| **Matter of Flinn v Annucci** |
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| 2016 NY Slip Op 30977(U) |
| May 31, 2016 |
| Supreme Court, Clinton County |
| Docket Number: 2016-27 |
| Judge: S. Peter Feldstein |
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**STATE OF NEW YORK**
**SUPREME COURT** **COUNTY OF CLINTON**

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In the Matter of the Application of
**GUNTHER FLINN, #07-A-4329**,
Petitioner,

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

-against-

**DECISION AND ORDER**
**RJI #09-1-2016-0009.03**
**INDEX #2016-27**
**ORI #NY009013J**

**ANTHONY ANNUCCI**, Acting Commissioner,
New York State DOCCS,
Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition (denominated Affidavit in Support of an Order to Show Cause) of Gunther Flinn, verified on December 29, 2015 and filed in the Clinton County Clerk's office on January 7, 2016. Petitioner, who is an inmate at the Clinton Correctional Facility Annex, is challenging the June 5, 2015 determination denying his application to participate in the DOCCS Family Reunion Program (FRP). An Order to Show Cause was issued on January 12, 2016. The Court has since received and reviewed respondent's Notice of Motion to Dismiss, supported by the Affirmation of Christopher J. Fleury, Esq., Assistant Attorney General, dated March 4, 2016, as well as by the Affidavit of Cheryl Morris, DOCCS Director of Ministerial, Family and Volunteer Services, sworn to on March 1, 2016 (the Morris Affidavit)[1]. The Court has also received and reviewed petitioner's Reply to Motion to Dismiss, sworn to on March 18, 2016 and filed in the Clinton County Clerk's office on March 23, 2016. Before addressing the merits of respondent's motion to dismiss, the Court

[1] The Morris Affidavit is annexed to Assistant Attorney General Fleury's Affirmation as Exhibit B thereof.

finds it appropriate to first set forth the history of petitioner's multiple challenges to the denials of his 2013 application to participate in the FRP.

On November 30, 2009 petitioner was sentenced in Jefferson County Court, following a jury verdict, to controlling, consecutive determinate sentences of 13 years and 2 years, with 5 years post-release supervision, upon his convictions of the crimes of Attempted Murder 2°, Assault 1°, Intimidating a Victim or Witness 1° (two counts), Assault 2°, Obstructing Governmental Administration 2° and Resisting Arrest[2]. The 2009 convictions/sentencing were affirmed on direct appeal to the Appellate Division, Fourth Department and the Court of Appeals. *People v. Flinn*, 98 AD3d 1262, *aff'd* 22 NY3d 599, *rearg denied*, 23 NY3d 940. At sentencing the following observations were made by the sentencing judge:

> "On July 9th, 2006 Mr. Flinn, you arrogantly came out of the bar, and without provocation, you attacked [the victim] in the street. At that time you brutally chose to pile drive [the victim's] skull into the pavement . . . This attack was not provoked. There was a history of arrogant bullying confrontation that you had with [the victim] . . . You were 100 pounds heavier and a head taller than [the victim]. He was never a physical threat to you. And there wasn't any evidence that he was a physical threat to anybody else in this world. [The victim] ended up as the fiancé of the girl who had earlier rejected your advances."

This Court (Supreme Court, Clinton County) also gleans from the sentencing transcript that petitioner's victim sustained permanent brain damage as a result of the attack and subsequently committed suicide.

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[2] Petitioner had previously been sentenced to an apparent determinate term of 6 years upon his conviction, following a plea, of the crime of Attempted Murder 2°. However, on March 20, 2009, on direct appeal to the Appellate Division Fourth Department, the previous judgement of conviction was reversed, petitioner's plea was vacated and the matter was remitted to the Jefferson County Court for further proceedings on the underlying indictment. *People v. Flinn*, 60 AD3d 1304.

"The Family Reunion Program is designed to provide selected inmates and their families the opportunity to meet for an extended period of time in privacy. The goal of the program is to preserve, enhance and strengthen family ties that have been disrupted as a result of incarceration." 7 NYCRR §220.1. An inmate's participation in the FRP is a privilege, not a right. *See Mays v. Morris,* 133 AD3d 1050*, Rodriguez v. Morris,* 113 AD3d 1011 and *Bierenbaum v. Goord*, 13 AD3d 945. ". . . [T]he administrative decision process determining whether a particular prisoner shall be allowed to participate in the FRP is 'heavily discretionary' . . . and . . . the Department [of Corrections and Community Supervision] must consider and balance a number of delineated factors, including the prisoner's security classification, his behavioral history and the nature of his underlying conviction . . ." *Georgiou v. Daniel*, 21 AD3d 1230, 1231 (citations omitted). A decision denying an inmate's application to participate in the FRP will not be disturbed if supported by a rational basis. *See Philips v. Commissioner of Correctional Services,* 65 AD3d 1407 and *Williamson v. Nuttall*, 35 AD3d 926.

7 NYCRR §220.4 establishes a multi-layered procedure for determining whether an inmate's application to participate in the FRP should be approved. Upon receipt of various facility-level recommendations (7 NYCRR §220.4(a) through (e)) the central office "Deputy commissioner for program services (or designee)" is empowered to make the final determination. 7 NYCRR §220.4(f). "A special review [of an FRP application] will be conducted which will include consideration of the specifics of the crime, the age of the inmate at the time of the offense, progress in programs, custodial adjustment, victim impact and the entire case record. A special review to determine if eligibility will be conducted if an inmate . . . has been convicted of heinous or unusual crimes . . . [or] has

a history of domestic violence." 7 NYCRR §220.2(c)(1)(iii) and (x). If the inmate's application is disapproved, the final determination ". . . must set forth the reason(s) therefore." 7 NYCRR §220.4(f)(2). An inmate whose FRP application has been disapproved may take an administrative appeal to the "deputy commissioner for program services" pursuant to 7 NYCRR §220.5(b)."

Petitioner first applied to participate in the FRP in November of 2011. On December 29, 2011 he was approved by the DOCCS Central Office for FRP visitation with his mother, father and two daughters notwithstanding the fact that the Deputy Superintendent for Security (or his designee) at the facility level had recommended against approval based upon the violent nature of the offense underlying petitioner's incarceration. No visitation took place pursuant to the 2011 FRP approval and on June 23, 2013 petitioner again applied to participate in the FRP. In his 2013 application petitioner requested FRP visitation with his wife and two daughters, then ages six and five. There is no dispute that petitioner met the preconditions for eligibility to participate in the FRP (7 NYCRR §220.2(a)) and presented no disqualifying conditions (7 NYCRR §220.2(b)).

The facility-level Correction Counselor, Deputy Superintendent for Security designee, Family Services Counselor and Superintendent all recommended that petitioner's 2013 FRP application be approved. By decision dated April 26, 2014, however, the DOCCS Central Office disapproved the application. The Central Office determination specified that special review was required based upon "DV [presumably, Domestic Violence] - 7 Orders of Protection." The FRP denial determination also contained the following comment: "Heinous, vicious, unprovoked domestic nature of

instant offense presents inmate a risk to the safety and security of others in a limited supervision setting. Inmate is not a suitable candidate for FRP. May utilize traditional modes of telephone, letters and regular visitation to maintain family ties." Petitioner took an administrative appeal from the Central Office FRP denial determination but allegedly no timely response was forthcoming[3].

On August 12, 2014 petitioner commenced a CPLR Article 78 Proceeding (*Flinn v. Annucci*, Clinton County Index #2014-1229) challenging the April 26, 2014 denial of his 2013 FRP application. By Decision and Judgment dated December 11, 2014 this Court, drawing an analogy with discretionary parole denial determinations, found that the April 26, 2014 DOCCS Central Office FRP denial determination was predicated upon erroneous information and, therefore, had to be vacated. In this regard the Decision and Judgment of December 11, 2014 stated, in relevant part, as follows:

> "It is abundantly clear to the Court that the assault perpetrated by petitioner outside a bar - however else such assault might be characterized as - did not constitute an act of 'domestic violence,' as that term is commonly understood/utilized. In this regard it is noted that the orders of protection referenced in the Central Office FRP denial determination were apparently issued to protect potential witnesses of the July 9, 2006 assault rather than potential victims of domestic violence. Accordingly, the Court finds that the April 26, 2014 FRP denial determination must be vacated and the matter remanded to the DOCCS Central Office for *de novo* FRP consideration. Nothing herein should be construed as precluding the Central Office from considering the actual facts and circumstances of the July 9, 2006 criminal offense underlying petitioner's incarceration upon *de novo* review."

Apparently in response to the Court's Decision and Judgment of December 11, 2014 (Index #2014-1229) the DOCCS Central Office issued an "Amended Decision," dated

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[3] Under the provisions of 7 NYCRR §220.5(c) a response to an administrative appeal from an FRP denial determination must be made within four weeks of receipt of the administrative appeal document.

December 30, 2014, again disapproving petitioner's 2013 FRP application. As part of the Amended Decision Central Office indicated that special review was required based upon the following reasons: "OOP [presumably, Order(s) of Protection] - 7 Orders of Protection - Special review required, in accordance with [DOCCS] Directive 4500, III., C., (7[ )]." The Court notes that the above-referenced provision of DOCCS Directive 4500 mandates special review by Central Office where the inmate applying to participate in the FRP program "[h]as a history of domestic violence or order of protection . . ." The Amended Decision of December 30, 2014 reads as follows:

> "Due to the nature of the instant offense whereby inmate on 7/9/06 arrogantly came out of a bar and without provocation attacked the victim. Inmate brutally chose to pile drive the victim's skull into the pavement. This attack was not provoked. There was a history of arrogant bullying confrontation inmate had with victim. Inmate was 100 pounds heavier and a head taller than the victim. Victim was not a physical threat to inmate. The victim sustained permanent brain damage as a result of attack and subsequently committed suicide. Due to the heinous, vicious, unprovoked nature of crime, inmate presents a risk to the safety and security of others in a limited supervision setting. Inmate is not a suitable candidate for FRP participation."

An administrative appeal was taken from the Amended Decision of December 30, 2014 but allegedly no timely response was forthcoming.

On April 23, 2015 petitioner commenced a CPLR Article 78 Proceeding (*Flinn v. Annucci*, Clinton County Index #2015-589) challenging the Amended Decision of December 30, 2014. In the petition filed under Index #2015-589 petitioner first argued that the Amended Decision of December 30, 2014 was ultimately predicated upon the same erroneous information underlying the vacated April 26, 2014 FRP denial determination. In this regard petitioner, alluding to the Decision and Judgment of December 11, 2014(under Index #2014-1229), asserted that "[t]his Court has already determined the orders of protection listed in Directive 4500 are for victims of domestic violence, and the

petitioner has not committed an act of domestic violence." Petitioner also argued - as he did in the prior proceeding - that any FRP denial determination with respect to his 2013 application is inherently irrational where no reason is cited as to why his original (2011) application for FRP visitation with his parents and daughters was approved but his 2013 application for FRP visitation with his wife and daughters was denied. Finally, petitioner argued that the reference to the victim's suicide was improperly incorporated into the Amended Decision of December 30, 2014. According to petitioner, it was stipulated at trial that the cause of the victim's death was not relevant to the criminal proceedings but the Amended Decision of December 30, 2014 " . . . makes mention of the victim's death as if the petitioner was the casue [sic]."

Respondent moved to dismiss the proceeding under Index #2015-589, asserting that after the proceeding had been commenced the Amended Decision of December 30, 2014 was administratively vacated[4], that a *de novo* review of Petitioner's 2013 FRP application was conducted by the DOCCS Central Office and that on June 5, 2015 such application was again denied. Accordingly, respondent argued that petitioner had received all of the relief to which he would be entitled and, therefore, that the proceeding under Index #2015-589 must be dismissed as moot.

By Decision, Order and Judgment dated September 25, 2015 the Court granted respondent's motion to dismiss the petition filed under Index #2015-589. In that Decision, Order and Judgment the Court found, in relevant part, as follows:

> "While it is certainly arguable that the DOCCS Central Office exceeded its authority when, acting *sua sponte,* it vacated the Amended Decision of

[4] In his supporting Affirmation of June 8, 2015 Assistant Attorney General Fleury stated that upon review of the Central Office Amended Decision of December 30, 2014 his office contacted the DOCCS Central Office and " . . . discussed with Central Office its erroneous reliance upon the orders of protection issued in the underlying case as its basis for special review . . . Respondent agreed to administratively vacate the December 30, 2014 Central Office decision [the Amended Decision] and conduct a proper *de novo* review of Petitioner's [2013] FRP application consistent with this Court's December 11, 2014 Decision and Order." (Footnote reference omitted).

> December 30, 2014 and issued the determination of June 5, 2015 after this proceeding, challenging the Amended Decision, was commenced by filing on April 23, 2015. This Court nevertheless finds that the issuance of judgment vacating the Amended Decision of December 30, 2014 and remanding the matter to the DOCCS Central Office for *de novo* FRP consideration was the only relief to which petitioner would have been entitled upon judicial annulment of the Amended Decision of December 30, 2014. Since petitioner has been afforded this relief, the Court finds that the petition should be dismissed as moot (*see Moore v. Goord*, 31 AD3d 1075), subject to petitioner's right to judicial review with respect to the DOCCS Central Office decision of June 5, 2015 after administrative remedies with respect thereto [have] been exhausted."

In view of the unusual procedural path that petitioner's 2013 FRP application had taken, the Court's Decision, Order and Judgment of September 25, 2015 afforded him an additional 30 days from September 25, 2015 to take an administrative appeal from the DOCCS Central Office FRP denial determination of June 5, 2015 (in the event he had not already done so).

In the petition currently before the Court under Clinton County Index #2016-27 petitioner alleges that he took an administrative appeal from the DOCCS Central Office FRP denial determination of June 5, 2015 but no timely response was forthcoming. Annexed to the Petition is a copy of a one-page appeal letter dated June 26, 2015. Respondent's current motion to dismiss, however, is premised upon the assertion that petitioner failed to exhaust administrative remedies with respect to the June 5, 2015 determination. In this regard the following is asserted in the relevant parts of paragraphs three and four of the Morris Affidavit: "I am aware of the instant matter in which Inmate Gunther Flinn . . . is alleging that he appealed by letter dated June 26, 2015 the June 5, 2015 F.R.P. Special Review denial of his participation in the F.R.P. . . . At the request of the Office of the Attorney General in connection with this matter, I have conducted an exhaustive review and search of Inmate Appeals in the records maintained at the Office of Ministerial, Family and

Volunteer Services and have found no evidence that Inmate Gunther Flinn . . . submitted an appeal of the June 5, 2015 F.R.P. Special Review determination."

DOCCS administrative review of petitioner's 2013 FRP application has certainly taken a convoluted path, as described in this Decision and Order. The application was first denied by decision dated April 26, 2014 and there was apparently no timely decision made with respect to petitioner's administrative appeal therefrom. Upon judicial review (Index #2014-1229) the April 26, 2014 FRP denial determination was vacated and the matter remanded to DOCCS Central Office for *de novo* consideration. Petitioner's 2013 FRP application was next administratively denied by Amended Decision dated December 30, 2014. Once again, there was apparently no timely response to petitioner's administrative appeal from that determination and petitioner again sought judicial review in the context of a CPLR Article 78 proceeding (Index #2015-589). Only after the commencement of that proceeding did DOCCS officials - apparently acting at the behest of counsel - purport to administratively reverse the Amended Decision of December 30, 2014 and issue a third FRP denial determination, dated June 5, 2015.

In the instant proceeding (Index #2016-27) petitioner, for the third time, seeks judicial review with respect to the administrative denial of his 2013 FRP application. Given petitioner's dogged determination to obtain judicial review of an FRP denial determination that is not tainted by any erroneous reference to domestic violence - as evidence by all the foregoing - this Court is simply not persuaded that he neglected to take a third administrative appeal from the June 5, 2015 determination. The Court's finding on this point should not be construed as calling into question the veracity of Director Morris but, rather, as recognizing the possibility that a duly submitted administrative appeal might, for unknown reasons, fail to reach its intended destination or, upon reaching such destination, might be inadvertency misplaced/misfiled.

In any event, the Court finds it appropriate to deny respondent's motion to dismiss and to direct petitioner to re-submit his administrative appeal from the June 5, 2015 FRP denial determination within 30 days of the date of this Decision and Order. The respondent, in turn, is directed to issue a final determination on administrative appeal within four weeks of receipt of petitioner's letter of appeal. In order to avoid the prospect of a fourth CPLR Article 78 proceeding the Court will retain jurisdiction of this proceeding and counsel is directed to provide the Court with a copy of respondent's final determination on administrative appeal as soon as is practical after issuance of such final determination. Additional order(s) of the Court may issue at that juncture.

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

**ORDERED**, that respondent's motion to dismiss is denied; and it is further

**ORDERED**, that petitioner re-serve a copy of his administrative appeal from the June 5, 2015 FRP denial determination within 30 days of the date of this Decision and Order; and it is further

**ADJUDGED**, that respondent is directed to consider and dispose of petitioner's re-submitted administrative appeal in a matter not inconsistent with this Decision and Order.

**Dated:** May 31, 2016 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice