

Matter of Parker v New York City Hous. Auth.
2009 NY Slip Op 31097(U)
May 13, 2009
Supreme Court, New York County
Docket Number: 402253/2008
Judge: Carol R. Edmead
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SCANNED ON 5/15/2009
* 1]
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD

PART 30

Index Number : 402253/2008
PARKER, SHARON
VS.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE 5/12/09

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

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).

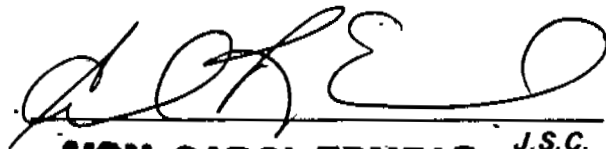
Upon the foregoing papers, it is ordered that this motion

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

ORDERED and ADJUDGED that the application of Petitioner Sharon Parker for an order and judgment (1) directing respondent New York City Housing Authority: (1) to reverse its Final Administrative Decision and to reinstate the tenancy of ; or, in the alternative (2) to reverse its Final Administrative Decision and to remand the case for (a) additional development and findings concerning why felt that she did not have to reveal sporadic income, including whether she was actually working just before she completed the re-certification forms of October 2003 and January 2005, and/or (b) new conclusions based solely on Charge #3 - misrepresentation of household income., **is denied in its entirety and the instant Petition is hereby 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 counsel for Petitioner.

Dated: 5/13/09



J.S.C.

HON. CAROL EDMEAD

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):

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

_____ x
In the Matter of the Application of

SHARON PARKER,

Petitioner,

Index No. 402253/2008

DECISION/ORDER

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

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

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
1415). x

EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Sharon Parker ("Petitioner") moves for an order and judgment (1) directing respondent New York City Housing Authority ("Rspndent" and/or the "Housing Authority"): (1) to reverse its Final Administrative Decision and to reinstate the tenancy of Petitioner; or, in the alternative (2) to reverse its Final Administrative Decision and to remand the case for (a) additional development and findings concerning why Petitioner felt that she did not have to reveal sporadic income, including whether she was actually working just before she completed the re-certification forms of October 2003 and January 2005, and/or (b) new conclusions based solely on Charge #3 - misrepresentation of household income.

Background

Petitioner has resided with her children as the tenant of record at the subject premises at 200 West 143rd St., #110, New York, NY, since about 1991.

In 2003, the Housing Authority preferred charges against Petitioner for chronically failing

to timely pay her rent. Petitioner failed to appear for her hearing and then applied to open her default. After a hearing officer granted Petitioner's application to open her default, the Housing Authority notified Petitioner of the new hearing date and amended the charges. On June 22, 2004, Petitioner appeared for an administrative hearing. Rather than proceed with the hearing on the charges, as was her right, Petitioner chose to settle the charges by agreeing to subject her tenancy to a two-year probationary period. She agreed the Housing Authority could seek to terminate her tenancy for violation of probation if she, or any member of her household, committed "any act or omission which would constitute grounds for termination of tenancy" under the Termination Procedures. She specifically agreed not to commit any act which would constitute breach of any rule or regulation of the Housing Authority or "Misrepresentation" under the Termination Procedures. The Board thereafter adopted a final and binding determination approving the stipulation on July 1, 2004. Accordingly, Petitioner's two year probation commenced on July 1, 2004 and would have expired on July 1, 2006.

The affidavit of income Petitioner signed annually has the following statement printed directly above the signature line: "I/We certify that the information listed on all pages of this form is accurate and complete to the best of my/our knowledge and belief. I/We authorize the New York City Housing Authority to independently verify the accuracy of all information submitted. I/We also understand that providing false statements or information is punishable under Federal and local laws. I/We also understand that providing false statements or information is grounds for termination of tenancy. Further, I/We have read or have had read to me/us the above statement."

The Affidavit of Income forms further provide:

NOTICE: The New York City Housing Authority may ask for proof of all statements made by you and an authorization signed by all adult members of your household for the release of information. Failure to return this Affidavit or supply any additional information required by the date requested, or willful submission of incorrect information, may result in a back charge for rent, termination of your lease and civil or criminal prosecution.

Defendants argue that Petitioner's daughter, Melanie, resided with Petitioner at all times relevant to this proceeding. On each of the affidavits of income for this period, Petitioner listed Melanie as a member of the tenant household. Management also listed Melanie as a household member on the Tenant Data Summary, a regularly updated document showing the authorized occupants of the apartment. In the affidavits of income for the income review periods between October 1, 2002 through September 30, 2004, Petitioner reported that her daughter Melanie did not earn any income, and she reported her own annual income for those periods as follows: .

10/1/01-9/30/02: \$18,768.33
10/1/02-9/30/03: \$ 0 (no amount from welfare specified)
10/1/03-9/30/04: \$6,000 (\$125 bi-weekly)

On August 12, 2005, after discovering Petitioner had reported an incorrect social security number on her affidavits of income, management sent Petitioner a letter requesting she meet with them to discuss her failure to comply with rules and regulations. Petitioner met with management on August 19, 2005, at which time management asked Petitioner to submit a copy of her social security card and to authorize the release of her tax returns to the Housing Authority by signing a form entitled "Request for Transcript of Tax Return." Management advised Petitioner it had received information she had been employed for over two years by American

Transit, Inc., a company located in Yonkers, but Petitioner denied she worked for the company. Management advised her that the Housing Authority would take appropriate action if it confirmed she had been employed. In or around September 2005, the Housing Authority's Inspector General's Office ("I.G.'s Office") investigated Petitioner's employment income. Chief Investigator Christopher France ("Chief Investigator France") contacted American Transit, which informed him Petitioner had been employed at the company from May 14, 2003 through September 5, 2005 as a full-time driver. Petitioner's employer transmitted copies of Petitioner's W-2 Wage and Tax Statements for 2003 and 2004 to Chief Investigator France. Management contacted the IRS, and received Petitioner's Tax Return Listings for 2003 and 2004. Petitioner's employer and the IRS reported Petitioner's actual annual earnings for 2003 and 2004 and her partial earnings for 2005 were as follows:

2003: \$15,693.36
2004: \$31,131.19
2005: \$17,358.51

In or around May 2005, in an employment certification form Petitioner submitted to management, Petitioner reported to the Housing Authority that she earned \$150 per week at Paige's Beauty Salon since April 2005. There is no indication Petitioner ever reported to the IRS that she earned any income from Paige's Beauty Salon. Chief Investigator France discovered that Melanie owned Paige's Beauty Salon by matching up Melanie's social security number with the business address for Paige's Beauty Salon.

Management obtained Melanie's IRS Tax Return Listing for 2003, which listed Petitioner's home address as Melanie's residence, and showed Melanie had reported to the IRS that she had earned \$8,662 in 2003 from her business, Paige's Beauty Salon, at 424 Grand

Concourse in the Bronx.

As a result, Petitioner's actual household income for 2003 and 2004 totaled:

2003: \$24,355 (\$15,693.36 in Petitioner's earnings + \$8,662 in Melanie's earnings = \$24,355)

2004: \$31,131 .

The Housing Authority subsequently provided Petitioner with two more opportunities to discuss the disparity between the income she reported to the Housing Authority and the information the Housing Authority obtained from its independent verification. She failed to avail herself of either opportunity. After notifying her of yet another opportunity to meet with management, management interviewed Petitioner on August 21, 2006. Petitioner denied she failed to accurately report her household income and claimed Melanie had moved out in 2003. Management informed Petitioner it intended to forward her tenant file for the preparation of termination-of-tenancy charges, and she would have an opportunity to defend herself at an administrative hearing. She stated that she would be represented by counsel.

On November 9, 2006, the Housing Authority notified Petitioner it had scheduled a termination-of-tenancy hearing based on charges she had willfully misstated or concealed the income she and her daughter had earned from approximately 2002 to 2005 by filing false affidavits of income, all of which resulted in her failure to pay the proper amount of rent due. The notice informed Petitioner of her right to retain counsel to represent her at the hearing. The notice further informed Petitioner the determination may result in her eviction and, if she desired to contest the charges, she could reply to the notice and appear at the hearing. The Housing Authority enclosed a copy of the Termination Procedures with the notice.

The Housing Authority held a hearing before Chief Hearing Officer Ester Tomicic Hines

("Hearing Officer"). On June 13, 2007, Petitioner appeared at the hearing pro se. She acknowledged she had received notice of the charges, and she requested an adjournment to retain counsel. Counsel for the Housing Authority objected because the case had been pending for six months due to Petitioner's multiple adjournment requests. The Hearing Officer advised Petitioner that if LSNY did not take her case, she should retain alternate representation and be ready to proceed in July, stating: "You have the right to bring witnesses, documents, whatever evidence you think is necessary to defend your case." The parties stipulated to adjourn the hearing to July 19, 2007. At the hearing on July 19, 2007, Petitioner again requested an adjournment of the hearing, asserting an attorney at LSNY would represent her, but the attorney was unable to appear because he was on trial. Counsel for the Housing Authority stated that he had not received any confirmation from LSNY that it was representing Petitioner. At the Hearing Officer's request, counsel for the Housing Authority contacted LSNY's project director, who could not confirm the organization's alleged representation of Petitioner. Despite the lack of confirmation, the Hearing Officer ruled that she would permit another adjournment. The parties stipulated to adjourn the hearing to July 31, 2007. The Hearing Officer directed the attorney for the Housing Authority to fax a copy of the stipulation of adjournment to LSNY, noting on the record there was still no indication that LSNY was representing Petitioner.

At the hearing on July 31, 2007, Petitioner stated that LSNY would not represent her, and she was ready to proceed. The Hearing Officer read each of the charges to Petitioner. Petitioner initially denied all of the charges except one (violation of probation), but the Hearing Officer ruled that she would deem Petitioner to have denied all the charges because Petitioner had denied the underlying charge of income fraud.

Throughout the hearing, the Hearing Officer thoroughly explained the hearing procedures, including Petitioner's right to object to testimony and to documents and to cross-examine the Housing Authority's witnesses. At various points, the Hearing Officer asked Petitioner whether she understood the Hearing Officer's directions.

After recounting the testimony and documentary evidence, the Hearing Officer sustained the charges that Petitioner had misrepresented her income and her daughter's income. The Hearing Officer recommended termination of Petitioner's tenancy.

The Housing Authority's Board subsequently adopted the Hearing Officer's decision, issuing a determination terminating Petitioner's tenancy.

Petitioner's Contentions

Petitioner filed an annual re-certification form with the Housing Authority on January 13, 2003, properly indicating that she had not returned to work, but erroneously indicating that her daughter still resided with her. She retained her oldest daughter Melanie as a purported household member because Petitioner had a serious illness and wanted her daughter to be able to easily take occupancy of the apartment in order to take care of the children if Petitioner died or became incapacitated from the illness.

Because she could not verify any public assistance or other income as part of the January 2003 certification, Petitioner was forced to pay the maximum rent of \$619.00 per month for her apartment until after her October 2003 certification. Thus she was overpaying rent for months, and was not underpaying rent despite her employment starting in May 2003. through October 2003.

Petitioner subsequently filed annual re-certification forms in October 2003 and January

2005. In both forms she continued to list her daughter as a household member because of Ms. Parker's illness and a recent car accident. However, she did not report on these two forms that she had begun sporadic employment as a bus driver for American Transit Inc. She did not report the income because she did not think it was required for only sporadic employment, she was not actually working the weeks in which she completed the forms, and she was still receiving public assistance which was reported. In addition, she did not report income for her daughter Sharon as she was not aware of her daughter's income.

Petitioner was not working on the day of these two certifications, nor that week. She never received any training from the Housing Authority about how to complete the certifications, and never read the forms closely.

The Final Administrative Decision was not supported by substantial evidence because
four of the five charges which were upheld - Charges #1, 4, 5, and 6 - were supported by little or no evidence at all.

The Final Administrative Decision was contrary to law because it was substantially based on a charge which was not made part of the formal notice of charges served on the petitioner: that she misstated the family composition on the annual re-certification forms by retaining her daughter - who had vacated - on the forms. This violated petitioner's constitutional due process rights as well as the respondent's hearing rules.

The penalty of termination of tenancy shocks the conscience. A lesser penalty should be imposed such as repayment of any rental arrears caused by the under reporting of income and a suitable probation. It is shocking since the termination will cause the Petitioner and her family great devastation, while at the same time Petitioner erroneously thought that sporadic work did

not have to be reported, the Housing Authority owed her \$3000.00 in unpaid damages due to an incinerator explosion. and she had routinely overpaid her rent in the past.

The respondents failed to adequately develop the record concerning whether the Petitioner was working during the time when she executed the October 2003 and January 2005 re- certifications, why she felt that she did not have to report sporadic income, what training or information has been provided to the tenant by the Housing Authority about reporting regular or sporadic income, and whether there were any mitigating factors for Petitioner. Exploration of mitigating factors would have resulted in eliciting testimony concerning the devastating effect of the loss of her home, the unavailability of other housing, Petitioner's illnesses, her prior overpayment of rent and the incinerator explosion with property loss.

Respondent's Opposition

Petitioner raises new claims she failed to raise at her hearing, which this Court should disregard. If this Court considers these claims, it should reject them because she failed to raise them at her hearing, she failed to serve a notice of claim concerning her claims seeking a monetary award, and her claims seeking a monetary award are time-barred.

Even if this Court could consider these new claims, it should reject them on the merits. First, Petitioner claims the Housing Authority overcharged her for her rent prior to May 2003. Pursuant to federal law, the Housing Authority establishes rental rates that do not exceed 30 percent of each tenant-household's income. Between February 2002 and February 2003, Petitioner's rent was \$606.00 based on her reported annual salary of \$26,761 from the NYPD.

Accordingly, the Housing Authority correctly calculated Petitioner's rent based on 30% of her reported income.

Second, Petitioner asserts the Housing Authority owes her \$3,000.00 after an incinerator explosion in 1990 damaged an apartment she occupied and forced her to relocate to her current apartment. Contrary to Petitioner's allegations, Petitioner moved from her former apartment to the current larger apartment due to "overcrowding;" that is, too many occupants in the apartment for the number of rooms in the apartment.

Third, Petitioner claims she "had a serious illness" and a "recent car accident." Petitioner fails to explain or document her illness or her car accident, and, in any event, these alleged events cannot excuse income fraud.

Fourth, Petitioner asserts she never received any training to complete the annual certifications. Contrary to her claims, no training is necessary because the forms are clearly worded. Petitioner's lease required her to inform the Housing Authority of any employment within thirty days of the date employment commences. The Housing Authority is not obligated to provide "training" to fill out these forms; Petitioner is obligated to complete them accurately.

Analysis

CPLR 7803 states that the court review of a determination of an agency, such as the Housing Authority, 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 Housing Authority'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 Envtl. 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]).

In the instant case, this court finds that relying on the entire record, the hearing officer's determination was supported by substantial evidence. Further, based on the record, the court is disinclined to find that plaintiff only worked "sporadically" for American Transit, supplanting the finding of the hearing officer.

Further, it would be improvident for this court, in this Article 78 proceeding, to consider arguments, claims and issues not raised in the administrative proceeding.

Finally, the termination of Petitioner's tenancy based on a finding that Petitioner committed fraud, is an appropriate sanction by the Housing Authority that will not be disturbed by this court.

Finally, on the record before this court, there is no basis to find that Petitioner's Due Process rights were violated, or that the administrative proceedings record is incomplete.

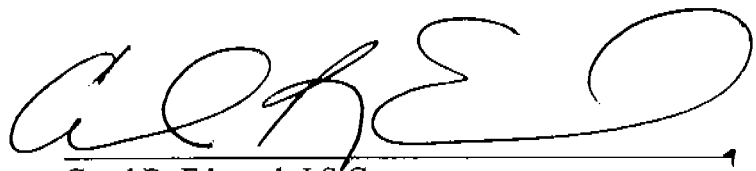
Conclusion

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the application of Petitioner Sharon Parker for an order and judgment (1) directing respondent New York City Housing Authority: (1) to reverse its Final Administrative Decision and to reinstate the tenancy of Petitioner; or, in the alternative (2) to reverse its Final Administrative Decision and to remand the case for (a) additional development and findings concerning why Petitioner felt that she did not have to reveal sporadic income, including whether she was actually working just before she completed the re-certification forms of October 2003 and January 2005, and/or (b) new conclusions based solely on Charge #3 - misrepresentation of household income., is denied in its entirety and the instant Petition is hereby 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 counsel for Petitioner.

Dated: May 13, 2009



Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD