

**Matter of Bahamonde v Novello**

2007 NY Slip Op 33224(U)

September 24, 2007

Supreme Court, Nassau County

Docket Number: 8578-06/

Judge: Geoffrey J. O'Connell

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. GEOFFREY J. O'CONNELL**

Justice

TRIAL/IAS, PART 4  
NASSAU COUNTY

In the Matter of the Application of:  
James Bahamonde, pro se,

Petitioner,

INDEX No. 18578/06  
XXX

For a Judgment under Article 78 of the Civil  
Practice Laws and Rules, to set aside an  
administrative determination

MOTION DATE: 7/19/07

-against

Antonia Novello, in her capacity as Commissioner  
of Health of the State of New York

MOTION SEQ. No. 1-MOD  
Remainder transferred to  
the Appellate Division

- 
- The following papers read on this motion:
  - Notice of Petition/Petition/Exhibits
  - Answer/Return/Memorandum of Law/Exhibits
  - Petitioner's Reply/Memorandum of Law/Attachments

Petitioner seeks an Order pursuant to CPLR Article 78 setting aside the decision of the administrative hearing officer for the New York State Department of Health and Social Services, dated June 22, 2006. Petitioner argues that the decision is irrational, arbitrary and capricious. Respondent opposes and seeks a dismissal of the petition as untimely.

It is undisputed that Petitioner JAMES BAHAMONDE is an attorney, appearing pro se. He is a quadriplegic, and a U.S. Marine Corps veteran.

Respondent contends that Petitioner is a certified disabled person and was receiving Medical Assistance benefits for a household of one, which included an authorization for personal care services. It is

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undisputed that Petitioner has married since he began receiving such benefits, and resides with his wife in a home in Bellmore.

Respondent claims that on his March 2004 re-certification form his only income was monthly payment from Social Security Disability ("SSD") of \$767.60, and that his only resources was \$1,906.76 in a bank account. (Answer, Exh. 4 at Ex. 100, 103)

On his April, 2005 re-certification, Petitioner claimed that he had a SSD monthly income of \$1250.20, and that his resources was the sum of \$200.00 in a Chase Bank account. He also advised the Department that he had an aide and Veterans Administration disability pension of \$11.00 (Answer Exh. 4 at Ag. Ex. 11).

Respondent claims that the Nassau County Department of Social Services (Nassau Social Services) reviewed a Trust, dated June 1, 2001 signed by Theresa Smalley, Petitioner's mother, which transferred her interest in 2501 Jody Court, North Bellmore to the Petitioner. Respondent offers proof that on August 27, 2005 he did not own the property and could not produce a deed for it. Nassau Social Services also stated that a New York State Department of Motor Vehicles report indicates that the Petitioner owns a 2005 Dodge van with hand controls. Nassau Social Services also states that it found evidence that the Petitioner formed a professional corporation, James Bahamonde, P.C. registered with the State in 2003.

Respondent claims that Nassau Social Services reviewed the Petitioner's Federal Individual and Corporate tax returns for 2003 and 2004. The 2003 corporate tax returns shows Petitioner reporting total assets of \$25,703 and gross sales or receipt of \$4,000.00. As part of this, Petitioner reported business deductions, income from loans from shareholders, and a negative business income. On his 2004 Individual tax return, Petitioner reported adjusted gross income of \$5,350.00, and a "non passive income of \$7,850.00" from Schedule K-1 on his Individual Return. His 2004 corporate return reported gross sales receipts or sales of \$87,368.00 and total assets of \$8,838.00, and claimed deductions of \$89,240.00 which included office, professional travel and advertising expenses.

Respondent argues that Nassau Social Services accountant reviewed the tax returns and was unable to determine how the Petitioner was managing the claimed business expenses (2003- \$3,693.00; 2004- \$89,240.00) with the reported income. The accountant noted that the Schedule K1 for the 2003 and 2004 returns were not attached to the returns provided to Nassau Social Services.

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Respondent claims that on September 21, 2005 Nassau Social Services sent Petitioner a letter advising him that it needed proof of citizenship for his wife, with a marriage certificate, social security number and proof of her income. It also sought a copy of the tax return for the 2001 Trust, along with any mortgage statement for the property, and copies of his tax returns for the last three years, including the Schedule K attachments for the corporate returns. It also sought information and documentation regarding the reported shareholder loans.

It is undisputed that Petitioner sent the Nassau Social Services a copy of his marriage certificate, his mortgage statement and a statement that his wife will file for U.S. citizenship shortly. He also provided a self-generated register report of his business expenses.

It is undisputed that the Petitioner did not provide the U. S. Corporate tax returns, with Schedule K-1 Income tax form attachments, an explanation for capital stock, total assets and loans from shareholders or complete personal and business bank statements as requested.

On October 14, 2005 Nassau Social Services sent Petitioner a Notice of Intent to Discontinue Medical Assistance benefits stating that the Petitioner had failed to submit the proper documentation to establish his eligibility for those benefits.

The "Notice of Decision" stated that Nassau Social Services would discontinue his medical assistance as of October 24, 2005 unless Petitioner provided the requested financial records and documents regarding his wife to investigate his eligibility.

On October 18, 2005 Petitioner sent additional information to Nassau Social Services. On October 21, 2005 Nassau Social Services notified the Petitioner that he still had not adequately responded, and outlined the documentation it still sought.

There is no evidence that this documentation was provided.

It is further apparently undisputed that at or around the same time, in June, 2005 the Nassau Social Services opened an investigation into Petitioner's Medicaid eligibility. At the time, the Petitioner was receiving approximately \$486.00 per month in Medicaid assistance for home health aid and assistance. On or about July 20, 2005, the Social Services caseworker informed the Petitioner that Nassau Social Services

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had determined that the Petitioner had excess income in the amount of \$486.00 per month, and his home-care agency would commence billing him in this amount as of August 1, 2005.

Petitioner claims that between August 2, 2005 through October 18, 2005, he repeatedly wrote to DSS employees objecting to their claims, answering their allegations and denying that he had any additional documents responsive to their requests.

The Petitioner contends that on October 20, 2005 he had substantially complied with the outstanding demands and provided all of the requested documents. He claims that when he did not receive a reply, on the next day, October 21, 2005, he requested the "Fair Hearing" from Respondent, questioning the correctness of Nassau Social Services determination that his benefits should be discontinued.

Although copies of other correspondence allegedly sent by Petitioner to Nassau Social Services are provided, a copy of the October 20, 2005 letter with the responsive documentation, is not provided to the Court.

Petitioner also provides a copy of a letter dated October 24, 2005 to Nassau Social Services, referencing responses, contending that additional documentation was provided.

Petitioner claims that, later he again contacted Nassau Social Services in January 2006, and again in April, 2006 stating that he was beginning a salaried position and seeking to qualify for the Medicaid buy-back program, and has applied for a service grant, but received no response.

A Fair Hearing was Ordered to hear Petitioner's claim that the Department wrongfully discontinued his medical assistance, and failed to respond to his inquiries and submission of medical expenses.

A Fair Hearing was held on March 9, 2006, March 30, 2006, April 13, 2006 and May 10, 2006 before an Administrative Law Judge, Thelma Lee.

Petitioner participated via telephone on the first three dates, and appeared in person on the May 10, 2006 hearing date.

During the course of this proceeding, it is conceded that the Petitioner supplied additional financial information to Nassau Social Services representatives. It is also undisputed that Nassau Social Services

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withdrew its request for information regarding Petitioner's wife and the Trust created by Mrs. Smalley.

Respondent claims that during the hearing the Petitioner admitted that he never submitted actual receipts to his accountant, only his self generated "Impairment-Related Work Expenses" report, which he had also provided to Nassau Social Services. The Petitioner argued that he relied upon his accountant who prepared his tax returns, and that he should not be found liable for any discrepancies or misrepresentations on the returns. Petitioner conceded that his accountant relied upon the Register of Expenses BAHAMONDE created and that all of the actual bill and receipts were in Petitioner's possession. Petitioner noted that the IRS did not seek to audit or otherwise question his returns.

On May 1, 2006, Petitioner submitted a letter from his accountant who stated that no Schedule K-1 was filed or prepared for Petitioner's business. He also provided some receipts for medical expenses, two promissory notes totaling \$10,000.00, and bank statements. Respondent claims that the Petitioner stated he did not provide them earlier because he did not trust Nassau County Department of Social Services.

At the May 10, 2006 portion of the hearing, Nassau Social Services stated that the documents provided were still insufficient to support BAHAMONDE's claimed business expenses, capital stock, assets and loans as reported in his tax returns. It also claimed that the Petitioner had failed to offer any documentation regarding available Veterans benefits. Nassau Social Services argued that since the Petitioner failed to do this, it could not consider his more recent request for the Medicaid Buy-In program for Disabled Working Individuals, deductions for a service dog and requests to establish an individual development account for certified disabled individuals in evaluating financial management.

On June 22, 2006 the Respondent's designee, Philip Nutin, issued a decision finding that the Nassau County Social Services decision to discontinue Petitioner's Medical Assistance benefits, was correct. He also agreed that the Petitioner's request for the Buy-In program and request for a service dog, were not properly before the hearing officer for consideration.

The Commissioner's Designee found at the conclusion of evidence that the Petitioner's testimony regarding his financial management and his refusal to comply with the Agency's request was not credible or persuasive. The Respondent's Designee found that the Petitioner's lack of cooperation in explaining any

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management to the Agency was "intentional, unreasonable and malicious."

The Respondent noted that the Medical Assistance Resource Guide ("MARG") states that not all deductions for self-employment which are deductible for taxes are applicable to the Medicaid Program and that a Schedule K-1, along with a Federal Tax Return must be supplied to verify this self-employment. An explanation by an accountant is an alternative means to verify self-employment income.

Pursuant to those provisions, the Designee concluded that the Agency could not rely upon the income figures or business deductions reflected on the 2003 and 2004 Individual and US Corp Returns provided to evaluate the Petitioner's financial qualifications for Medical Assistance. He noted that the Petitioner has not provided all of the requisite verification for a satisfactory explanation of his financial circumstances despite several adjournments of the Fair Hearing for him to do so. The Designee determined without such documentation the Agency's October 14, 2005 Notices had to be affirmed.

This decision is dated June 22, 2006. (Petition/Exh. A).

Petitioner claims that the Respondent's failure to recognize Petitioner's medical and business expenses was arbitrary capricious and not supported by the substantial evidence in the record, and should be reversed and set aside. He also argues that the hearing officer acted in an arbitrary and capricious manner in not considering his requests or taking into consideration evidence supporting requests for the Medicaid Buy-in program and service dog.

In this petition, BAHAMONDE alleges, among other things that the hearing officer demonstrated bias toward him and that the Nassau Social Services representative "uttered a liable" against him and made numerous and intentional misrepresentations.

It is undisputed that Petitioner, an attorney licenced to practice in the State of New York, was aware of the Nassau Social Services investigation and requests for specific information and documentation. He does not dispute that he was present at the Fair Hearing, and did not supply the income information sought. He argues that the case manager assigned to his matter was later vindictive and rude and did not treat him fairly. He also complains that the transcripts of the hearing are incomplete and fails to note that he stated that he argued that documents were not previously provided because he did not understand certain requests and his

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requests of clarification or help were unanswered. He also argues that the Decision fails to note his complaints of harassment by Nassau County Department of Social Services representatives.

In his Reply papers, including his memorandum of law, the Petitioner concedes that he did not provide Nassau Special Services with much of the documentation sought.

The Petitioner does not claim that the financial information provided by him to the Nassau County Department of Social Services was in accordance with the MARG, nor does he argue that the MARG is not applicable.

18 NYCRR § 360-2.2(f) requires that a personal interview be conducted with all applicants for Medical Assistance. Section 360-2.3 provides that the applicant and recipient has a continuing obligation to provide accurate and complete information regarding income, resources and other listed factors which are relevant to eligibility. The local Social Services agency is required to make a collateral investigation when a recipient is unable to provide proper verification.

The MARG at pages 72 through 76 governs self-employment or small business income. It states that when an individual is self-employed or owns or operates a small business, certain costs related to the business are deducted from the gross income for the purposes of determining eligibility for Medical Assistance benefits.

Pursuant to the regulations a single owner of a business must supply a tax return, including a Schedule C or accountant's statement of business records/ledgers or single statement from owner. It also states that since not all tax deductions for self-employment are applicable to the Medicaid program, a self employed recipient is required to submit a tax return with a Schedule K-1.

Based on the proof presented, the Petitioner has failed to demonstrate that he is entitled to the relief sought, which includes a reinstatement of his Medical Assistance benefits. There is no demonstration that the Respondents decision, upholding the County's determination of discontinuing benefits, was arbitrary or capricious. The record indicates that the Petitioner never claimed his SSD income or VA benefits on his 2003 and 2004 re-certification forms. There is no dispute, that for whatever reason, the Petitioner did not provide the Nassau County Department of Social Services with the specific financial documentation requested.

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In an Article 78 proceeding, the appropriate standard for the Court's review is whether the determination violated a lawful procedure, was in error of law, or was arbitrary and capricious or an abuse of discretion. *DeStefano v. Albany County Department of Social Services*, 107 AD2d 969 (3rd Dept. 1985); *Levandusky v. One Fifth Ave. Apartment Corp.*, 75 NY2d 530 (1990). It is not for the Court to substitute its judgment for that of the administrative agency. *Non-Emergency Transporters of New York v. Hammons*, 249 AD2d 124 (1<sup>st</sup> Dept 1998). Whether a decision can be determined arbitrary and capricious generally hinges on whether the action taken was justified and supported by facts presented in the administrative process. *Pell v. Board of Education*, 34 NY2d 222 (1975). An administrative agency's exercise of its powers is accorded a high degree of judicial deference, especially when the agency acts in its area of expertise. Accordingly the party seeking to nullify such a decision has the heavy burden of showing that the decision is unreasonable and not supported by any evidence. *Consolidated Nursing Home, Inc. v. Commissioner of NYS Department of Health*, 85 NY2d 326 (1995).

The evidence establishes that the Hearing Officer considered the Petitioner's evidence. The Petitioner has failed to demonstrate that the Hearing officer erred as a matter of law or acted in an arbitrary and capricious matter. *Wamahiu v. Fahey*, 119 AD2d 916 (3rd Dept. 1986); *Watkins v. Toia*, 57 AD2d 628 (2nd Dept. 1977) aff'd 46 NY2d 773; *Pottick v. Duncan*, 251 AD2d 333 (2nd Dept. 1998); *Beyond Builders Inc. v. Pigott*, 20 AD3d 474 (2nd Dept. 2005); *Wolf Hill Properties v Modelewski*, 19 AD3d 429 (2nd Dept. 2005).

While a determination such as that here challenged must be supported by substantial evidence, it is administrative and will not be upset if the record demonstrates the existence of a rational basis for the determination made. *Matter of Sasso v Osgood*, 86 NY2d 374, 384 (1995); *Wamahiu v. Fahey, supra*; *Watkins v. Toia, supra*. Here the Respondent has stated a rational basis for its determination.

The determination of whether the decision was based on substantial evidence should not be made by this Court, but the matter should appropriately be transferred immediately to the Appellate Division to CPLR § 7804; *Menoli v. Toia*, 47 NY2d 708 (1979).

It is, SO ORDERED.

Dated: Sept 24, 2007

  
HON. GEOFFREY J. O'CONNOR, J.S.C.

**ENTERED**

OCT 05 2007

NASSAU COUNTY  
COUNTY CLERK'S OFFICE