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

_____X

In the Matter of the Application of
ANGELO TORRES, #82-A-0449,
Petitioner,

For a Judgment Pursuant to Article 78
Of the Civil Practice Laws and Rules

DECISION AND JUDGMENT
RJI #09-1-2007-0121.013
INDEX # 07-0275
ORI #NY009013J

-against-

SHIRLEY BAKER, Coordinator,
Ministerial and Family Services, and
FRANK BUSHEY, Family Services Counselor,
Respondents.

_____X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Angelo Torres, verified on February 20, 2007, and stamped as filed in the Clinton County Clerk's office on February 28, 2007. Petitioner, who is an inmate at the Clinton Correctional Facility, is challenging the determination denying his application to participate in the DOCS Family Reunion Program (FRP). The Court issued an Order to Show Cause on March 6, 2007, and has received and reviewed respondents' Answer and Return, verified on April 20, 2007, as well as respondents' Letter Memorandum of April 20, 2007. The Court has also received and reviewed petitioner's Reply thereto, filed in the Clinton County Clerk's office on June 21, 2007. By Letter Order dated September 21, 2007, the Court directed respondents to supplement the record with respect to the issue of ". . . whether there is any applicable regulation, directive, and/or policy (etc.) providing for an administrative segregation cycle for the family reunion program at Clinton Correctional Facility." In response thereto the Court received correspondence from counsel for the respondents, with exhibits, dated October 12, 2007.

On August 6, 1981, the petitioner was sentenced in Supreme Court, Kings County, as a second felony offender, to two controlling, consecutive indeterminate sentences of imprisonment of 25 years to life and 12 ½ to 25 years upon his convictions of the crimes of Murder 2°, Attempted Murder 2°, and Criminal Possession of a Weapon 2°.

The petitioner was placed in administrative segregation (7 NYCRR §301.4) on July 25, 1995, and continues in such placement to date. The basis for petitioner's initial placement in administrative segregation is set forth in the February 20, 2007, sixty-day administrative segregation review as follows:

> "An ongoing investigation based on information from confidential sources indicates that inmate Torres is involved in promoting violence against other inmates and unauthorized group activities such as narcotic trafficking, extortion and unauthorized group activity within the Department of Corrections. This confidential information indicates that Torres has been involved in ordering assaults on other inmates for various reasons including non-payment of drug money and prevention of information being provided to this Administration. Based on all information, Torres is deemed to be a threat to the safety of other inmates and a threat to the good order and security of the facility."

It was noted, moreover, in the summary report and recommendation of the central office three-member committee, submitted in connection with the February 20, 2007, administrative segregation review, ". . . that based on recently acquired information, Inmate Torres continues to be regarded as an authority figure in . . . [an] aforementioned criminal organization."

On December 15, 2005, the petitioner applied to participate in the FRP at the Clinton Correctional Facility, seeking visitation with his sister, two adult nieces and one adult daughter. "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 Bierenbaum v. Goord*, 13 AD3d 945 and *Mercer v. Goord*, 258 AD2d 960, *lv den* 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 Correctional Services] 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 Williamson v. Nuttall*, 35 AD3d 926.

7 NYCRR §220.4 establishes a multi-layered procedure for evaluating an inmate's application for participation in the FRP. Upon the receipt of various recommendations the Assistant Commissioner, or his designee, is empowered to make a final determination. If the inmate's application is disproved, the final determination ". . . must set forth the reason(s) therefore." 7 NYCRR §220.4(f)(2). An inmate whose FRP application has been disproved may take an administrative appeal pursuant to 7 NYCRR §220.5(b). In the case at bar the approval of petitioner's FRP application was recommended by petitioner's correction counselor and the Deputy Superintendent for Security, or his designee, pursuant to 7 NYCRR §220.4(b) and (c). The facility family services coordinator and superintendent, or his designee, however, both recommended the denial of petitioner's FRP application pursuant to 7 NYCRR §220.4(d) and (e). The petitioner's FRP application was ultimately disapproved at the central office level and the petitioner was

advised of that disapproval by notice dated January 31, 2006. The reason for disapproval was stated as follows: "Your listed visitors have not yet established a pattern of visiting in the visiting room. The FRP program is intended to be a supplement to the visiting room, not a replacement to the visiting room." Upon administrative appeal the respondent Baker denied petitioner's FRP application albeit on different grounds than the underlying denial. The respondent Baker's December 18, 2007, denial determination reads, in relevant part, as follows:

> "I have completed my review of your appeal and find that at this time, you are not an ideal candidate for the Family Reunion Program as your participation may lead to an incident that could seriously jeopardize not only your safety, but also the safety and security of other inmates, visitors, the Family Reunion Program site, and the facility, due in part to:
>
> 1) your placement in Administrative Segregation;
> 2) the reason for such placement.
>
> Therefore, I am not incline [sic] to render a favorable decision to your appeal."

The petitioner maintains that the denial of his FRP application ". . . was improper because it was unreasonable and made without due regard to the numerous facts of the situation." The petitioner points out that his correction counselor and the Deputy Superintendent for Security, both of whom allegedly are members of the committee conducting 60-day reviews of petitioner's administrative segregation status, recommended approval of the petitioner's FRP application. In particular, the petitioner alleges that the Deputy Superintendent for Security is chairman of the administrative segregation review committee and yet did not express any safety or security concerns when he recommended approval of petitioner's FRP application. The petitioner also notes that the facility Superintendent, although recommending denial of petitioner's FRP

application, specifically found that petitioner ". . . meets both Security and Program criteria for FRP." The record reveals that the Superintendent's denial recommendation was based solely upon petitioner's failure to establish required visitation. Even the central office's ultimate denial of his FRP application, the petitioner goes on to note, was based solely upon the failure to meet the visitation criteria. No safety or security concerns were expressed. According to the petitioner, "[t]he Respondents denial for participation in the FRP based on security concerns must be found without merit when those who are trained, experienced and deal solely with security matters on a daily basis dispute and refute what respondents claim."

The petitioner also challenges the rationality of respondent Baker's FRP denial determination by alleging that the Clinton Correctional Facility administration has established a rigid structure whereby inmate's participating in the FRP program do so in cycles according to their various security classifications. According to the petitioner, he ". . . would more than likely be placed on a cycle to participate on the FRP cite [site] alone since no other Ad. Seg. inmates are participating [in the FRP program]." The petitioner next alleges that he participated in the FRP program for approximately six years without incident (presumably prior to his 1995 placement in administrative segregation). "More to the point," the petitioner goes on to allege, "[p]etitioner does not have a heinous crime, his program participation is excellent, he has only received 15 days keeplock in the last 12 yrs . . . his security classification has been lowered to medium A status . . . and he has completed almost 27 yrs. on a 25 to life sentence. In 8 months the petitioner returns to the parole board to be considered for release."

Given the petitioner's ongoing placement in administrative segregation and, more importantly, the reasons underlying such placement, the Court finds that the ultimate determination denying petitioner's application to participate in the FRP program was rationally based upon concerns with respect to the safety and security of the FRP site, the petitioner, as well as other inmate's and their visitors participating in the FRP program. *See Correnti v. Baker*, 19 AD3d 945, *lv den* 5 NY3d 715 and *Payne v. Goord*, 12 AD3d 733. In reaching this conclusion it is noted that the record, as supplemented in response to the Court's Letter Order of September 21, 2007, clearly demonstrate the absence of any provision for a separate, administrative segregation cycle for the FRP at the Clinton Correctional Facility.[1] *See Cabassa v. Goord*, 40 AD3d 1281.

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: November 7 , 2007 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice

[1]The supplemented record also indicates that DOCS Directive 4500(III)(b)(3), revised as of August 31, 2007, now provides that an inmate's administrative segregation status disqualifies such inmate from FRP participation. The Court finds that the revision, however, is not relevant to its judicial review of respondent Baker's determination denying petitioner's application to participate in the FRP program. The Court's review of the denial determination is limited to the grounds invoked by the respondent and it is powerless to affirm by substituting more adequate or proper grounds. *See Scherbyn v. Wayne-Finger Lakes Goord of Cooperative Educational Services*, 77 NY2d 753 and *Bierenbaum v. Goord*, 13 AD3d 945.