

**Matter of Wright v Hernandez**

2009 NY Slip Op 30648(U)

March 5, 2009

Supreme Court, New York County

Docket Number: 402716/08

Judge: Joan B. Lobis

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SCANNED ON 3/9/2009

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

PRESENT: Joan B. Lobis

PART 6

Index Number : 402716/2008  
WRIGHT, RANDOLPH  
vs.  
NYC HOUSING AUTHORITY  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE 2-6-09  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...  
Answering Affidavits -- Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1-9  
10-35  
x

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion—

*petition decided in accordance  
with accompanying decision, order  
and judgment.*

**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: 3/5/09 \_\_\_\_\_ JBL J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

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

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
In the Matter of the Application of

RANDOLPH WRIGHT,

Petitioner,

Index No. 402716/08

For a Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules,

**Decision, Order and Judgment**

-against-

TINO HERNANDEZ, as Chairman of the  
New York City Housing Authority,

**UNFILED JUDGMENT**  
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141B).  
Respondent. X

-----X  
**JOAN B. LOBIS, J.S.C.:**

Petitioner, Randolph Wright, brings this Article 78 proceeding, seeking to annul the determination by respondent, the New York City Housing Authority ("NYCHA" or the "Authority"), to declare him ineligible for public housing, following a determination after hearing. The final determination was issued on July 31, 2008, following a hearing that was held on July 24, 2008, before Chief Hearing Officer Ester Tomicic Hines.

Petitioner, who was born in 1964, asserts that he resided in Apartment 3D (the "Apartment"), a three-bedroom unit located at 2121 Madison Avenue, a housing complex known as Lincoln Houses. He states that he resided in the apartment of his grandmother, Annie Blocker, since his birth, except for periodic absences some years ago. Ms. Blocker passed away on March 3, 2007. Petitioner seeks to stay in the Apartment as a remaining family member.

Petitioner filed a grievance in his effort to remain in the Apartment. In a decision dated September 24, 2007, Steven Lebowitz, the Project Manager for Lincoln Houses, denied petitioner's request for a lease as a remaining family member. The Project Manager determined that petitioner was not part of the original family composition, and permission was not given for him to join the household. In addition, a criminal background check was performed, which found that because of a prior felony conviction, petitioner is presently ineligible to reside in public housing, and will not be eligible until November 15, 2015. For these reasons, the request was denied.

In a decision dated October 5, 2007, Virgilio Cruz, the Borough Director/Borough Manager, concurred with the decision of the Project Manager in disapproving petitioner's request for remaining family member status. Under "Findings and Reasons," the determination states that petitioner "was not part of the original family composition and permission was not given to him to join the household." The decision also notes that petitioner failed the criminal background check.

Petitioner appealed the determination to a hearing. At the hearing, petitioner, who was represented by counsel, testified on his own behalf, and called as a witness Carol Williams, whose children were fathered by petitioner's uncle. Katherine Johnson, a Housing Assistant, testified on behalf of NYCHA.

Petitioner testified that in the five years before the hearing, his mother, his uncle, and his niece all lived in the Apartment with him and his grandmother. Petitioner testified that his grandmother died in March 2007 and his mother died the next month, in April 2007. He testified that

his uncle moved out earlier, in or about January 2007, and his niece moved out when petitioner's mother passed away.

Petitioner presented W-2 forms for the 2000 and 2001 tax years and a voter registration card for 1988. Petitioner also entered into evidence other documents which showed he used the Apartment's address in the late 1980s. He submitted a social security card for his daughter, which shows the Apartment as her address. Petitioner also entered into evidence various other tax documents. Although the transcript is not clear, it appears that he admitted W-2 forms and correspondence from the United States Department of the Treasury that relate to the years 1990, 1995, 1997, 2000-03, and 2005. Petitioner also entered into evidence QVC receipts and insurance documents which showed that petitioner used the Apartment as his address, and entered into evidence two documents from the Department of Motor Vehicles, dated 1996 and 2003.

As to his criminal conviction, petitioner testified that in July 2005, he was convicted of criminal possession of marijuana in the third degree. On November 15, 2005, he was sentenced to five years' probation. He has undergone monthly urinalysis testing; he has never had a positive test since his conviction. Petitioner testified that in 2003, prior to his arrest and conviction, he attended a drug rehabilitation program at Daytop Village, and received a certificate of completion. Petitioner also testified to another incident that occurred in 2001, when he was involved a dispute with the mother of his child. He was found to have a box cutter that he used at work in his pocket. Petitioner stated that he was convicted of the misdemeanor of criminal possession of a weapon.

Ms. Johnson, the Housing Assistant, testified that she made a total of two visits to the Apartment, in 2004 and 2005. She did not see petitioner in the Apartment on either of those visits. The income affidavits from 2000 through 2006 were admitted into evidence. None of these affidavits listed petitioner as an occupant of the Apartment. The last income affidavit that was filed by Ms. Blocker, dated July 6, 2006, does not list petitioner as a person living in the Apartment.

Ms. Johnson testified that in June 2006, Ms. Blocker informed Ms. Johnson that she wanted to include petitioner on the family composition form. According to Ms. Johnson's testimony, Ms. Blocker said that petitioner did not reside in the Apartment at that time, but he was going to move in to take care of her. Then, according to Ms. Johnson, Ms. Blocker called back to say that she changed her mind, and did not want to list petitioner on the family composition form.

Hearing Officer Hines issued a decision, dated July 31, 2008, denying petitioner's grievance. The denial is based on a number of grounds: there is no indication that Ms. Blocker ever returned a form by which to request permission for petitioner to reside in the Apartment; the annual affidavits list only Ms. Blocker as an occupant; and, petitioner has a conviction for a felony, which renders him ineligible. In a notice dated August 13, 2008, the Secretary of the Authority informed petitioner that the Authority had approved the Hearing Officer's decision and disposition in the proceeding to deny the grievance. This Article 78 proceeding followed.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures,

whether it is arbitrary or capricious, or whether it was affected by an error of law. Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). “The arbitrary or 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.’” Id. (citation omitted). A determination is considered “arbitrary” when it is made “without sound basis in reason and is generally taken without regard to the facts.” Id.

Although petitioner was an member of the household from birth, at some point, he left the household. He presented documentation to show that he resided in the Apartment for a number of years prior to his grandmother’s death. But, since a written request was never submitted and since permission to add petitioner as an occupant was never obtained, the court is constrained to find that it was not arbitrary and capricious for respondent to find that petitioner cannot succeed his grandmother as a tenant to the Apartment. Aponte v. New York City Hous. Auth., 48 A.D.3d 229, (1st Dep’t 2008) (finding that there is “no basis to relieve petitioners of the written permission requirement”); McFarlane v. New York City Hous. Auth., 9 A.D.3d 289, 290 (1st Dep’t 2004) (grandchildren of deceased tenant cannot succeed to apartment where written permission was never granted); Abdil v. Martinez, 307 A.D.2d 238, 242 (1st Dep’t 2003) (denying Article 78 petition, and finding that daughter and her son cannot succeed to father’s apartment where no written request was ever made and permission was not obtained); contrast with, Gill v. Hernandez, \_\_\_ Misc. 3d \_\_\_, 865 N.Y.S.2d 843 (Sup. Ct. N.Y. Co. 2008) (court granted Article 78 petition since written approval to add daughter as Section 8 tenant was submitted and daughter’s income information was always included on lease renewal forms). Even if this court were to find that petitioner remained in continuous occupancy of the Apartment for the requisite time period, he cannot show that he had permission to join the household more than two years’ before his grandmother’s death. His name is not listed on any

[\*7]  
of the income affidavits from 2000 through 2006. Pelaez v. New York City Hous. Auth., 56 A.D.3d 325 (1st Dep't 2008).

Moreover, NYCHA notes that if it is both true that petitioner resided in the Apartment and that he worked for UPS for the past twenty years, even if eighteen of those years were part-time, then petitioner and his grandmother violated NYCHA's rules and procedures by failing to list petitioner's salary as income on the annual income affidavit. Finally, even if this court were to credit petitioner's testimony that he has refrained from using marijuana since the time of his conviction, his conviction of a felony renders him ineligible to reside in public housing until November 15, 2015.<sup>1</sup> Faison v. New York City Hous. Auth., 283 A.D.2d 353, 357 (1st Dep't 2001) (finding that NYCHA's rules with respect to denying public housing to individuals with certain criminal convictions is not arbitrary and capricious or an abuse of discretion). It was not arbitrary and capricious for the Authority to conclude that petitioner failed to present evidence of rehabilitation, when his certificate of completion of a Daytop Village program was issued before, and not after, his conviction.

The petition is denied and this proceeding is dismissed. This constitutes the decision, order and judgment of the court.

Dated: March 5, 2008

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and notice of entry cannot be served. JOAN D. BOBIS, J.S.C.  
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<sup>1</sup> Under the Authority's rules and regulations, an individual convicted of a Class E felony is ineligible for public housing until after the completion of five years without other convictions or pending charges, after the completion of his or her sentence. Since petitioner's sentence of probation ends in November 2010, he is deemed ineligible until November 2015, absent evidence of rehabilitation.