STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of DONNY BATTS,

Petitioner,

-against-

CHERYL MORRIS, AS DEPARTMENT OF CORRECTIONS DIRECTOR OF MINISTERIAL FAMILY AND VOLUNTEER SERVICES,

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 # 01-10-ST2750 Index No. 3385-11

Appearances: Donny Batts
Inmate No. 96-A-3482
Petitioner, Pro Se
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

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Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Justin C. Levin,
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of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate currently incarcerated at Attica Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a determination dated January

10, 2011 in which he was denied participation in the Family Reunion Program ("FRP"). The respondent made a motion to dismiss pursuant to CPLR 3211 (a) (5) on grounds that the statute of limitations expired prior to commencement of the proceeding. The Court, by order dated November 9, 2011, denied the motion and directed the respondent to serve an answer. The respondent has done so, and the Court now proceeds to address the merits of the petition.

The petitioner was sentenced on June 4, 1996 in Suffolk County Court to life imprisonment upon conviction of the crime of murder in the first degree. In 2007 he applied for participation in FRP. The application was denied and he filed an appeal. The appeal was denied by Shirley R. Baker, Coordinator of Family Services, in a determination dated October 29, 2007 which recited as follows:

> "I have completed my review of your appeal of denial of your Family Reunion Program application. I am not inclined to render a favorable decision to the appeal for the following reason:
>
> "Your program service reports up until February 2007 indicates your refusal to participate in a sex offender program as recommended by the Division of Guidance and Counseling. Please be informed that this office reviews such refusals as being indicative of behavior not to be rewarded with the Family Reunion Program.
>
> "Nevertheless, given your sentence structure, I am amenable to your submitting an application for consideration one (1) year from your last refusal, providing: (1) you have maintained your status on the sex offender program list and; (2) no new 'refusals' are indicated."

The petitioner applied again for participation in FRP on July 10, 2009. On September 23, 2009 Correctional Counselor Pat Callanan disapproved the application "[d]ue to the nature of IO. Sex offender counseling required prior to consideration." Less than four

months later, on January 19, 2010, the petitioner wrote to Counselor Callanan, indicating that although he had attempted to follow her recommendation and was currently on the Sex Offender Program waiting list, he had been unable to participate in the sex offender program. In a letter dated January 29, 2010 Counselor Callanan advised the petitioner that he could appeal her decision to Shirley Baker, Coordinator of Family Services. As a consequence the petitioner wrote a letter to Family Services Coordinator Baker on February 5, 2010 again mentioning his inability to participate in the sex offender program. He also wrote a letter to the Commissioner of the Department of Corrections and Community Service Commission ("DOCCS"), Brian Fischer. The matter was referred to Kenneth S. Perlman, Deputy Commissioner of Program Services of the Department of Corrections and Community Services ("DOCCS") who responded in a letter dated September 20, 2010 as follows:

> "Commissioner Fischer has asked me to respond to your letter to him regarding the denial of your Family Reunion Program appeal.
>
> "Please be advised that your letter was forwarded to the Division of Ministerial, Family and Volunteer Services. They have informed me that a favorable response was issued to your appeal on September 3, 2010 granting you the opportunity to participate in the Family Reunion Program.
>
> "Also, a favorable response requires additional processing such as the home visit with your family member. It is recommenced that you allow the process to develop as required, in order for the Family Reunion visit to come to fruition.
>
> "It is recommended that you address any future issues regarding this matter with your facility's assigned Family Reunion Program Coordinator."

Thereafter, Counselor Patricia Callanan, in a decision dated October 8, 2010, disapproved petitioner's application to participate in FRP. upon a finding that the petitioner,

had, on September 27, 2010, refused transfer to a correctional facility which offered the sex offender program. By letter received by DOCCS on December 22, 2010, petitioner appealed this determination.

Ultimately, respondent Morris, Director of Ministerial, Family and Volunteer Services, issued the determination dated January 10, 2011, which recited:

> "This is in response to your recent letters dated appealing the denial of your Family Reunion Program Applications.
>
> "A review of your record revealed that your applications were not processed in accordance with the guidelines outlined in Department Directive # 4500 - Family Reunion Program. As a result of this discovery a special review was conducted based on the heinous nature of your instant offense, Murder-1st. Specifically, during the commission of the offense, not only did you brutally beat and strangle your victim, you also cut her neck and attempted to rape her. Your careless acts ultimately resulted in her death. Further, review of your record revealed a recidivistic history laced with a pattern of violent and sexually related offenses. It is believed that your participation in this privileged program would jeopardize the safety of other program participants and disrupt facility operations. Therefore, you are deemed an unsuitable candidate for this program and will not be given consideration for future participation. Please note that this decision is final and cannot be appealed."

The petitioner indicates that he was approved for participation in the Family Reunion Program at Elmira Correctional Facility in 1997. He indicates that he completed an anger management program in 2008. In his account of the events of September or early October 2010, he maintains that he was offered a choice of either signing a refusal form for participation in the Sex Offender Program, or being transferred to a different facility, which he did not want to do. The petitioner further argues that the respondent violated Rule 220.5 (c), which recites that the deputy commissioner of program services shall make a ruling

within four weeks after receipt of an appeal. He also argues that the determination violates his right to equal protection under the constitution.

Rule 220 of the DOCCS rules recites as follows:

> "Any inmate has the right to apply for participation in the family reunion program (FRP), if his/her facility of residence offers the program. Eligibility is to be determined during processing, not prior thereto.
>
> (a) Preconditions. An inmate must meet the following preconditions to be eligible to participate in the FRP:
>
> "(3) Program participation. The inmate applicant must have participated in or pursued required programs as identified on his or her program/earned eligibility plan. Program/earned eligibility plan refusals, negative removals or regressions make an applicant ineligible until that need is addressed. Formal therapeutic programs sanctioned by the department, such as the Alcohol and Substance Abuse Treatment Program (ASAT) or other approved department treatment program (including CASAT, DWI, the Stay n' Out Program at Arthurkill and Bayview and other specialized substance abuse programs approved by the department) for substance abuse and the Aggression Replacement Training Program (ART) for aggression/violence, are the standards that must be met. Inmates who have actively pursued their plan yet who have not completed programs and satisfied their needs will be evaluated according to their entire record. Active participation or actual completion, however, may be required to satisfy this precondition." (see 7 NYCRR 220.2, emphasis supplied).

It is well settled that participation in FRP is a privilege, not a right, and the decision of whether to grant an inmate's request to participate is "'heavily discretionary'" (Matter of Defeo v New York State Department of Correctional Services, 56 AD3d 886, 887 [3rd Dept., 2008], quoting Matter of Doe v Coughlin, 71 NY2d 48, 55-56 [1987], cert denied 488 US 879 [1988]; Matter of Philips v Commissioner of Correctional Services, 65 AD3d 1407, 1408 [3rd Dept.,, 2009]; Matter of Georgiou v Daniel, 21 AD3d 1230, 1231 [3rd Dept., 2005],

Matter of Cabassa v Goord, 40 AD3d 1281, 1281 [3rd Dept., 2007]; Matter of Stacione v Baker, 24 AD3d 843, 843 [3rd Dept., 2005]). In reviewing an application to participate i in FRP, DOCCS must consider and balance a number of factors (see 7 NYCRR Part 220). Notably, an inmate's need to participate in recommended programming is a factor to be considered (see Matter of Rosas v Baker, 1 AD3d 665, 665-666 [3rd Dept., 2003]; Matter of Stacione v Baker, supra, at 843). "As long as the [Family Reunion] Program is implemented in a reasonable manner consistent with the inmate's status as a prisoner and the legitimate operational considerations of the facility, it will withstand judicial scrutiny"(Matter of Cliff v Brady, 290 AD2d 895, 896 [3d Dept., 2002], citations and internal quotation marks omitted]).

The record documents petitioner's refusal to transfer to a facility offering the Sex Offender Program, as well as petitioner's prior refusal to participate in the program. Because the petitioner had not completed the Sex Offender Program, respondent was required under Rule 220.2 and DOCCS Directive 4500 to review petitioner's FRP application on his entire record. The respondent, in her determination dated January 10, 2011 did so. She properly considered the crime for which he is incarcerated, as well as the underlying facts as set forth in the presentence investigation report, which was a part of his record.

Turning to petitioner's argument under DOCCS Rule 220.5, said rule recites as follows:

> "§ 220.5 Processing disapproval of inmate to participate
> (a) The family services coordinator:
> (1) informs inmate of disapproval, and counsels the inmate regarding the reason(s) for such disapproval and the steps that may be taken to obtain approval in the future;
> (2) prepares interview/disapproval for inmate's FRP file.

> (b) Advises the inmate that (s)he may appeal the disapproval by letter to the deputy commissioner for program services, with a copy to the facility family services coordinator, to be mailed within 10 days of notification of disapproval. The inmate's letter must state the reason(s) for challenging the disapproval.
> (c) The deputy commissioner for program services will respond within four weeks of receipt of the letter of appeal stating the reason(s) for sustaining or reversing the approval. The deputy commissioner's decision shall be final" (see 7 NYCRR 220.5).

DOCCS Directive 4500, paragraph V (D) recites:

> "D. Processing Disapproval of Inmate to Participate: Facility Family Reunion Correction Counselor shall:
>
> 1. Inform inmate of disapproval, and counsel the inmate regarding the reason(s) for disapproval and
> the steps that may be taken to obtain approval in the future. Also, advise the inmate that he/she may appeal the disapproval by letter to the Director of Ministerial, Family and Volunteer Services, with a copy to the facility Family Reunion Correction Counselor, mailed within ten (10) days of notification of disapproval. The inmate's letter must state the reason(s) for challenging the disapproval.
> The Director of Ministerial, Family and Volunteer Services will respond within four (4) weeks of receipt of the letter of appeal stating the reason(s) for sustaining or reversing the approval. The Director's decision shall be final.
>
> 2. Prepares interview/disapproval form for inmate's Family Reunion file."

The Court finds that respondent timely issued the appeals decision on behalf of the Deputy Commissioner of Program Services as the appropriate designee, and that there was no violation of Rule 220.5.

Lastly, the Court finds that the petitioner failed in his burden of demonstrating a violation of his constitutional right to equal protection under the law. 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 constitute an abuse of discretion. The Court concludes that the petition must be dismissed.

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for *in camera* review.

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. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: February 14, 2012
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated May 27, 2011, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated November 29, 2011, Supporting Papers and Exhibits

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SEALING ORDER

The following documents having been filed by the respondent with the Court for *in camera review* in connection with the above matter, namely, respondent's Exhibit B, Presentence Investigation Report, and respondent's Exhibit K, Intradepartmental E-Mail, Dated September 3, 2010, it is hereby

ORDERED, that the foregoing designated documents, including all duplicates and copies thereof, shall be filed as sealed instruments and not made available to any person or public or private agency unless by further order of the Court.

ENTER

Dated: February 14, 2012
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice