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| Matter of Miles v Artus |
| 2008 NY Slip Op 30653(U) |
| January 28, 2008 |
| Supreme Court, Clinton County |
| Docket Number: |
| Judge: S. Peter Feldstein |
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF CLINTON

X

In the Matter of the Application of
ALONZO MILES, #03-A-5467,

Petitioner,

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

**DECISION AND JUDGMENT
RJI #09-1-2007-0322.033
INDEX # 07-0689
ORI #NY009013J**

-against-

DALE ARTUS, Superintendent,
Clinton Correctional Facility,
L. TURNER, SHIRLEY BAKER,
JOHN H. NUTTALL, and
BRIAN FISHER, Commissioner,
New York State Department of Correction,

Respondents.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Alonzo Miles, verified on May 17, 2007, and stamped as filed in the Clinton County Clerk's office on May 30, 2007. Petitioner, who is an inmate at the Clinton Correctional Facility, is challenging the denial of his application to participate in the DOCS Family Reunion Program (FRP). The Court issued an Order to Show Cause on June 11, 2007, and has received and reviewed respondents' Answer and Return, including *in camera* materials, verified on August 3, 2007, as well as respondents' Letter Memorandum of August 3, 2007. The Court has also received and reviewed petitioner's Reply thereto, filed in the Clinton County Clerk's office on August 27, 2007.

On October 2, 2003, the petitioner was sentenced in Supreme Court, Kings County, to an indeterminate sentence of imprisonment of 25 years to life upon his conviction of the crime of Murder 1^o. The incident underlying petitioner's murder conviction involved him beating the victim (his girlfriend) and stabbing her 37 times.

The petitioner has submitted at least four applications to participate in the FRP at the Clinton Correctional Facility. In each instance the petitioner sought unsupervised visitation with his wife. "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 to the “assistant commissioner” pursuant to 7 NYCRR §220.5(b).

At this juncture, before examining the disposition of petitioner’s various FRP applications, the Court deems it advisable to clarify the role of the facility Family Services Coordinator (Frank Bushey at the Clinton Correctional Facility) in the processing of FRP applications. The facility Family Services Coordinator initially receives an inmate’s FRP application and performs certain administrative tasks with respect thereto before forwarding the application to the inmate’s correction counselor. 7 NYCRR §220.4(a). Later on in the review process the Family Services Coordinator reviews certain records, attaches pertinent supplemental data and makes his or her own recommendation as to the approval or disapproval of the FRP application before forwarding same to the facility superintendent. 7 NYCRR §220.4(d). Later, after a final determination is made with respect to the FRP application by the assistant commissioner, or designee, the

application is returned to the facility Family Services Coordinator (7 NYCRR §220.4(f)(3)), who then, if the FRP application is not approved, informs the inmate of the disapproval. 7 NYCRR §220.5(a)(1).¹ Thus, while the Facility Family Services Coordinator performs certain administrative tasks and makes a recommendation as to whether or not a particular FRP application should be approved, the facility Family Service Coordinator has no regulatory authority to approve or disapprove an FRP application. To the extent an inmate receives a notice of disapproval from the Family Services Coordinator, the Family Services Coordinator is only acting, in effect, as a messenger with respect to a denial determination issued by the assistant commissioner or designee.

By notice dated November 10, 2005, a previous application of the petitioner to participate in the FRP program was denied based upon a “negative mental health report.” A copy of a November 7, 2005, memorandum from Maureen Bosco, Unit Chief, Central New York Psychiatric Center, to Frank Bushey, is annexed to the respondents’ Answer and Return as Exhibit B. The memorandum, which presumably forms the basis for the aforementioned November 10, 2005, FHRP denial determination, reads, in relevant part, as follows: “This is to inform you that Inmate Miles was evaluated by mental health staff on 10/25/05. At this time, it is not recommended that Inmate Miles participate in the Family Reunion Program.” There is nothing in the record to suggest that petitioner took an administrative appeal from the November 10, 2005, notice of the denial of his FRP application.

On January 18, 2006, the petitioner submitted a new FRP application. By notice dated March 6, 2006, the petitioner was advised that his FRP application had been denied based upon “. . . a negative OMH [Office of Mental Health] evaluation for unsupervised FRP visits.” Nothing in the record suggests that a separate mental health evaluation was obtained in connection with petitioner’s January 18, 2006, RFP application and the Court presumes that the reference to the evaluation in the denial notice of March 6, 2006, was to the previously mentioned November 7, 2005, Bosco

¹The specific duties of the Family Services Coordinator with respect to approved FRP applications (7 NYCRR §220.4(g), (i) and (j)) are not relevant to this proceeding.

memorandum. Petitioner's administrative appeal from the March 6, 2006, notice of denial was received in DOCS Office of Ministerial and Family Services on March 24, 2006. An April 4, 2006, memorandum from respondent Shirley Baker, Coordinator, DOCS Office of Ministerial and Family Services, to Frank Bushey, Family Services Coordinator, Clinton Correctional Facility, reads as follows:

"The above referenced [Alonzo Miles] appealed the denial of his FRP application. I have completed my review and I find (1) whereas his crime is disturbing it is not heinous in that its nature does not make him vulnerable and a magnet for victimization; (2) he has completed A.R.T. [Aggression Replacement Training]; (3) he has an acceptable disciplinary; (4) his wife meets the visitation requirement. Therefore, I am inclined to render a favorable decision to his appeal. Please so inform him of my decision, reactivate his application, and continue processing it in accordance with Dir. 4500. . ."

On the copy of this memorandum attached to the respondents' Answer and Return as part of Exhibit C an unsigned, undated handwritten note states "approval rescinded due to OMH report."

In the meantime, on March 27, 2006, the petitioner submitted a third application to participate in the FRP program. After conflicting recommendations were made by various DOCS officials, the application was received in the DOCS central office on April 13, 2006. Approximately three months later, on July 12, 2006, the petitioner's March 27, 2006, FRP application was denied, based upon "negative OMH reconn.," by a document signed by Shirley Baker, Coordinator, DOCS Office of Ministerial Family Services. Notice of such denial from Frank Bushey, Family Services Coordinator, Clinton Correctional Facility, was dated July 18, 2006. Petitioner's administrative appeal, dated July 19, 2006, was addressed to respondent John Nuttall, Deputy Commissioner, Program Services, DOCS Office of Ministerial and Family Services. In his administrative appeal the petitioner wrote that shortly after his most recent FRP application was submitted ". . . Mr. Bushey ordered that I undergo a psychiatric evaluation as part of a special review to determine my eligibility to participate in the F.R.P. . . . Thereafter, at Clinton Correctional Facility I was interviewed as part of a psychiatric evaluation by Clinton Correctional Facility, Satellite Unit, Psychologist, Kieth [sic] Ford . . . Upon completing his psychiatric evaluation, Mr. Ford failed to document such psychiatric

evaluation in his findings . . . Unit Chief, Maureen Bosco . . . has no record of such psychiatric evaluation in the Clinton Correctional Facility . . . records/files.” Petitioner goes on to state in his administrative appeal that notwithstanding the foregoing, “[o]n July 18, 2006, Mr. Bushey rendered a decision disapproving . . . my F.R.P. application based upon a ‘negative mental-health evaluation.’” The record before the Court does not include a decision on petitioner’s administrative appeal of July 19, 2006.

On July 26, 2006, only one week after the date of his most recent administrative appeal, the petitioner submitted yet another application to participate in the FRP program. Again, the application review sheet showed conflicting recommendations from the various DOCS officials charged with reviewing the application. The last official to review the application, respondent Dale Artus, Superintendent, Clinton Correctional Facility, recommended on August 21, 2006, that the petitioner’s application be denied. The record before the Court, however, does not include reference to a final decision with respect to petitioner’s July 26, 2006, FRP application. Nevertheless, the record does include a copy of an August 30, 2006, letter from John H. Nuttall, Deputy Commissioner, Program Services to the petitioner which reads as follows: “The Division of Ministerial, Family and Volunteer Services has informed me that subsequent to their March 2, 2006, decision, you submitted a new application which they received on April 13, 2006. That application was returned to the Family Reunion Program office at the Clinton Correctional Facility approved on July 13, 2006.” Deputy Commissioner Nuttall’s August 30, 2006, letter to petitioner, the Court notes, directly contradicts the written disapproval of petitioner’s FRP application signed by respondent Shirley Baker, Coordinator, Ministerial and Family Services on July 12, 2006.

The state of the record after the issuance of Deputy Commissioner Nuttall’s August 30, 2006, letter includes reference to an inmate grievance proceeding (CL-53936-06) filed by the petitioner on September 8, 2006. In his grievance the petitioner takes note of Deputy Commissioner Nuttall’s statement that petitioner’s March 27, 2006, FRP application was approved by the Division of Ministerial and Family Services and returned to the FRP office at the Clinton Correctional Facility on July 13, 2006. According to the petitioner’s grievance, “. . . Frank Bushey went beyond his authority by still denying me

my participation in the F.R.P. program. I am requesting that Mr. Bushey be directed to comply with the approved decision rendered by the central office on July 13, 2006. . .” The petitioner’s grievance was denied by the Superintendent of the Clinton Correctional Facility on October 5, 2006.² There is nothing in the record, however, to indicate that petitioner appealed the superintendent’s denial determination to the Inmate Grievance Program Central Office Review Committee pursuant to 7 NYCRR §701.5(d).

In addition to the filing of the above-referenced grievance, the petitioner, after August 30, 2006, instituted various informal efforts to secure approval of his application to participate in the FRP. On September 14, 2006, for example, the petitioner wrote to Deputy Commissioner Nuttall complaining that despite the Deputy Commissioner’s letter of August 30, 2006, various DOCS officials refused to acknowledge that the petitioner’s March 27, 2006, FRP application had been approved on July 13, 2006. Deputy Commissioner Nuttall responded, in relevant part, on October 18, 2006, as follows:

“Please be advised that the Division of Ministerial, Family and Volunteer Services has informed me that all inmate applicants require final clearance by medical and/or Office of Mental Health. In your case, the report from the Office of Mental Health was not favorable. Thus, the contingent approval by their office had to be rescinded.

Further, you subsequently, submitted a new application³ which is currently undergoing Central Office processing . . .”

On November 16, 2006, facility Family Services Coordinator Bushey wrote to Maureen Bosco requesting a new mental health evaluation with respect to the petitioner. That new evaluation was apparently completed on December 11, 2006, and on March 12, 2007, Ms. (Dr?) Bosco wrote a memo to Mr. Bushey stating “[t]his is to inform you that Inmate Miles was evaluated by mental health staff on 12/11/06. At this time,

²As if to add to the confused state of the record in this proceeding, the October 5, 2006, grievance denial determination of the Superintendent of the Clinton Correctional Facility notes “. . . that grievant submitted a new application, which was logged in subsequent to Deputy Commissioner Nuttall’s [August 30, 2006] letter to grievant.” The record before the Court, however, indicates that petitioner’s last FRP application was dated July 26, 2006.

³The Court is not certain which FRP application Deputy Commissioner Nuttall is referring to. As noted previously, the record before the Court is devoid of reference to any FRP application submitted by the petitioner after July 26, 2006.

it is not recommended that Inmate Miles participate in the Family Reunion Program.” Three days later, on March 15, 2007, facility Family Services Coordinator Bushey notified petitioner that “[t]his office has received back a report from the office of mental health. The report came back with a negative recommendation for FRP participation. Therefore, your application is disapproved.”

Setting aside for the moment the issue of which FRP application Mr. Bushey is referring to in his March 15, 2007, correspondence, the Court notes that Mr. Bushey, as Family Services Coordinator at the Clinton Correctional Facility, has no statutory or regulatory authority to disapprove (or approve) any FRP application. As noted previously, while the facility Family Services Coordinator performs certain administrative tasks and recommends whether or not a particular FRP application should be approved, final regulatory authority to approve or disapprove an FRP application lies with the assistant commissioner or designee (7 NYCRR §220.4(f)(3)). The facility Family Services Coordinator only acts, in effect, as a messenger with respect to the final disapproval determination of the assistant commissioner or designee. 7 NYCRR §220.5(a)(1). This fact is underscored by Deputy Commissioner Nuttall’s April 5, 2007, letter to the petitioner with respect to the status of petitioner’s FRP application.

According to the Deputy Commissioner “[t]he Division of Ministerial, Family and Volunteer Services has informed me that the response from the Office of Mental Health was received March 13, 2007. Your application will complete final processing and be returned to your facility Family Reunion Program Office.” The record before the Court, however, contains no reference to a post April 5, 2007, final decision with respect to petitioner’s application to participate in the FRP.

The record in this preceding can be described, charitably, as confusing, sometimes contradictory, and possibly incomplete. Notwithstanding Deputy Commissioner Nuttall’s letter of August 30, 2006, the record before the court clearly indicates that petitioner’s March 27, 2006, FRP application was denied on July 12, 2006, with notice of such denial to the petitioner dated July 18, 2006. Although there is some indirect reference to an FRP application submitted by the petitioner after Deputy Commissioner Nuttall’s letter of August 30, 2006, the latest FRP application clearly documented in the

record is dated July 26, 2006, and stamped as received, presumably by the facility Family Services Coordinator, on August 1, 2006. In addition, as noted previously, there is nothing in the record to indicate that final action with respect to petitioner's most recent FRP application was ever taken by the assistant commissioner or designee. In the absence of such final action the Court finds that Frank Bushey, Family Services Coordinator, Clinton Correctional Facility, exceeded his regulatory authority when he purported to disapprove petitioner's FRP application on March 15, 2007. To the extent respondents assert that petitioner failed to exhaust administrative remedies by taking an administrative appeal (7 NYCRR § 220.5 (b)) from Mr. Bushey's March 15, 2007, "determination," the court rejects that assertion. In this regard the Court also notes that petitioner was advised by Deputy Commissioner Nuttall on April 5, 2007, that final processing of the FRP application was not complete.

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

ADJUDGED, that the petition is granted, without costs or disbursements , but only to the extent that this matter is remanded to the assistant commissioner or designee who shall forthwith make a final determination which respect to petitioner's FRP application of July 26, 2007.

Dated: January 28, 2008, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice