Matter of Williams v Annucci
2014 NY Slip Op 33386(U)
December 8, 2014
Supreme Court, Clinton County
Docket Number: 2014-743
Judge: S. Peter Feldstein

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

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In the Matter of the Application of
PAUL WILLIAMS, #12-A-3596,

Petitioner,

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

DECISION AND JUDGMENT
RJI#09-1-2014-0288.22
INDEX # 2014-743
ORI #NY009013J

-against-

ANTHONY ANNUCCI, Commissioner, NYS DOCCS and **JEFF McCOY**, Deputy Commissioner of Programs,

Respondents.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Paul Williams, verified on May 15, 2014 and filed in the Clinton County Clerk's office on May 23, 2014. Petitioner, who is an inmate at the Clinton Correctional Facility, is challenging the February 2014 denial of his application to participate in the DOCCS Family Reunion Program (FRP). The Court issued an Order to Show Cause on May 28, 2014 and has received and reviewed respondents' Answer and Return, including *in camera* materials, verified on August 11, 2014 and supported by the August 11, 2014 Letter Memorandum of Hilary D. Rogers, Esq., Assistant Attorney General. The Court has also received and reviewed petitioner's Reply thereto, sworn to on August 29, 2014 and filed in the Clinton County Clerk's office on September 11, 2014[1]. Respondents' Supplemental Return, consisting of a copy of the Sentence and Commitment order underlying petitioner's ongoing incarceration in DOCCS custody, was filed in the Clinton County Clerk's office on October 27, 2014.

[1] A seemingly identical Reply to respondents' Answer and Return, sworn to on September 10, 2014, was filed in the Clinton County Clerk's office on September 12, 2014.

On July 25, 2012 petitioner was sentenced in Supreme Court, Queens County, as a second violent felony offender, to an indeterminate sentence of 25 years to life together with two determinate terms of 25 years each, with 5 years post-release supervision, upon his convictions of the crimes of Murder 2°, Attempted Murder 2° and Assault 1°. Although the two determinate terms were directed to run concurrently with respect to each other, the indeterminate sentence was directed to run consecutively with respect to the concurrent determinate terms.

Petitioner originally submitted an application to participate in the FRP in February of 2013. That application was ultimately denied by the DOCCS Central Office on April 1, 2010 based upon the "[l]ethal nature" of the crimes underlying petitioner's incarceration. Although the FRP denial determination included the comment that it was "reasonable" for petitioner to complete an anti-aggression program prior to re-application, the determination also contained the notation that "[c]ompletion of program does not imply approval."

In September of 2013, after successfully completing an anti-aggression program, petitioner re-applied to participate in the FRP. In his application petitioner requested FRP visitation with his wife and 3-year old son. 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)). In addition, there is nothing in the record to suggest that petitioner application to participate in the FRP was subject to special review (7 NYCRR §220.2(c)).

"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 Rodriguez v. Morris,* 113 AD3d 1011, *Bierenbaum v. Goord*, 13 AD3d 945 and *Mercer v. Goord*, 258 AD2d 960, *lv denied* 93 NY2d 812. ". . . [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 the 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). 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).

In the case at bar the facility-level Correction Counselor, Deputy Superintendent for Security designee, Family Services Counselor and Superintendent all recommended that petitioner's FRP application be approved. By decision dated February 6, 2014, however, the DOCCS Central Office disapproved the application with the following comment: "Your multi-state criminal history which includes, but is not limited to, Armed

Rob. of Mail Carrier demonstrates a lack of disregard [sic] for human life which escalated to death of one and critically wounding another. Out of state charge (card-forgery device) and fugitive from justice lack disposition. When considering and balancing info, your participation in limited supervision privilege is not warranted. Family ties may be obtained thru traditional modes of telephone, letter and regular visitation." Although petitioner took an administrative appeal from the central office FRP denial determination, no response thereto was forthcoming. This proceeding ensued.

Where an inmate's application to participate in the FRP is subject to special review pursuant to 7 NYCRR §220.2(c), such review " . . . 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." 7 NYCRR §220.2(c)(1). Although, as noted previously, petitioner's application to participate in the FRP was not subject to special review, the Court nevertheless finds that DOCCS central office officials were not precluded from considering the nature of the crime(s) underlying petitioner's incarceration, together with his prior criminal history, in reaching a final determination with respect to such application. With this in mind, the Court finds nothing irrational in the denial of petitioner's application based upon his multi-state criminal history which culminated in the 2012 Murder 2°, Attempted Murder 2° and Assault 1° convictions.

The petitioner also argues that the processing of the disapproval of his application violated departmental regulations since he was never counseled with respect to " . . . steps that may be taken to obtain approval in the future . . ." 7 NYCRR §220.5(a)(1). While the Court has some concern with respect to the apparent failure to counsel petitioner in this respect, it is noted that the FRP denial determination is based upon the nature of the crimes underlying petitioner's incarceration as well as his prior criminal history. The

Court reads the counseling requirements being applicable where there are concrete steps that an inmate might take to improve his/her chances of participating in the FRP at some future date. In the case at bar it is hard to perceive what such steps might be other than to maintain satisfactory programing/disciplinary records for a more extended period of time. Under these circumstances the Court finds that any potential regulatory err or does not warrant reversal of the FRP denial determination.

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: December 8, 2014 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice