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

DECISION AND JUDGMENT
RJI #09-1-2014-0461.30
INDEX # 2014-1229
ORI #NY009013J

-against-

ANTHONY ANNUCCI, Commissioner,
NYS Department of Corrections and
Community Supervision,
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 July 31, 2014 and filed in the Clinton County Clerk's office on August 12, 2014. Petitioner, who is an inmate at the Clinton Correctional Facility, is challenging the April 17, 2014 denial of his application to participate in the DOCCS Family Reunion Program (FRP). The Court issued an Order to Show Cause on August 18, 2014 and has received and reviewed respondent's Answer and Return, verified on October 10, 2014 and supported by the October 10, 2014 Letter Memorandum of Glen Francis Michaels, Esq., Assistant Attorney General. The Court has also received and reviewed petitioner's Reply thereto, sworn to on October 27, 2014 and filed in the Clinton County Clerk's office on October 30, 2014.

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[1]. 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.

The record in this proceeding does not include (for *in camera* inspection) copies of any presentence reports and the Court is therefore not fully aware of the facts and circumstances surrounding the July 9, 2006 criminal offense. It is noted, however, that the sentencing judge made the following observations: "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.

Petitioner originally applied to participate in the FRP in November of 2011. On December 29, 2011 petitioner was approved by the DOCCS central office for FRP

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[1] 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.

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 once 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 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). "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 a history of domestic violence." 7 NYCRR §220.2(c)(1)(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). "

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. The Court notes that the Family Services Counselor did not check the boxes on the recommendation form to indicate that petitioner "has been/is the subject of an Order of Protection" or that the application "requires a SPECIAL REVIEW COMPLETED. By decision dated April 26, 2014, however, the DOCCS Central Office disapproved petitioner's application to participate in the FRP. 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." Although petitioner took an administrative appeal from the Central Office FRP denial determination, no response was forthcoming. This proceeding ensued.

Although petitioner is factually correct in his assertion that the only difference between his approved 2011 FRP application and his denied 2013 FRP application - other than the passage of time - was the addition of his wife as a potential visitor. Notwithstanding the foregoing, the Court is simply not persuaded that the appropriate DOCCS officials were thereby foreclosed from subjecting the 2013 application to closer scrutiny and/or from reaching a different result with respect to the disposition of the 2013 application. However, despite the narrow scope of judicial review of an FRP denial determination this Court, drawing an analogy with discretionary parole denial determinations, finds that an FRP denial determination is irrational, and therefore must be overturned, when it is predicated upon erroneous information. *See Henry v. Dennison*, 40 AD3d 1175, *Smith v. New York State Board of Parole*, 34 AD3d 1156 and *Plevy v. Travis*, 17 AD3d 879. 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.

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 cost or disbursements, but only to the extent that the April 26, 2014 DOCCS Central Office FRP denial determination is vacated and the matter remanded to the Central Office for *de novo* review of petitioner's FRP application in a manner not inconsistent with this Decision and Judgment.

Dated: December 11, 2014 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice