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

PRESENT: O. PETER SHERWOOD PART 61
*Justice*

In the Matter of the Application of
MILEXCIA ROSE,

Petitioner,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

INDEX NO. 401569/10
MOTION DATE Aug. 9, 2010
MOTION SEQ. NO. 001
MOTION CAL. NO. 71

The following papers, numbered 1 to 5 were read on this petition pursuant to CPLR Article 78

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1-2 |
| Answering Affidavits — Exhibits | 3-5 |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☑ No

Upon the foregoing papers, the petition for a judgment pursuant to CPLR Article 78 annulling a determination of respondent the New York State City Housing Authority 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 141B).

Dated: 1/11/11

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: PART 61

----------X

In the Matter of the Application of

MILEXCIA ROSE,

Petitioner,

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

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

----------X

DECISION AND JUDGMENT

Index No. 401569/2010



O. PETER SHERWOOD, J.:

Pro se petitioner, Milexcia Rose ("petitioner"), an applicant for public housing, brings this CPLR Article 78 proceeding seeking a judgment reversing and annulling the determination of a Hearing Officer, dated April 26, 2010, which sustained, after an informal hearing, a decision of respondent New York City Housing Authority ("NYCHA") that petitioner is ineligible for public housing. Respondent opposes the petition. For the reasons that follow, the petition is denied and the proceeding is dismissed.

***Background***

On or about July 6, 2006, petitioner applied for public housing for herself, her sons Kevin ("Kevin") and Kelvin Rose ("Kelvin") and her daughter Kenisha Rose ("Kenisha"), listing her address as 83 Sackman Street, Brooklyn, New York (Verified Answer ¶ 13, Ex. "B"). NYCHA conducted an eligibility interview on April 6, 2007 (*id.*, Ex. "C"). At the time of this interview, petitioner advised that her present address was 106-70 Ruscoe Street, Queens, New York and that she was applying for housing for only herself and Kenisha (*id.*, Ex. "D"). She further asserted in an affidavit that Kevin, Kelvin, and the father of her three children, Ronulfo Tocker, would not be residing with her (*id.*). The NYCHA interviewer asked petitioner whether she or any family member had ever been convicted of an offense and she replied "No" (*id.*, Ex. "C" at 28).

Thereafter, as a result of a criminal background check, NYCHA learned that Kevin had been convicted of three offenses, a class B misdemeanor in March 2005, a class A misdemeanor in February 2006, and another class A misdemeanor in August 2008 (Verified Answer ¶ 14, Ex. "E"). Petitioner's application was forwarded to NYCHA's Family Composition Review Unit ("FRCU") to determine if reasonable basis existed to believe a questionable family member ("QFM") was or would be a member of petitioner's household. NYCHA's definition of QFM includes a person over 16 years of age, listed as a family member on an application, who is reported to have moved out within three years prior to the eligibility interview or who is reported to be currently in prison (*id.* ¶ 12). Although petitioner advised that Kevin had moved out in 2006, his 2008 arrest records listed petitioner's current address of 106-70 Ruscoe Street, Queens, New York as Kevin's address. NYCHA held that petitioner was ineligible for public housing for a certain period of time (until August 2012 pursuant to NYCHA standards). NYCHA concluded that petitioner's statement that Kevin had not resided with her since 2006 was incredible based upon the evidence of a shared address in 2008. In reaching its determination, NYCHA noted that the offenses are serious; the relationship between petitioner and Kevin was long and enduring; there is evidence of shared address; and there is no evidence that the relationship terminated (*id.* ¶ 15, Ex. "F").

By letter dated October 9, 2008, NYCHA advised petitioner of the ineligibility finding and that if she wished to challenge the determination she should visit the Application Information Office and bring with her any documentation or other evidence that the offending party would not present a problem in the future or evidence that the offender would not be living with petitioner in public housing. At the foot of the letter the following legend appeared in large print: "IF YOU DO NOT APPEAR WITHIN 30 DAYS FROM THE DATE OF THIS LETTER, WE WILL FIND YOU INELIGIBLE FOR PUBLIC HOUSING BASED ON OUR INVESTIGATION AND EVALUATION." (Verified Answer Ex. "G"). A notation on the letter dated 11/9/08 indicated that petitioner did not respond to the letter or present evidence. Petitioner was advised by letter dated November 24, 2008, that she was ineligible for public housing based upon Kevin's criminal record and that she had the right to visit the Applications Admissions Office to discuss the finding of ineligibility and, if after appearing at the Applications Information Office she was still found to be

ineligible, she had a right to request, within 90 days of the date of the letter, an informal hearing before an impartial hearing officer (*id.* ¶ 17, Ex. "H").

In February 2009, petitioner made a request for an informal hearing (Verified Answer Ex. "J") and met with a NYCHA representative, at which time she submitted a notarized statement that Kevin would not reside with her when he was released from prison (*id.* ¶ 18, Ex. "I").

On December 14, 2009, an informal hearing was conducted before Hearing Officer Kenneth Cox at which a NYCHA representative and petitioner were present. NYCHA submitted documentary evidence, including petitioner's NYCHA application, the report of her eligibility interview, and the results of NYCHA's criminal background check of petitioner's family members (*id.* ¶ 19, Ex. "L"). Petitioner provided that she resided at 83 Sackman Street, 1st floor, Brooklyn, New York and was applying for housing for herself and Kenisha (*id.*). She alleged that Kevin left her household in June 2007 and was presently incarcerated at Upstate Correctional Facility pursuant to a 2008 conviction. Petitioner further averred that Kevin had resided at 164th Street in Jamaica, New York and when he was released from prison on or about March 20, 2010, he would reside with his girlfriend. Petitioner submitted documentary evidence consisting of: (1) a notarized statement from Shakilya M. Boyd stating that she resided at 120-17 142 Street, Jamaica, New York and would allow her boyfriend, identified as Kevin Tocker Rose, "to stay with [her] and [her] grandmother when he comes home from jail in February 2010 (*id.* Ex. "O"); (2) an earnings statement (*id.* Ex. "M"); and a postmarked envelope from Kevin bearing the address of the Upstate Correctional Facility addressed to petitioner at 8551 79 Street, Woodhaven, New York (*id.* Ex. "N").

On April 26, 2010, the Hearing Officer sustained NYCHA's decision that petitioner was made ineligible for public housing due to Kevin's criminal convictions, finding that NYCHA had made an appropriate determination based on Federal housing guidelines. The Hearing Officer found petitioner's documentary proof to be insufficient to demonstrate that Kevin would not be residing with her when he is released from prison.

The petitioner thereafter commenced this proceeding pursuant to CPLR article 78 to reverse the NYCHA determination denying her application to vacate her default.

***Discussion***

The court's role in reviewing a decision of an administrative agency, such as the NYCHA, is limited, with the standard of review being whether the administrative determination was made in violation of a lawful procedure, was affected by an error of law or was arbitrary and capricious and without a rational basis in the administrative record (*see,* CPLR 7803; *Pell v Board of Educ.,* 34 NY2d 222, 231 [1974]). The court may not conduct a de novo review of the facts and circumstances or substitute its own judgment for that of the administrative agency (*see, Greystone Management Corp. v Conciliation and Appeals Bd.,* 94 AD2d 614, 616 [1st Dept 1983], *affd.* 62 NY2d 763 [1984]). Rather, the court should review the record as a whole to determine whether a rational basis exists to support the findings of the administrative agency (*see, Nelson v Roberts,* 304 AD2d 20 [1st Dept 2003]). Moreover, where the administrative determination requires an evaluation of the facts within an area of the administrative body's expertise, the determination must be accorded great weight and judicial deference (*see, Flacke v Onondaga Landfill Systems, Inc.,* 69 NY2d 335, 363 [1987]). An action is arbitrary and capricious when the action is taken "without regard to the facts" (*Pell v Board of Education, supra*).

Here, petitioner contends that her son, who is twenty-four years old, will not reside with her; that he is old enough to take care of himself; that prior to his incarceration he was living with his girlfriend; and that he has been released from prison and is again living with his girlfriend (Verified Petition, ¶ 3). This court in its review is limited to the facts and record adduced before the administrative agency and, therefore, additional contentions, raised for the first time in this CPLR article 78 proceeding, may not be considered (*see, Matter of Featherstone v Franco,* 95 NY2d 550, 554 [2000]; *Matter of McNeal v Hernandez,* 58 AD3d 417, 418 [1st Dept 2009]; *Matter of Torres v New York City Hous. Auth.,* 40 AD3d 328, 330 [1st Dept. 2007]). To permit petitioner to raise additional contentions for the first time in this proceeding "would deprive the administrative agency of the opportunity 'to prepare a record reflective of its 'expertise and judgment'" (*Matter of Yarbough v Franco,* 95 NY2d 342, 347 [2000], quoting *Watergate II Apts. v Buffalo Sewer Auth.,* 46 NY2d 52, 57 [1978]).

Respondent's determination as to petitioner's ineligibility for public housing is rationally based upon the record. Petitioner initially claimed that Kevin left her household in December 2006,

which statement she contradicted at the administrative hearing when she alleged that Kevin left her household in June 2007. The latter statement is contradicted by petitioner's sworn statement dated April 6, 2007, in which she stated that Kevin was no longer a member of her family composition. Also noteworthy is evidence in the record that when arrested in 2008 Kevin gave petitioner's address as his residence address. Such inconsistent evidence presented NYCHA and the Hearing Officer with a credibility issue which was resolved against petitioner and is sufficiently supported by the record. In addition, petitioner's documentary proof that Kevin would not be residing with her upon his release from prison is lacking in sufficient detail and suggests that his alleged living arrangements with his girlfriend are not firmly established. The court further notes that prior to NYCHA's criminal background check petitioner had denied that any of her family members had been convicted of a crime. Accordingly, the court finds that NYCHA's determination as to petitioner's ineligibility for public housing is not arbitrary or capricious or contrary to law and must be upheld.

***Conclusion***

Based upon the foregoing discussion, it is

**ADJUDGED** that the petition seeking to reverse and annul NYCHA's determination is denied and the proceeding is dismissed.

This constitutes the decision and judgment of the court.

**DATED:** January 4, 2011

**ENTER,**

**O. PETER SHERWOOD**
**J.S.C.**