

**Matter of Perlmutter v New York State Div. of Hous.  
& Community Renewal**

2010 NY Slip Op 31806(U)

July 9, 2010

Sup Ct, NY County

Docket Number: 106319/08

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA

PART 19

Justice

Perlmutter, Lucy

INDEX NO. 106319/08

- v -

MOTION DATE \_\_\_\_\_

Housing + Community

MOTION SEQ. NO. 05

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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 based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Petition  
~~motion and cross-motion~~ are decided in accordance with accompanying memorandum decision.

Dated: July 9, 2010

Saliann Scarpulla  
SALIANN SCARPULLA J.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):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X  
IN THE MATTER OF THE APPLICATION OF  
LUCY PERLMUTTER,

Petitioner,

Index No.: 106319/08

Submission Date: 4/28/2010

- against-

NEW YORK STATE DIVISION OF HOUSING  
AND COMMUNITY RENEWAL,

**DECISION AND ORDER**

Respondent.

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For Petitioner:  
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New York, NY 10005

For Respondent:  
Gary R. Connor  
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For Respondent:  
Andrew M. Cuomo  
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New York, NY 10271

Papers considered in review of this petition:

- Petition .....1
- Aff in Opp ..... 2
- Mem of Law .....3

HON. SALIANN SCARPULLA, J.:

In this Article 78 proceeding, petitioner Lucy Perlmutter (“Perlmutter”) seeks to  
(1) vacate the order of respondent New York State Department of Housing and  
Community Renewal (“DHCR”) issued on December 5, 2007 as arbitrary and capricious;  
and (2) restore Perlmutter’s Section 8 voucher.

It is undisputed that for many years Perlmutter was the recipient of a Section 8 subsidy, which was applied toward her rent at 546 Main Street, Apt. #427, Roosevelt Island, NY. At some point, a notification was sent to her that an annual recertification inspection was scheduled for October 12, 2006. At that time, Perlmutter was hospitalized for rehabilitation from pancreatitis and gallbladder surgery. The annual recertification was rescheduled by DHCR for February 19, 2007.<sup>1</sup> Subsequently, DHCR issued Perlmutter a Notice of Termination dated April 6, 2007, indicating that her Section 8 voucher was being terminated because she was not home for either the scheduled inspection on October 12, 2006 or on February 19, 2007, and that Perlmutter had failed to “notify Section 8 that [she] would not be at home.” The Notice of Termination indicated that her termination was supported by regulations CFR 982.404(d) and 982.405. The Notice of Termination further provided that if Perlmutter did not agree with the decision to termination her Section 8 subsidy, she had the right to request an informal hearing on or before April 30, 2007.

Perlmutter was still hospitalized when DHCR sent her the Notice of Termination, and her daughter, Iris Perlmutter (“Iris”), received the notice. Iris then contacted DHCR to reschedule the recertification inspection, and also to request an informal hearing regarding the notice of termination. Iris also sent a letter to DHCR dated August 16, 2007

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<sup>1</sup> February 19, 2007 was President’s Day, a state and federal holiday. It is not clear from the record whether an inspection was attempted on that date.

requesting an informal hearing. However, DHCR issued another Termination Notice, dated September 26, 2007. This Termination Notice indicates that Perlmutter's Section 8 voucher would be terminated effective November 1, 2007. The reason given for termination in this notice is that "[t]he tenant failed to request a [sic] informal hearing as advised per telephone call on n8/16/2007 [sic]. The regulations which support this action are the following: CFR 982.551 and 982.552." The Termination Notice further advised Perlmutter that she had until October 18, 2007 to request an informal hearing.

In a letter dated October 8, 2007, Iris again requested an informal hearing on behalf of her mother. As a result, DHCR scheduled an informal hearing for November 29, 2007. On that date, a hearing was conducted before Edward Diaz, Hearing Officer. Also present and participating were Marie Lee, Perlmutter's Case manager, Tomesia Williams, a Supervisor, and Iris Perlmutter, on behalf of her mother.<sup>2</sup>

The hearing officer issued his decision, dated December 5, 2007. The "Findings of Fact" included in the decision are as follows:

- (1) Apartment vacant for two years.
- (2) Annual Recertification forms signed for Lucy Perlmutter by daughter.
- (3) Daughter has Power of Attorney
- (4) Daughter unable to confirm when Lucy Perlmutter will be released from Jewish Home and Hospital.

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<sup>2</sup> Iris Perlmutter was appointed by her mother to represent her interests pursuant to Perlmutter's execution of a Durable General Power of Attorney, dated November 8, 2007.

The section of the decision titled “Conclusions of Law” states: “After considering all the evidence in the records and based upon the preponderance of the evidence, I find that under 24 CFR §§ 982.551 and 552: [.]” No further explanation is given.

The section of the decision titled “Conclusion” states: “For the foregoing reasons, the Termination Notice should be affirmed.” It does not specify whether the decision refers to the April 6, 2007 Termination Notice or the September 26, 2007 Termination Notice.

Perlmutter now commences this Article 78 proceeding, seeking to vacate DHCR’s December 5, 2007 order and to restore Perlmutter’s Section 8 voucher. Perlmutter argues that the DHCR hearing officer’s findings in the December 5, 2007 decision were arbitrary and capricious, without basis in law and fact, and violative of Perlmutter’s due process rights. Specifically, Perlmutter contends that DHCR deprived Perlmutter of her due process rights when it stated one reason for her termination in the Termination Notices – that Perlmutter missed her recertification inspections – but then based the decision to terminate her Section 8 voucher on Perlmutter’s absence from her apartment for over 180 days.<sup>3</sup> Perlmutter also argues that DHCR premised her termination on 24 CFR §§982.551 and 552, yet she has not committed any of the prohibited acts specified in these regulations.

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<sup>3</sup> This basis is not specified in the hearing officer’s decision, but Perlmutter’s absence for over 180 days was discussed at the hearing, and is the focus of DHCR’s opposition papers.

DHCR answers the petition, arguing that its findings in the December 5, 2007 order were neither arbitrary nor capricious, nor a violation of Perlmutter's due process rights.

### **Discussion**

It is well settled that judicial review of an administrative determination pursuant to CPLR Article 78 is limited to a review of the record before DHCR and the question of whether its determination was arbitrary or capricious and has a rational basis in the record. See CPLR §7803(3); *Gilman v. N.Y. State Div. of Hous. & Community Renewal*, 99 N.Y.2d 144 (2002); *Nestor v. New York State Div. of Hous. & Community Renewal*, 257 A.D.2d 395 (1st Dep't 1999). "In short, '[j]udicial review of an administrative determination is limited to the grounds invoked by the agency.'" *Matter of Rizzo v. DHCR*, 6 N.Y.3d 104, 110 (2005) (quoting *Matter of Aronosky v. Board of Educ., Community School Dist. No. 22 of City of N.Y.*, 75 N.Y.2d 997, 1000 (1990)). 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 Rohan v. New York City Housing Authority*, 2009 NY Slip Op 30177U, at \*6-\*7 (Sup. Ct. N.Y. Co. Jan. 23, 2009) (quoting *Matter of Pell v. Board of Education*, 23 N.Y. 2d 222,231 (1974)).

In addition, "[t]his Court has the authority to review an administrative sanction that 'shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law.'" *Matter of Toomer v. Rhea*, 2010 NY Slip Op 31130U, at \*5 (Sup. Ct.

N.Y. Co. April 23, 2010) (quoting *Peoples v. New York City Housing Authority*, 281 A.D.2d 259 (1<sup>st</sup> Dep't 2001)).

Here, the decision of the hearing officer failed to provide any legal analysis or basis for his conclusion that the Termination Notice be affirmed.<sup>4</sup> While the decision does include factual findings, it fails to provide any legal explanation. All that is provided is the following sentence fragment:

After considering all the evidence in the records and based upon the preponderance of the evidence, I find that under 24 CFR §§ 982.551 and 552:

This utter lack of findings fails to constitute a rational basis for termination of Perlmutter's Section 8 voucher. The hearing officer's reference to two regulatory provisions also fails to provided a rational basis for his conclusion, as both section 982.551 and 982.552 include at least twenty (20) subsections, and offer a host of reasons why a participant may have her Section 8 voucher terminated. The inclusion of four (4) factual findings alone is insufficient support for such a severe finding by the hearing officer.

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<sup>4</sup>The hearing officer's decision fails to specify which of the two Termination Notices he is affirming. It goes without saying that it would be a due process violation to terminate Perlmutter's Section 8 subsidy without making her aware of which notice, and which regulatory provisions, were the basis of the termination. "It is well settled that the due process [of law] requires the State, before it deprives a person of an entitlement [to Section 8], to provide notice that is 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Diaz v. Donovan*, 2008 N.Y. Misc. LEXIS 4570, at \* 13 (Sup. Ct. N.Y. Co. 2008).

While it is possible that Perlmutter was in violation of one part of 24 CFR §982.551 and/or §982.552, it is not this Court's place to guess how the hearing officer came to that determination or to hypothesize as to how the hearing officer applied his factual findings to any of the provisions of 24 CFR §§ 982.551 and 982.442. "While this Court cannot substitute its judgment for that of the underlying agency, one is forced to ponder how the agency could have arrived at its determination which is surely arbitrary, since no analysis of the [applicable law] was done." *Boatwright v. N.Y.S. Office of Mental retardation and Developmental Disabilities*, 2007 N.Y. Misc. Lexis 3399, at \* 8 (Sup. Ct. N.Y. Co. April 18, 2007). See also *Matter of Home Depot, U.S.A. v. Town Board of the Town of Hempstead*, 63 A.D.3d 938, 939 (2d Dep't 2009) (Town Board's decision found to be arbitrary and capricious where it "offered no findings to support" its conclusion). Lacking any analysis or application of the law of the factual findings, the hearing officer's determination is by definition arbitrary and capricious.

Such a conclusion without any rationale is especially problematic when the sanction is so severe. The hearing officer affirmed the termination notice (without specifying which one), thereby Perlmutter's Section 8 voucher, which is the most severe sanction to be levied on a Section 8 recipient. In *Matter of Gist v. Mulligan*, 65 A.D.3d 1231, 1232 (2d Dep't 2009), the petitioner was found to have violated certain provisions in 24 CFR 982.551, in particular failing to complete her annual form for recertification of eligibility, failing to appear for her recertification appointment and failing to notify the

appropriate department that she had vacated her apartment. The petitioner failed to comply because, at the time of her scheduled recertification appointment, she was “incarcerated for conduct that resulted in a misdemeanor conviction, and did have the funds necessary to post bail.” *Gist*, 65 A.D.3d at 1233. The Appellate Division, Second Department found that “under the circumstances of this case, the penalty imposed was so disproportionate to the offenses committed as to be shocking to one’s sense of fairness . . . and, thus, an abuse of discretion as a matter of law.” *Gist*, 65 A.D.3d at 1232-33.

Terminating Perlmutter’s Section 8 subsidy for her failure to comply with these same provisions because she was hospitalized would surely also be disproportionate, shocking to one’s sense of fairness, and an abuse of discretion as a matter of law. *See also Sicardo v. Smith*, 49 A.D.3d 761, 762 (2d Dep’t 2008) (termination of Section 8 subsidy for petitioner’s failure to notify agency that her former husband was living in subject residence was shocking to one’s senses, and the matter was remanded for imposition of a lesser penalty).

In accordance with the foregoing, it is hereby

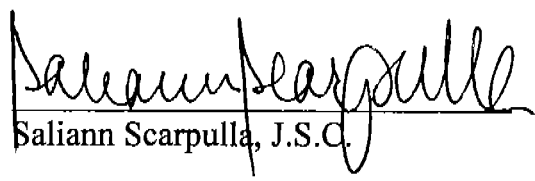
ORDERED and ADJUDGED that the petition of Lucy Perlmutter to vacate the decision of respondent New York State Department of Housing and Community Renewal on December 5, 2007 and to reinstate her Section 8 voucher is granted, and it is further

ORDERED and ADJUDGED that the matter is remanded to the New York State Department of Housing and Community Renewal to reinstate Lucy Perlmutter' Section 8 subsidy retroactive to December 5, 2007.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York  
July 9, 2010

ENTER:

  
Saliann Scarpulla, 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 141B).