State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 23, 2004 95906

In the Matter of ROBERT BIERENBAUM,
Appellant,
v
GLENN S. GOORD, as Commissioner of Correctional Services,
Respondent.

MEMORANDUM AND ORDER

Calendar Date: November 17, 2004

Before: Mercure, J.P., Spain, Mugglin and Lahtinen, JJ.

White & White, New York City (Diarmuid White of counsel), for appellant.

Eliot Spitzer, Attorney General, Albany (Kathleen M. Treasure of counsel), for respondent.

Mercure, J.P.

Appeal from a judgment of the Supreme Court (Benza, J.), entered March 8, 2004 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review a determination of respondent partially denying petitioner's request to participate in the family reunion program.

In 2000, petitioner, an inmate at Auburn Correctional Facility in Cayuga County, was convicted of the 1985 murder of his wife and was sentenced to a prison term of 20 years to life (People v Bierenbaum, 301 AD2d 119, 122, lv denied 99 NY2d 626 [2003], cert denied 540 US 821 [2003]). Prior to his indictment

in 1999, petitioner married his current wife and had a daughter. In December 2001, petitioner applied for participation in the family reunion program (hereinafter FRP) with his wife, daughter and his parents. His application was disapproved and he was informed that, due to the nature of his crime, he was required to successfully complete an antiaggression program before he would be further considered for participation in the FRP. In February 2003, petitioner, having completed the antiaggression program, reapplied for participation in the FRP. His application was approved for participation with his parents only. After petitioner received no response to a letter he allegedly wrote requesting clarification and reconsideration of the decision by the Director for the Office of Ministerial and Family Services, he commenced this CPLR article 78 proceeding challenging respondent's denial of participation in the FRP with his wife and daughter. Supreme Court dismissed the petition, resulting in this appeal.

Generally speaking, participation in the FRP is a privilege, not a right (see Matter of Doe v Coughlin, 71 NY2d 48, 55-56 [1987], cert denied 488 US 879 [1988]; Matter of Mercer v Goord, 258 AD2d 960, 960 [1999], lv denied 93 NY2d 812 [1999]) and respondent's denial of a request to participate in the FRP will be upheld if it has a rational basis (see Matter of Couser v Goord, 1 AD3d 663, 664 [2003]; Matter of Cliff v Brady, 290 AD2d 895, 896 [2002], lv dismissed, lv denied 98 NY2d 642 [2002]). We note, however, that our review of the denial is limited to the grounds invoked by respondent and "'[i]f those grounds are inadequate or improper, [we are] powerless to affirm the administrative action by substituting what [we] consider[] to be a more adequate or proper basis'" (Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753, 758 [1991], quoting Matter of Montauk Improvement v Proccacino, 41 NY2d 913, 913 [1977]; see Matter of Aronsky v Board of Educ., Community School Dist. No. 2 of City of N.Y., 75 NY2d 997 [1990]). This is so because the "[f]ailure of the agency to set forth an adequate statement of the factual basis for the determination forecloses the possibility of fair judicial review and deprives the petitioner of his statutory right to such review" (Matter of Montauk Improvement v Proccacino, supra at 914). On the record before us, the failure of the agency to state its reason or the

factual basis for the ultimate denial of petitioner's application to participate in the FRP with his wife and daughter – as even its own regulations arguably require it to do (see 7 NYCRR 220.4 [b] [5]; 220.5 [a] [1]) – prevents us from assessing whether that denial is rational. We have considered the parties' remaining arguments and find them to be either rendered academic by our decision or otherwise meritless.

Spain, Mugglin and Lahtinen, JJ., concur.

ORDERED that the judgment is reversed, on the law, without costs, and matter remitted to respondent for further proceedings not inconsistent with this Court's decision.

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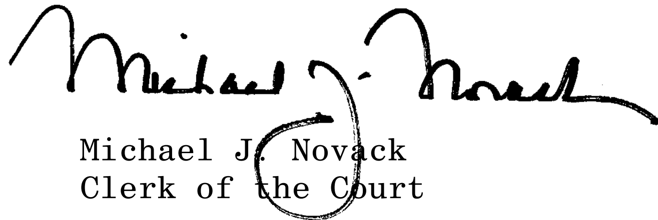

Michael J. Novack
Clerk of the Court