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

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In the Matter of the Application of
NIGEL JOSEPH, #97-A-3826,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2011-0273.57
INDEX # 2011-600
ORI #NY016015J

-against-

BRIAN FISCHER, Commissioner, NYS Department of Corrections and Community Supervision, and **DARWIN LaCLAIR,** Superintendent, Franklin Correctional Facility,
Respondents.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated in Wyoming County by the Petition of Nigel Joseph, dated December 13, 2010 and filed in the Wyoming County Clerk's office. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the recommendation/requirement that he participate in the DOCCS Alcohol and Substance Abuse Treatment (ASAT) program, as set forth in the August 18, 2010 final determination of the Inmate Grievance Program Central Office Review Committee (CORC) in grievance no. FKN-9178-10.

An Order to Show Cause was issued out of Wyoming County on January 21, 2011. By Order dated June 13, 2011 the Supreme Court, Wyoming County (Hon. Mark H. Dadd) directed that venue be transferred from Wyoming County to Franklin County. The papers originally filed in Wyoming County were received in the Franklin County Clerk's office on June 17, 2011. By Letter Order dated June 22, 2011 the respondents were directed to serve answering papers. By Decision and Order/Supplemental Order to Show Cause, dated

September 21, 2011, this Court denied respondents' motion to dismiss and issued a Supplemental Order to Show Cause. The Court has since received and reviewed respondents' Answer, verified on November 10, 2011 and supported by the Affirmation of Justin C. Levin, Esq., Assistant Attorney General, dated November 10, 2011. The Court has received no Reply thereto from petitioner.

Petitioner alleges that he entered DOCCS custody in June of 1997 without any indication of drug or alcohol abuse. In December of 2004, however, while petitioner was confined at the Attica Correctional Facility, he was issued an inmate misbehavior report charging him with a violation of inmate rule 113.25 (drug possession). According to petitioner he was found guilty of the drug possession charge following an inmate disciplinary hearing and the determination of guilt was affirmed on administrative appeal. Petitioner goes on to assert that based upon the forgoing the facility guidance unit determined in May of 2004 to mandate that he complete the ASAT program. In paragraphs 13 and 14 of the petition the following is asserted:

> " . . . [U]pon being accepted into the [ASAT] program on 5/10/04 the petitioner met with correctional counselor and signed a counselor referral from [presumably, form] indicating the need for ASAT which was a result of the correctional counselor advise [sic] that if the petitioner refused the program his condition [sic] release date would come into question . . . meaning his conditional release date would be taken away from him. Upon being process [sic] . . . [petitioner] did admit to using marijuana since 12 years of age but this admition [sic] was only to guarantee that he be accepted into the [ASAT] program. Also this admition [sic] was advised by his correctional counselor that he should say any thing that is necessary in order to get into the [ASAT] program."

In the meantime, petitioner apparently commenced a CPLR Article 78 proceeding challenging the results of the inmate disciplinary hearing wherein he had been found guilty of violating inmate rule 113.25 (drug possession). According to petitioner, the

results and disposition hearing were, in fact, vacated by judgment (presumably issued out of Supreme Court, Wyoming County) dated January 3, 2005. Petitioner contends in this proceeding " . . . that the sole reason the Department Correctional Counselors referred the petitioner to the (ASAT) program is to the fact that he was issued a misbehavior on December 29, 2004 which charging him for drug possession which was later dismiss [sic]; and now the Respondent is using self admitances [sic] as their sole reason to mandate said program to the petitioner, when he simply did what he was advised to do by the Correction Counselors."

Petitioner challenged the recommendation/requirement that he participate in the DOCCS ASAT program by filing an inmate grievance complaint (FKN 9178/10) at the Franklin Correctional Facility on May 3, 2010. By Decision dated May 28, 2010 the Acting Superintendent of the Franklin Correctional Facility denied petitioner's grievance as follows:

> "The grievant feels he does not have a documented need for ASAT and is requesting the mandate to participate in the ASAT program be removed from his record.
>
> The grievant's concerns have been reviewed and investigated. It appears that ASAT was not initially a mandated need when the grievant entered the DOCS system in 1997. During an initial interview in May 2004 while at Five Points C.F., ASAT was first assessed as a mandated need. On 5/10/04 the grievant met with his correction counselor and signed a Counselor Referral Form indicating the need for ASAT as well as the willingness to participate in the program, among other recommendations. He was subsequently placed in the RSAT program and during the completion of the RSAT Treatment Plan on 11/15/04, the grievant self-disclosed the daily use of approximately 1 oz. of marijuana since 12 years of age and noted one of his goals to be 'to maintain abstinence'. This form was signed by the grievant.
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> It should also be noted that the grievant was subsequently assessed the need for ASAT at every facility he has been housed at since Five Points C.F.,

> has made numerous written requests to be assigned to ASAT in order to complete the program and even requested to be evaluated for the Chemical Dependency/Domestic Violence Program once offered at Eastern Annex.
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> Upon review of all available information, it appears the need for ASAT is based upon self-reported use and not as the result of a misbehavior report which was subsequently expunged. The mandated need for ASAT is appropriate and in accordance with the ASAT Program Operations Manual and, as such, this grievance is denied."

Upon administrative appeal the CORC, by final determination dated August 18, 2010, upheld the determination of the Superintendent of the Franklin Correctional Facility for the reasons stated therein. The CORC noted " . . . that the grievant was appropriately assessed in need for substance abuse treatment based upon his self admission to marijuana use. CORC advises him that this assessment is in accordance with former Deputy Commissioner Nuttall's 5/23/05 e-mail which stated that self-reported drug use indicates a need for referral to substance abuse treatment." This proceeding ensued.

To prevail on a challenge to the final results of a grievance proceeding an inmate " . . . must carry the heavy burden of demonstrating that the determination by CORC was irrational or arbitrary and capricious." *Frejomil v. Fischer*, 68 AD3d 1371, 1372 (citations omitted). *See Williams v. Goord*, 41 AD3d 1118, *lv den* 9 NY3d 812, *McKethan v. Kafka*, 31 AD3d 1078 and *Matos v. Goord*, 27 AD3d 940. The Court finds that petitioner has failed to carry this burden. Petitioner's self-admissions of drug abuse, dating back to 2004, support the recommendation/requirement that he participate in the ASAT program notwithstanding the bald assertions that such self-admissions were fabricated, upon the advice of a correction counselor, to gain admission into the ASAT program. This Court therefore concludes that the administrative determination recommending/requiring petitioner's participation in the ASAT program was not irrational or arbitrary and

capricious. *See Rodriguez v. Goord*, 50 AD3d 1328, *Frazier v. Miller*, 35 AD3d 950, *Gomez v. Goord*, 34 AD3d 963 *and Tucker v. Nuttall*, 31 AD 3d 1078. In reaching this conclusion the Court notes that DOCS has considerable discretion in determining the program needs of inmates. *See Gomez v. Goord*, 34 AD3d 963 *and McKethan v. Kafka*, 31 AD3d 1078.

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: January 30, 2012 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice