

Matter of Rohan v New York City Hous. Auth.
2009 NY Slip Op 30177(U)
January 23, 2009
Supreme Court, New York County
Docket Number: 402639/2008
Judge: Carol Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD

PART 35

lucifra

Index Number : 402639/2008

ROHAN, DESIREE

VS.

HOUSING AUTHORITY

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT
 This judgment has not been entered by the County Clerk
 and notice of entry cannot be served by the County Clerk
 until entry, counsel or authorized representative must
 appear in person at the Judgment Clerk's Desk (Room
 4122)

The instant application is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED and ADJUDGED that the application of petitioner Desiree Rohan for an order and judgment pursuant to CPLR Article 78 reversing the determination of respondent New York City Housing Authority, dated June 12, 2008, is denied in its entirety and the Petition is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order with notice of entry within twenty days of entry on petitioner.

Dated: 1/23/09



HON. CAROL EDMEAD ^{s.c.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

_____ x
In the Matter of the Application of
DESIREE ROHAN,

Petitioner,

Index No. 402639/2008

For an Order Pursuant to Article 78 of the
Civil Practice Law and Rules,

DECISION/ORDER

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

_____ x
EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Desiree Rohan (“petitioner”) moves for an order and judgment pursuant to CPLR Article 78 reversing the determination of respondent New York City Housing Authority (“respondent”), dated June 12, 2008 (the “Determination”).

Background

In or about April 1998, petitioner became a participant in the Section 8 program with her last two residences at 1585 Odell Street, Apt. 4B, Bronx, NY 10462 and 2325 Southern Boulevard, Apt. 2E, Bronx, NY 10460. On four affidavits of income petitioner submitted between January 12, 2001 and December 15, 2003, she reported only one job or none at all in the spaces where the form instructed her to “list all current employment and employment during last 12 months,” including the name and address of each employer, the present rate of pay, and the “total earned during the past 12 mos.” Petitioner certified on these forms that she had provided “accurate and complete” information, and she “understand[s] that false statements or information

are grounds for termination of housing assistance.”

Petitioner's Contentions

Petitioner alleges that she was charged with a crime, participated in a criminal procedure, only for Section 8 to drop the charges, based on a lack of evidence. If she had been informed by NYCHA that her paperwork reflecting her income for the years in question, was inaccurate, she would have corrected it.

Respondent's Contentions

In or around January 2005, management conducted a third-party verification of Petitioner's income in connection with her submission of her annual re-certification papers. Management received a verification of employment from Heritage Health Housing Inc. ("Heritage Health"), reporting Petitioner had worked as a "resident counselor" and earned \$10,700.28 in 2003 and \$10,023.29 in 2004. Petitioner did not report this income on her annual affidavits of income.

The Housing Authority's Office of the Inspector General ("IG") conducted an investigation. The IG received: {1} a report from HUD showing Petitioner had earned income from the fourth quarter of 2002 through the third quarter of 2004 that she did not report to the Housing Authority; (2) Tax Return Listings from the Internal Revenue Service ("IRS") for the years 2001 through 2004, indicating Petitioner had reported wages to the IRS totaling approximately \$50,000.00 in both 2001 and 2002 and approximately \$31,000.00 in both 2003 and 2004; (3) W-2 statements from Heritage Health showing Petitioner had earned \$1,408.03 in 2000; \$12,044.10 in 2001; \$9,947.79 in 2002; \$10,700.28 in 2003; \$10,023.39 in 2004; and \$3,244.80 in 2005, which she did not report to the Housing Authority; and (4) W-2 statements

from the New York City Office of Payroll Administration ("NYC Payroll Administration") revealing Petitioner had earned \$2,316.09 in 2000; \$37,454.73 in 2001; \$40,126.47 in 2002; \$20,003.006 in 2003; and \$22,014.60 in 2004, that she did not report in full to the Housing Authority.

Management recalculated the subsidy taking into account Petitioner's actual income. The Housing Authority had overpaid the rent subsidy to the landlord on behalf of Petitioner in the amount of \$19,186.00 for the period from May 2001 through March 2005.

In October 2006, Investigator Patricia Carvajal from the IG submitted a criminal complaint alleging Petitioner had committed one count of grand larceny in the third degree, a class D felony, in violation of Penal Law section 155.35, and two counts of offering a false instrument for filing in the first degree, a class E felony, in violation of Penal Law section 175.35, based on Petitioner's concealment from the Housing Authority of her income and her filing of documents containing false information. The City of New York Department of Investigation arrested Petitioner, and the Bronx County District Attorney's Office charged Petitioner with the above crimes on October 3, 2006. On July 25, 2007, the criminal case against Petitioner was dismissed, not on the merits of the case, but based on a lack of a "speedy trial."

In October 2006, the Housing Authority's Leased Housing Department sent a "Notice of Termination of Section 8 Subsidy" to Petitioner. In the notice, the Housing Authority warned Petitioner that it intended to terminate her Section 8 subsidy because she had committed fraud in connection with her participation in the Section 8 program by willfully misstating or concealing her income in the several affidavits of income she had submitted between 2001 and 2005. The notice also advised Petitioner that she could request an informal conference or an

impartial hearing, and Petitioner requested an informal conference.

The Housing Authority subsequently sent Petitioner a notice scheduling a hearing for February 27, 2008. The notice advised Petitioner that she "MAY BE REPRESENTED BY COUNSEL OR OTHER REPRESENTATIVE OF YOUR CHOICE" at the hearing.

Instead of proceeding with the hearing on February 27, 2008, the parties held an informal conference. No agreement was reached at the informal conference, and a hearing was scheduled for April 3, 2008.

A hearing was held before Hearing Officer Stuart G. Laurence ("Hearing Officer"). The Housing Authority presented its case on April 3, 2008, and the hearing was then adjourned to May 14, 2008, for Petitioner to retain counsel, which she did not. Petitioner reviewed the Housing Authority's file on her subsidy. She then appeared pro se, bringing a friend to the second hearing date, and denied the charges.

John Forbes, Chief Investigator for the IG ("Chief Investigator Forbes"), testified he conducted an investigation of Petitioner. His investigation substantiated NYCHA's claims.

Petitioner then made a series of confusing, and at times incorrect, unsworn statements. First, she suggested she had reported her income to the Housing Authority in full, referring to the affidavit of income for the twelve month period ending September 30, 2001, where she had reported she had earned \$23,760 that year, when in fact she had reported to the IRS earnings of \$50,517 in 2001 and \$50,095 in 2002. Second, although Petitioner seemed to suggest the Housing Authority had obtained incorrect income information because it had used the wrong Social Security number in requesting information about her from Heritage Health, the information from Heritage Health matched Petitioner's Social Security number. Third, Petitioner

suggested she had imprecisely completed the annual affidavits of income because, despite the fact she is a college graduate, she had been taking medication for her chronic asthma.. However, she did not provide any proof for this assertion and there is no evidence to suggest she had requested assistance in completing the forms.

After reviewing all of the testimony and the documentary evidence submitted at the hearing, the Hearing Officer sustained the charges and issued a disposition of termination of subsidy.

In compliance with the Hearing Officer's decision and disposition, the Housing Authority issued and sent a final determination to Petitioner. The Housing Authority notified the landlord it would cease making subsidy payments on behalf of Petitioner, effective July 31, 2008.

Substantial evidence supports the Housing Authority's termination of Petitioner's Section 8 subsidy. An administrative agency's decision withstands judicial scrutiny if it has a rational basis and is based upon substantial evidence.

Analysis

CPLR 7803 states that the court review of a determination of an agency, such as NYCHA, consists of whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty imposed. CPLR 7803(3) (*see Windsor Place Corp. v New York State DHCR*, 161 A.D.2d 279 [1st Dept.1990]; *Mazel v DHCR*, 138 A.D.2d 600 [1st Dept.1988]; *Bambeck v DHCR*, 129 A.D.2d 51 [1st Dept.1987], *lv. den.* 70 N.Y.2d 615 [1988]). An action is arbitrary and capricious, or an abuse of discretion, when the

action is taken "without sound basis in reason and ... without regard to the facts." *Matter of Pell v Board of Education*, 34 N.Y.2d 222, 231(1974). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion. *Matter of Pell v Board of Education*, 34 N.Y.2d, at 231. The court's function is completed on finding that a rational basis supports the DHCR's determination (*see Howard v Wyman*, 28 N.Y.2d 434 [1971]). Where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (*see Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 A.D.2d 72 [1st Dept.], *aff'd* 66 N.Y.2d 1032 [1985]).

On judicial review of an agency action under CPLR Article 78, the courts must uphold the agency's exercise of discretion unless it has "no rational basis" or the action is "arbitrary and capricious." *Pell v Board of Ed. Union Free School District*, 34 NY2d 222, 230-31, 356 NYS2d 833, 839 (1974) "The arbitrary and capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." 34 NY2d at 231, 356 NYS2d at 839 *See also Jackson v New York State Urban Dev Corp.*, 67 NY2d 400, 417, 503 NYS2d 298, 305 (1986) (on review of agency action under CPLR Article 78, the courts may not "second guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence").

Moreover, where, as here, the agency's determination involves factual evaluation within an area of the agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference. *See Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363, 514 NYS2d 689, 693 (1987). Courts are required to "resolve [any] reasonable

doubts in favor of the administrative findings and decisions” of the responsible agency. *Town of Henrietta v Department of Env'tl. Conservation*, 76 A.D.2d 215, 224, 430 NYS2d 440, 448 (4th Dep't 1980). *See also Jackson*, 67 NY2d at 417, 503 NYS2d at 305; *City of Rome v Department of Health Dept.*, 65 A.D.2d 220, 225, 441 NYS2d 61, 64 (4th Dep't 1978), *lv. To app. denied*, 46 NY2d 713, 416 NYS2d 1027 (1979).

And, “Where evidence conflicts, issues of credibility are the province of an administrative hearing officer, since ‘the decisions by an Administrative Hearing Officer to credit the testimony of a given witness is largely unreviewable by the courts.’ ” *Wooten v Finkle*, 285 AD2D 407, 408 (1st Dept 2001) (*quoting Berenhaus v Ward*, 70 NY2d 436, 443 (1987), and the courts may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists (*Berenhaus*, 70 N.Y.2d at 444, 522 N.Y.S.2d 478, 517 N.E.2d 193; *Matter of Stork Rest. v. Boland*, 282 N.Y. 256, 267, 26 N.E.2d 247 [1940]; *Matter of Acosta v. Wollett*, 55 N.Y.2d 761, 447 N.Y.S.2d 241, 431 N.E.2d 966 [1981]; *Matter of Verdell v. Lincoln Amsterdam House, Inc.*, 27 A.D.3d 388, 390, 813 N.Y.S.2d 68 [2006]).

The record evidence establishes the Housing Authority met its minimal burden of establishing the allegations with evidence more seeming than imaginary. The substantial evidence includes: (1) the four affidavits of income Petitioner submitted between January 12, 2001 and December 15, 2003, wherein she misrepresented her income and employment. Since NYCHA's determination in this case is founded on a rational basis, that interpretation is affirmed whether or not this court might have come to a different conclusion.

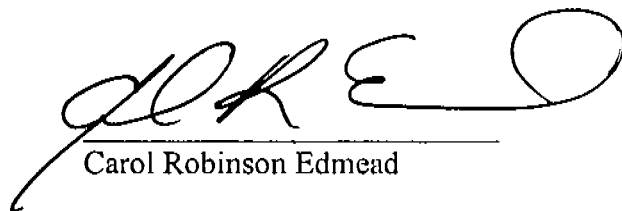
Conclusion

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the application of petitioner Desiree Rohan for an order and judgment pursuant to CPLR Article 78 reversing the determination of respondent New York City Housing Authority, dated June 12, 2008, is denied in its entirety and the Petition is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order with notice of entry within twenty days of entry on petitioner.

Dated: January 23, 2009



Carol Robinson Edmead

HON. CAROL EDMEAD

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 1412B).