[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KAREN S. SMITH PART 44

Justice

In the Matter of the Application of
CELIA NORIEGA,

Petitioner,

- v -

SHAUN DONOVAN, as Commissioner of the New York City Department of Housing Preservation and Development,

Respondent.

INDEX NO. 401315/06

MOTION DATE 9/29/06

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this Article 78 petition.

	PAPERS NUMBERED
Notice of Petition — Affidavits — Exhibits	1
Notice of Cross-Motion	2
Opposing Affidavit	
Verified Answer	4

Cross-Motion: ☐ Yes ■ No

Petitioner Celia Noriega's Article 78 petition is granted for the reasons stated more fully below.

Petitioner brought the instant petition pursuant to Article 78 of the CPLR, seeking an order, 1) reversing respondent's termination of petitioner's participation in the Section 8 Housing Choice Voucher Program ("Section 8") without prior written notice; 2) reversing respondent's determination not to restore petitioner's Section 8 benefits retroactive to June 1, 2000; 3) reversing respondent's determination decreasing petitioner's monthly rent subsidy to $0.00; 4) directing respondent to immediately restore petitioner's benefits retroactive to June 1, 2000; 5) directing that petitioner tenant's portion of the rent be $111.00 from June 1, 2000; and 6) directing respondent to refrain from terminating or suspending petitioner's Section 8 benefits without prior notice and an opportunity to be heard. Rather than answering the petition, respondent cross-moved to dismiss the petition and remand it to the agency for an informal hearing on petitioner's eligibility to receive Section 8 housing subsidies, arguing that it is preferable for the issue to be heard first at the administrative level. This Court denied respondent's motion and ordered it to answer the petition in an interim order dated November 30, 2006. Subsequently, respondent filed a motion to vacate the interim order or, in the alternative, seeking leave to appeal same; the motion was denied by decision and order dated March 15, 2007, and respondent was again directed to answer the instant petition, which it did.

Petitioner is an elderly woman who has participated in Section 8 housing since 1986. In 1999, petitioner's son moved into her apartment and she notified respondent of the change in household income through submission a re-certification form that same year. Respondent claims it sent a letter dated April 11, 2000 and again on October 18, 2000, copies of which respondent submitted, informing petitioner that her housing

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

assistance payment was reduced to $0.00 based on her 1999 re-certification information. Specifically, respondent claims that petitioner's son's presence in the home increased her "family income" to such an extent that she no longer qualified for Section 8 benefits. Petitioner denies that she received the letters, and the October 18, 2000 letter submitted by respondent is not signed or filled out entirely. In 2002, approximately two years after respondent claims it had terminated her benefits, petitioner received a re-certification form, which she completed and returned to respondent. Petitioner states that because she did not receive the letters respondent claims it sent her in 2000, and the next correspondence from respondent was the re-certification form in 2002, she was unaware of any changes in her housing assistance payment. It is undisputed that the landlord never notified petitioner that he had stopped receiving payment from respondent; in fact, while both the April and October 2000 letters allegedly sent to petitioner state that they were also sent to the landlord, the landlord denies receiving them or any other notice that petitioner's benefits had been terminated or reduced to $0.00. In 2005, her landlord served a rent demand notice, demanding that she pay $27,114 for back rent dating to at least 2000. Petitioner contacted respondent and, according to petitioner, discovered for the first time that respondent had not been paying the landlord her housing assistance payments for approximately five years. In fact, respondent informed petitioner that she was removed from the system entirely 180 days after respondent stopped paying petitioner's Section 8 subsidy back in 2000. The landlord subsequently commenced a summary nonpayment proceeding to recover the back rent and petitioner faces potential eviction.

Judicial review of an administrative determination brought on by an Article 78 proceeding is limited to the evaluation of whether such determination is consistent with lawful procedures, whether it is arbitrary or capricious, and whether it is a reasonable exercise of the agency's discretion. (*Matter of Pell v. Board of Education of Union Free School District*, 34 NY2d 222 [1974]). The Court of Appeals has defined an administrative agency's action to be arbitrary and capricious if the action "is without sound basis in reason and is generally taken without regard to the facts." (*Id.* at 231). The agency's determination will be found to have a rational basis where it is "supported by proof sufficient to satisfy a reasonable [person], of all the facts necessary to be proved in order to authorize the determination. *(Matter of Weber v. Town of Cheektowaga*, 284 NY 377 [1940]; *see also Park East Land Corporation v. Finkelstein*, 299 NY 70 [1949] [the administrative agency's determination will not be disturbed if it has support in the record, has a reasonable basis in law, and is not arbitrary or capricious]).

The Section 8 subsidy program is a Federal program and is governed by 24 CFR 982 *et seq.* Section 982.555 confers upon Section 8 participants the right to an informal hearing under some circumstances and prescribes the notice which must be given to participants in such circumstances:

> (a) When hearing is required.
>
> (1) A PHA [public housing agency] must give a participant family an opportunity for an informal hearing to consider whether the following PHA decisions relating to the individual circumstances of a participant family are in accordance with the law, HUD regulations and PHA policies:
>
> (i) A determination of the family's annual or adjusted income, and the use of such income to compute the housing assistance payment.
>
> * * *
>
> (2) In the cases described in paragraph[ ] (a)(1) . . . of this section, the PHA must give the opportunity for an informal hearing <u>*before*</u> the PHA terminates housing assistance payments for the family under an outstanding HAP [housing assistance payment] contract.
>
> * * *

(c) Notice to family.

(1) In the cases described in paragraph[ ] (a)(1) . . . of this section, the PHA must give the family *prompt written notice* that the family may request a hearing. The notice must:

(I) Contain a brief statement of reasons for the decision,

(II) State that if the family does not agree with the decision, the family may request an informal hearing on the decision, and

(III) State the deadline for the family to request an informal hearing.

(Emphasis added).

Plaintiff seeks an order nullifying the determination of respondent to reduce her HAP subsidy to $0.00, effectively terminating her Section 8 benefits, contending that she did not receive the April or October 2000 letters notifying her of the reduction, and that respondent's failure to provide notice of the right to request an informal hearing, pursuant to 24 CFR 982.555(c) is not "consistent with lawful procedures" and is arbitrary or capricious. (*See Matos v. Hernandez*, 2005 NY Slip Op 52188U [Sup. Ct., NY Co. 2005]).

In its answer, respondent does not claim that it provided the requisite notice to petitioner nor does it submit a copy of any such notice. Rather, respondent claims that the April and October 2000 letters, entitled "Notice of Recertification," informed petitioner that her benefits had been reduced to zero and, therefore, that she was or should have been aware of the termination. However, both petitioner and her landlord aver that neither letter was received and respondent does not provide any evidence that the letters were mailed; the October 2000 letter, in fact, is not signed and some information is left blank. In addition, 24 CFR 982.555(c) is not satisfied by notifying a Section 8 participant that his or her benefits have been terminated;[1] rather respondent was obliged to send a specific notification of termination, delineating the basis for termination, explaining that a hearing was available to challenge the termination, and the deadline by which petitioner must request such a hearing. Under the explicit terms of the regulations, these notice requirements must be fulfilled by respondent *prior* to terminating or reducing a Section 8 participant's benefits. Having failed to comply with the notice requirements of 24 CFR 982 *et seq.*, respondent's termination of petitioner's housing subsidy was arbitrary and capricious, an abuse of discretion, and in violation of lawful procedure and, therefore must be annulled. (*See Fair v. Finkel*, 284 AD2d 126, 129 [1st Dept. 2001]; Matos *v. Hernandez*, 2005 NY Slip Op 52188U [Sup. Ct. NY Co. 2005]; *Almonte v. Roberts*, NYLJ, Dec. 1, 1999, p. 34 col. 2 [Sup. Ct. Queens Co.]).

While petitioner argues that respondent's initial determination that petitioner no longer qualified for a housing subsidy was also arbitrary or capricious, this issue is not ripe for judicial review at this time. As respondent's termination of petitioner's benefits is annulled for failure to comply with applicable Federal regulations, respondent must reinstate petitioner's benefits, retroactive to the date of the initial termination and at the same rate provided prior to such termination. If, after petitioner's benefits are restored, respondent wishes to pursue termination at that time, respondent must comply with the notice requirements of 24 CFR 982.555 and all other applicable laws and regulations. At that time, if petitioner

---

[1] As respondent "reduced" petitioner's benefits to $0.00, thereby terminating her participation in the Section 8 program 180 days thereafter, the Court does not make a distinction when referring to its actions as a reduction or as a termination.

wishes to challenge the determination of respondent, she may do so pursuant to Article 78 of the CPLR.

Accordingly, it is

ADJUDGED that respondent's decision to terminate petitioner's benefits is vacated and annulled; and it is further

ADJUDGED that respondent's decision to reduce petitioner's rental subsidy to $0.00 is vacated and annulled; and it is further

ORDERED that respondent is directed to restore petitioner's Section 8 housing benefits retroactive to June 1, 2000 at the level provided for prior to respondent's reduction or termination of said benefits, within 20 days after the service of the judgment to be entered hereon.

This constitutes the decision and judgment of the Court.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: May 2, 2007

Hon. Karen S. Smith, *J.S.C.*

Check one: ■ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST