidential Exhibit H, verified on January 15, 2010, supported by the Affirmation of Kelly L. Munkwitz, Esq., Assistant Attorney General, dated January 15, 2010. The Court has also received and reviewed petitioner's Reply thereto, filed in the Franklin County Clerk's office on March 4, 2010.

On August 31, 2005, petitioner was sentenced in Warren County Court upon his conviction, following a jury verdict, of the crime of Sexual Abuse 1°. The conviction, however, was reversed on direct appeal to the Appellate Division, Third Department and the matter was remitted for a new trial. *People v. Carpenter*, 35 AD3d 1092. On July 25,

2007, following a new trial and jury verdict, petitioner was sentenced in Warren County Court to a determinate term of 5 years, with 3 years post-release supervision, upon his conviction of the crime of Sexual Abuse 1°. In June of 2008 petitioner's 2007 conviction was affirmed on direct appeal to the Appellate Division, Third Department and on August 15, 2008 his application for leave to appeal to the Court of Appeals was denied. *People v. Carpenter*, 52 AD3d 1050, *lv den* 11 NY3d 735.

After applying 8 months and 20 days of potentially available good time, petitioner's conditional release was originally established as September 17, 2009. The petitioner had no good time recommended lost as a result of any Tier III Superintendent's Hearing. On May 22, 2009, however, petitioner was notified that the TAC had determined that there may be sufficient reason not to recommend the granting of all of his potentially available good time and that a TAC hearing had been scheduled for May 27, 2009. *See* 7 NYCRR §261.4. The stated reason for such hearing was petitioner's alleged " . . . refusal to participate in the ART [Aggression Replacement Training], Sex Offender Treatment Program, and Transitional Services Phases two and three." On May 27, 2009, following the TAC hearing, the committee recommended withholding the entire 8 months and 20 days of petitioner's potentially available good time. The stated reasons for the recommendation were as follows: "TAC recommends withholding all available good time due to refusal of programs, specifically ART, Sex Offender Program, Transitional Services Phase II and III. May request reconsideration after successful completion of ART and Sex Offender Program." The TAC recommendation was confirmed by the Superintendent of the Franklin Correctional Facility on May 29, 2009 and affirmed by the commissioner's designee on June 12, 2009. This proceeding ensued.

Good time allowances ". . . may be granted for good behavior and efficient and willing performance of duties assigned or progress and achievement in an assigned

treatment program, and may be withheld, forfeited or canceled in whole or in part for bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned." Correction Law §803(1)(a). Inmates do not have the right to demand or require the good time allowances authorized under Correction Law §803 and "[t]he decision of the commissioner of correctional services as to the granting, withholding, forfeiture, cancellation or restoration of such allowances shall be final and shall not be reviewable if made in accordance with law." Correction Law §803(4). *See Reed v. Fischer,* 54 AD3d 1088*, Edwards v. Goord,* 26 AD3d 659, *lv den* 7 NY3d 710, *rearg den* 7 NY3d 992 and *Benjamin v. New York State Department of Correctional Services*, 19 AD3d 832. Case law suggests that a determination to withhold good time may be overturned if such determination is found to be irrational. *See Burke v. Goord*, 273 AD2d 575, *app. dis*, *lv den* 95 NY2d 898 and *Jones v. Coombe*, 269 AD2d 632, *lv den* 95 NY2d 755. "The committee shall not recommend the granting of the total allowance authorized by law or the withholding of any part of the allowance in accordance with any automatic rule, but shall appraise the entire institutional experience of the inmate and make its own determination." 7 NYCRR §261.3(c). *See Amato v. Ward*, 41 NY2d 469.

Petitioner alleges that at his initial meeting with a corrections counselor at the Franklin Correctional Facility he was advised that in order to participate in the DOCS Sex Offender Program he must admit guilt to the offense underlying his incarceration. According to petitioner, "[a]n innocence [presumably, innocent] individual that who has consistently maintained his innocence and who is pursuing post-conviction relief via the U.S. Supreme Court, C.P.L. 440 pleadings and Federal Habeas Corpus petition should not be forced to falsely admit his guilt in order to earn statutory good-time and should not be punished for pursuing remedies available to him by law." The respondent, referencing the unreported January 25, 2008 Decision/Order/Judgment of the Supreme Court,

Albany County, in *Belter v. Fischer* (Albany County Index No. 4908-07), counters that inmates participating in the DOCS Sex Offender Program, although required to acknowledge their problems and the circumstances of such problems, are not required to admit their guilt to specific crimes. Whatever the substance of petitioner's conversation with his counselor, and whatever the nature of the program considered by Judge Ceresia in *Belter*, the record in this proceeding is devoid of any evidentiary material describing the nature/requirements of the sex offender program recommended to the petitioner herein. Nevertheless, for the reasons set forth below, the Court finds no basis to overturn the TAC recommendation, as affirmed by the commissioner's designee.

It is clear from the record that as early as October 12, 2007 petitioner refused to participate in the recommended ART and sex offender programs. It is also clear from the record that petitioner's refusal to participate in the programs is ongoing. The Court rejects any implied suggestion that it was the proper role of the TAC to investigate and make its own determination as to the appropriateness of the long-standing recommendations that petitioner participate in the ART and sex offender programs. The inmate grievance program set forth in 7 NYCRR Part 701 incorporates detailed procedures for the resolution of inmate complaints with respect to, *inter alia*, the ". . .application of any written or unwritten policy, regulation, procedure or rule of the Department of Correctional Services or any of its program units . . ." 7 NYCRR §701.2(a). It appears to the Court, moreover, that the subject matter of petitioner's concerns regarding the alleged improper recommendation that he participate in the DOCS Sex Offender Program would have been an appropriate subject for review in an inmate grievance proceeding. *See Harris v. Granger* 64 AD3d 837, *lv den* 13 NY3d 710 *and Matos v. Goord* 27 AD3d 940. Nothing in the record suggests, however, that petitioner ever initiated an inmate

grievance proceeding to challenge the recommendation that he participate in sex offender programming.

In the absence of a successful inmate grievance proceeding challenging the recommendation that he participate in sex offender programming, the Court finds petitioner's refusal to participate in such programming (to address the very conduct that resulted in his incarceration) provided a rational basis for the determination to withhold good time. *See Given v. Goord* 51 AD3d 1343 *and Edwards v. Goord,* 26 AD3d 659, *lv den* 7 NY3d 710, *rearg den* 7 NY3d 922. The Court also notes that petitioner's papers do not address his refusal to participate in the ART program.

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

ADJUDGED, that the petition is dismissed.

Dated: April 7, 2010, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice