

Matter of McClane v Baker

2011 NY Slip Op 33049(U)

November 16, 2011

Sup Ct, Albany County

Docket Number: 5253-11

Judge: George B. Ceresia Jr

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STATE OF NEW YORK
 SUPREME COURT COUNTY OF ALBANY

In The Matter of BRIAN MCCLANE,
Petitioner,
-against-
 SHIRLEY R. BAKER, COORDINATOR,
 MINISTERIAL AND FAMILY 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
 RJ# 01-11-ST2945 Index No. 5253-11

Appearances: Brian McClane
 Inmate No. 02-A-5095
 Petitioner, Pro Se
 Clinton Correctional Facility
 P.O. Box 2011
 Dannemora, NY 12929

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 (Cathy Y. Sheehan,
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 of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Clinton Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a determination which denied his application to participate in the Family Reunion Program ("FRP"). The petitioner maintains that he is

eligible for the program under Department of Correctional Services and Community Supervision (“DOCCS”) Directive 4500. He indicates that he wishes to visit with his mother, father and two aunts. He maintains that he has a right to unite with his family and loved ones in just the same manner as other inmates. He maintains that he has not had any problems interacting with other inmates during the course of his incarceration, and there is no reason to believe that any problems would arise if he is permitted to participate in FRP.

Petitioner’s application was initially denied by the facility Superintendent on October 29, 2010. The Superintendent indicated that “[the petitioner] needs to complete the sex offender program per central office.” The petitioner appealed the determination, which was denied on March 25, 2011 by respondent Baker in an appeals decision which recites as follows:

“I have completed my review of your appeal of the denial of your application to participate in the Family Reunion Program. Our records indicate that your application was subject to special review to determine your eligibility for the program under Department Directive # 4500, Section C.3, 4, and 6.

“After careful consideration, I am not inclined to render a favorable decision to your appeal for the following reason:

“Your records depict horrendous crimes, including, pedophilia, and incest. The victim, your eight month old daughter, was also subjected to child pornography and photographing her unclothed.

“Inmates convicted of such crimes as yours, normally become vulnerable to victimization in the correction setting. Therefore, I am of the opinion that you are not an ideal candidate for the FRP as your participation may lead to an incident that could seriously jeopardize not only your safety, but also, the safety and security of your visitor(s), other inmates and their visitors, the FRP, its site, and the good order of the facility.”

It is well settled that participation in the 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 [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 in the Family Reunion Program, DOCCS must consider and balance a number of factors (see 7 NYCRR Part 220). “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).

As stated in DOCCS regulation § 220.2 (c) (1) (iii):

“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. []

(c) Special review/inmate.

(1) A special review 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 eligibility will be conducted if an inmate: [] (iii) *has been convicted of heinous or unusual crimes or it if appears that the inmate is a sex offender*” (see 7 NYCRR 220.2 [c] [1] [iii], emphasis supplied)

DOCCS Directive 4500, which governs the FRP program recites:

“Special review/Inmate: A special review 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 eligibility will be conducted if an inmate: [] 3. *Has been convicted of heinous or unusual crime or if it appears that the inmate is a sex offender.*” (DOCCS Directive 4500, III, C, 3, emphasis supplied)

The foregoing has been consistently upheld by the Courts. “Among the factors to be considered [in considering an application for FRP] is the nature of the petitioner's conviction, particularly where it was heinous or unusual” (Matter of Philips v Commissioner of Correctional Services, 65 AD3d 1407, 1408 [3rd Dept., 2009], citing 7 NYCRR 220.1 et seq.; Matter of Doe v Coughlin, 71 NY2d at 55 n 1; Matter of Defeo v New York State Dept. of Correctional Servs., 56 AD3d 886, 887 [2008]). Thus, it appears that special review of the petitioner’s application for FRP was proper. Under the particular circumstances here, the Court cannot fault the reasoning or factual basis for respondent’s determination (see Matter of Philips v Commissioner of Correctional Services, *supra*).

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 an abuse of discretion. The Court concludes that the petition must be dismissed.

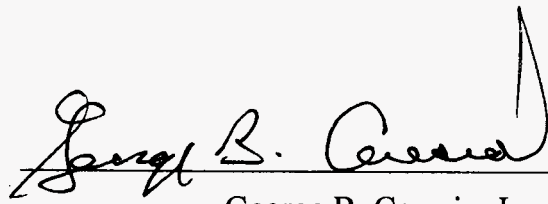
Accordingly it is

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: November 16, 2011
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated August 11, 2011, Petition, Supporting Papers and Exhibits
2. Answer dated October 13, 2011, Supporting Papers and Exhibits