

Matter of Gregory v New York City Hous. Auth.

2010 NY Slip Op 31684(U)

June 29, 2010

Supreme Court, New York County

Docket Number: 402874/2009

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

In the Matter of the Application of
ANTHONY GREGORY,

INDEX NO. 402874/2009

Petitioner,

MOTION DATE April 14, 2010

-against-

MOTION SEQ. NO. 001

NEW YORK CITY HOUSING AUTHORITY,

MOTION CAL. NO. 49

Respondent.

The following papers, numbered 1 to 4 were read on this petition pursuant to CPLR article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	<u>1-2</u>
Answering Affidavits — Exhibits	<u>3-4</u>
Replying Affidavits	

Cross Motion: Yes No

Upon the foregoing papers, the petition pursuant to article 78 of the Civil Practice Law and Rules is decided in accordance with the accompanying decision 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 1-1B).

Dated: 6/29/10

O.P. Sherwood
O. PETER SHERWOOD, 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
COUNTY OF NEW YORK: IAS PART 61**

----- X
**In the Matter of the Application of
ANTHONY GREGORY,**

Petitioner,

**DECISION, ORDER
AND JUDGMENT**

Index No. 402874/2009

**For a Judgment under Article 78 of the
Civil Practice Law and Rules**

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

----- X
O. PETER SHERWOOD, J.:

Petitioner, Anthony Gregory (“petitioner”), proceeding *pro se*, brings this CPLR Article 78 proceeding to annul the determination of respondent, the New York City Housing Authority (“NYCHA” or “respondent”), to terminate his tenancy. The final determination is set forth in a “Determination of Status” that was issued by the NYCHA on September 16, 2009, which approved an August 31, 2009 decision by Hearing Officer Desiree Miller.

Background

Petitioner, who is 24 years old, lives in Apartment 18D at 340 Alexander Avenue, Bronx, New York (the “Apartment”), which is part of the Mott Haven Houses housing project. The Mott Haven Houses are operated and maintained by NYCHA. Petitioner, as a remaining family member, succeeded to the tenancy of his grandmother, Marva Gregory, after she died, and is the sole occupant of the Apartment.

The circumstances which led to the determination to terminate petitioner’s tenancy stem from the recovery by the police of a loaded firearm in petitioner’s Apartment. Petitioner was arrested and charged. Petitioner pleaded guilty to one count of Criminal Possession of a Weapon in the fourth degree, an A misdemeanor (Penal Law § 265.01), and was sentenced to three years probation.

By letter dated December 22, 2008, the Housing Manager of Mott Haven Houses advised petitioner that termination of his tenancy was being considered on the grounds of non-desirability

and that an appointment was scheduled for him to meet with management on January 6, 2009, to discuss the matter. Petitioner met with management, accompanied by his mother Marva Wright, on the scheduled date to discuss his arrest. According to respondent's record of that interview, petitioner claimed that he was set up by a friend who left the gun in his Apartment and that the case was dismissed. At the close of the interview, petitioner was advised that his file would be forwarded to NYCHA's office at 250 Broadway for further review and that he would be notified by letter of the date and time of a hearing on the matter. This was confirmed by letter from the Housing Manager, dated January 8, 2009, which also advised petitioner that he had the right to appear at the hearing with an attorney or representative.

A Notice and Specification of Charges, dated June 15, 2009, was sent to petitioner by certified mail to notify him that a hearing was scheduled for July 22, 2009, at 9:30 a.m. He was again advised that he had the right to be represented at the hearing by counsel or other representative of his choice. Petitioner was charged with non-desirability in relation to his possession of a loaded firearm in his apartment which posed a danger to the health and safety of his neighbors and of NYCHA employees.

The hearing commenced on July 22, 2009 and was adjourned to August 27, 2009, at petitioner's request, so that he could retain counsel. On the adjourned date, petitioner appeared accompanied by his mother but without counsel, claiming that all attorneys he contacted were booked in August. Petitioner decided to proceed *pro se*. The Hearing Officer explained the procedures, namely that the burden to prove the charges against petitioner was on NYCHA; NYCHA would present its direct case first by introducing testimonial and/or documentary evidence; petitioner could cross examine the NYCHA's witnesses and object to the introduction of evidence; and petitioner could also present witnesses and introduce documents in his defense, although he was not required to do so, and the NYCHA could cross examine his witnesses and object to the introduction of his evidence.

The Hearing Officer read the charges in the Notice, to wit, that on August 9, 2008, petitioner unlawfully possessed a loaded firearm in the Apartment and that by doing so petitioner breached the NYCHA rules and regulations. Petitioner admitted both charges on the record. The NYCHA entered into evidence a copy of petitioner's lease, a certified copy of petitioner's August 9, 2008

arrest report, and a certified copy of the Certificate of Disposition indicating that on February 18, 2009, petitioner was convicted of Criminal Possession of a Weapon in the fourth degree and that on March 25, 2009, he was sentenced to three years probation.

Petitioner did not testify at the hearing nor did he introduce any evidence in his defense. The Hearing Officer offered the parties an opportunity to make closing statements but they declined. However, petitioner's mother stated on the record that petitioner was twenty-four years old and had never been in trouble. She also attempted to raise issues regarding the lack of a warrant for the search of the Apartment and an issue related to petitioner providing information to the police concerning other individuals possessing guns. The Hearing Officer advised that such issues were not appropriate for the hearing, but should have been raised in the criminal proceeding.

In a decision and disposition dated August 31, 2009, the Hearing Officer sustained the charges, noting that they were admitted by petitioner. She concluded that petitioner's "risky behavior in possessing a loaded firearm in his NYCHA apartment is not only a source of danger to his neighbors, but a source of danger to unsuspecting NYCHA employees. The record is devoid of mitigating circumstances or any evidence that the conduct is not likely to repeat." For these reasons, the Hearing Officer determined that termination of petitioner's tenancy was warranted.

In a Determination of Status dated September 16, 2009, the Secretary of the NYCHA advised petitioner that the NYCHA had approved the Hearing Officer's decision and disposition finding him ineligible for continued occupancy and terminated his tenancy. This proceeding ensued.

Petitioner does not specifically challenge the determination but appears to challenge the disposition terminating his tenancy as unduly harsh. He asks that the termination of his tenancy be vacated and that he be placed on probation. Petitioner states that he has been laid off from his job, is receiving public assistance, has lived in the Apartment his entire life, and has nowhere else to go if he is evicted from the Apartment. In support of the petition, petitioner offers mitigating circumstances, specifically, that prior to the incident at issue he had never been in trouble and did not have a criminal record. He claims that he was unaware of the gun in the apartment and that after he was arrested the police told him that one of his "so-called" friends had alerted the police that petitioner had a gun and if he admitted to such possession they would release him.

Respondent opposes the petition on the grounds that judicial review is limited to the record before the Hearing Officer and the mitigating circumstances petitioner now raises were not asserted at the hearing.

At the outset, the court notes that neither party has requested that this proceeding be transferred to the Appellate Division pursuant to CPLR § 7804 (g) on the ground that an issue of substantial evidence is presented. Generally, when a determination is made following a hearing, and a claim of substantial evidence is raised, the matter must be transferred to the Appellate Division (CPLR § 7804 [g]; *see Matter of Roman v New York City Hous. Auth.*, 63 AD2d 845 [2d Dept 2009; *Matter of Bradford v New York City Hous. Auth.*, 34 AD3d 463 [2d Dept 2006]; *see also Matter of Maldonado v New York City Hous. Auth.*, 63 AD3d 568 [1st Dept 2009]). Here, the petition does not specifically raise a claim of substantial evidence, but even if it did, petitioner's lease obligated him to refrain from criminal activity and collateral estoppel bars any challenge to petitioner's conviction of Criminal Possession of a Weapon in the Fourth Degree (*see, S.T. Grand, Inc. v City of New York*, 32 NY2d 300, 304-305 [1973]; *Property Clerk of New York City Police Dept. v Krasnik*, 41 AD3d 245 [1st Dept 2007]). Hence, there is no need to transfer this proceeding (*see generally, Matter of Rolon v New York City Hous. Auth.*, 23 Misc3d 1114 [A] ***5 [Sup Ct , N.Y. Co. 2009]). Petitioner's plea of guilty as well as his admission to the charges on the record at the hearing are sufficient to support the Hearing Officer's determination (*see, Matter of Bell v New York City Hous. Auth.*, 49 AD3d 284 [1st Dept 2008]; *Matter of Bradford*, 34 AD3d at 464).

The question remains whether the measure or mode of penalty imposed constitutes an abuse of discretion (CPLR § 7803 [3]). Generally, in an Article 78 proceeding the penalty imposed by an administrative agency must be upheld "unless it shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law" (*Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]). This generally "involves consideration of whether the impact of the penalty on the individual is so severe that it is disproportionate to the misconduct, or to the harm to the agency or the public" (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 234 [1974]).

Here, there is no basis to disturb the Hearing Officer's findings based upon the documentary evidence of petitioner's arrest and conviction. It may not be said that the penalty of termination is so disproportionate as to shock the conscience. Moreover, as respondent notes, petitioner raised no

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mitigating circumstances at the hearing and this court in reviewing the determination is limited to the facts and circumstances adduced before the administrative agency (*see, Matter of Featherstone*, 95 NY2d at 554; *Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330 [1st Dept 2007]). Thus, petitioner's attempt to raise before this court mitigating circumstances that he neglected to raise before the Hearing Officer is unavailing.

Conclusion

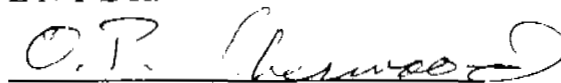
Based upon the foregoing discussion, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and judgment of the Court.

DATED: 6/29/10

ENTER:



O. PETER SHERWOOD

J.S.C.

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 109).