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

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Index Number : 402430/2010

BROWN, ROBERT

VS

RHEA, JOHN

Sequence Number : 001

ARTICLE 78

Cal # 9

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 ... Petition	1
~~Answering Affidavits~~ — Exhibits + memo	2, 3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

HON. BARBARA JAFFE
SUPREME COURT OF THE STATE OF NEW YORK
60 CENTRE STREET
NEW YORK, NY 10013-4395

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER
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: 4/13/11
APR 13 2011

BARBARA JAFFE J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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 5

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ROBERT BROWN,

Petitioner,

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

-against-

JOHN B. RHEA, as Chairperson and Member of The New York City Housing Authority, and the NEW YORK CITY HOUSING AUTHORITY,

Respondents

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Index No. 402430/10

Motion Date: 2/15/11
Motion Seq. No.: 001

DECISION & JUDGMENT

BARBARA JAFFE, JSC:

For petitioner:
Jennifer Yi Man Cheung
Christopher D. Lamb, Esq.
MFY Legal Services, Inc.
299 Broadway, 4th Floor
New York, NY 10007
212-417-3704

For respondent:
Andrew M. Lupin, Esq.
Sonia M. Kaloyanides
General Counsel
250 Broadway, 9th Floor
New York, NY 10007
212-776-5183

By notice of petition dated August 27, 2010, petitioner moves pursuant to CPLR Article 78 for an order annulling the decision by respondent denying his application for a section 8 voucher, and compelling respondent to grant the application. Respondent opposes.

I. FACTS

A. Background

The New York City Housing Authority (NYCHA) was created by the New York State Legislature to administer section 8 of the United States Housing Act of 1937, build and operate low-income apartments in New York City, and provide rent subsidies to lower-income families

to enable them to rent privately owned housing. (Verified Answer dated Oct. 15, 2010 [Answer]). It has the authority to make and impose standards for occupancy. (Pub. Hous. Law §§ 3[2], 37[1][w], 156; 24 CFR § 960.202[a]). A prospective recipient of Section 8 funds must apply to NYCHA which, pursuant to federal regulations, may deny the request if it determines that the applicant engages in illegal drug use or other criminal activity. (24 CFR § 982.553[a][1][ii][A], [B]). Accordingly, NYCHA conducts criminal background checks on applicants, and has adopted eligibility standards for admission, excluding applicants who may affect the health, safety or welfare of other tenants. (Answer, Exh. A). Pursuant to these standards, a person with a conviction for a misdemeanor based on the possession of a controlled substance may be eligible four years after a sentence has been completed, providing that the applicant has no further convictions or pending charges. (*Id.*).

Petitioner is an unemployed and allegedly disabled Bronx resident, who had been convicted at least twice for criminal possession of a controlled substance, on February 24, 2004. and on July 27, 2006. (Answer). Some time in 2006, petitioner applied for a NYCHA voucher. (*Id.*). On February 21, 2007, NYCHA interviewed petitioner to determine his eligibility. (*Id.*). Exh. C). Petitioner informed NYCHA that he had been convicted for criminal possession of a controlled substance in 1997, and that he was currently facing prosecution for assault, with a court date scheduled on March 16, 2007. (*Id.*).

Following the interview, NYCHA conducted a criminal background search, which revealed the 2004 and 2006 convictions. (*Id.*, Exh. D). By letter dated February 27, 2007, NYCHA sent petitioner a letter informing him of the criminal convictions, and inviting him to visit the applications office, accompanied by counsel if he so desired, and to present evidence of

his rehabilitation. (*Id.*, Exh. E). The letter also contained the proviso that if petitioner did not appear at the applications office within 30 days, he would be deemed ineligible for section 8 benefits. (*Id.*). In response, petitioner submitted an undated letter from Elmcor Youth & Adult Activities, Inc. (Elmcor), congratulating him for the "successful completion of active participation in the Residential Modality" as of an unspecified date. (*Id.*, Exh. F).

By letter dated March 14, 2007, NYCHA denied petitioner section 8 benefits due to his criminal convictions, and informed him that he would be ineligible until July 27, 2011. (*Id.*, Exh. G, H).

B. Informal hearing

By letter dated May 24, 2007, petitioner requested an informal hearing. (*Id.*, Exh. I). The hearing was held before a hearing officer on February 1, 2010, wherein petitioner and respondent testified and presented evidence. By decision dated June 29, 2010, the hearing officer found, in pertinent part, that petitioner was convicted on April 15, 2006 for criminal possession of a controlled, substance, was sentenced on July 27, 2006 to a conditional discharge for one year, and was thus rendered ineligible for section 8 benefits until July 27, 2011. The hearing officer considered the Elcor letter but noted that although petitioner testified that in 2000, he completed a drug treatment program at Elcor, the Elcor letter does not reflect the nature of the program or when petitioner completed it, and that because of medical problems, petitioner had not been employed or registered in school since the 2006 offense. The hearing officer also admitted in evidence three letters from Saint Dominic's home indicating that he had tested negative for illegal drug use, along with six character references, only two of which were notarized and three were from family members. Petitioner thereafter submitted a letter from Elcor reflecting that he

completed an unidentified program in June 2000.

Based on these findings, the hearing officer concluded that petitioner had not submitted sufficient evidence that he "made significant positive changes in his behavior since his offense," and sustained the determination of ineligibility for public housing. (*Id.*, Exh. K).

II. CONTENTIONS

Petitioner argues that the decision denying petitioner's application was arbitrary and capricious and not supported by substantial evidence, as the hearing officer failed to take into consideration that petitioner was awarded custody of his three children and thus a family court has determined that he was not involved in criminal activity or drugs, and that he failed to take into account evidence of petitioner's rehabilitation, good tenancy, and good character references. (Petition). In support, petitioner submits the documents submitted before the hearing officer, including a letter from New York City Children's Services dated November 17, 2009, stating that petitioner has custody of his children and provides adequate care (*id.*, Exhs. C, D, E), the letter from Saint Dominic's Home reflecting that he tested negative for drugs (*id.*, Exh. F, H), personal references (*id.*, Exhs. G, M, N, O, P, Q, R), and the letters from Elcor stating that petitioner completed a program in June 2000 (*id.*, Exhs. I, J).

In opposition, respondent argues that the hearing officer's determination was rational and that it is entitled to great deference. (Answer).

III. ANALYSIS

When an administrative determination is made following a hearing required by law, and a claim of substantial evidence is raised, the matter must be transferred to the Appellate Division. (CPLR 7803[4], 7804[g]; Siegel, NY Prac § 568 [4th ed]). However, if no issues are raised

involving substantial evidence, a transfer need not follow. (*Matter of Kinard v New York State Hous. Auth.*, 2009 WO 3780701, 2009 NY Slip Op 32584[U] [Sup Ct, New York County]; *Matter of Rolon v New York State Hous. Auth.*, 23 Misc 3d 1114[A], 2009 NY Slip Op 50751[U] [Sup Ct, New York County]).

Here, although petitioner argues that the hearing officer's determination is not supported by substantial evidence, neither party seeks a transfer to the Appellate Division, nor do the facts reflect an issue of substantial evidence. Moreover, neither party has argued that the informal hearing was required by law or the constitution. (*See Duncan v Klein*, 38 AD3d 380 [1st Dept 2007] [substantial evidence standard not applicable; disciplinary conference not conducted pursuant to constitution or statute]). Consequently, I review the proceeding to discern whether the determination reached is arbitrary and capricious.

Judicial review of an administrative agency's decision is limited to whether the decision "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 or discipline imposed." (CPLR 7803[3]). In reviewing an administrative agency's determination as to whether it is arbitrary and capricious under CPLR Article 78, the test is whether the determination "is without sound basis in reason and . . . without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Kenton Assoc., Ltd. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]). Moreover, the determination of an administrative agency, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a

result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]).

The hearing officer's decision was based on clearly applicable NYCHA guidelines that an applicant is ineligible for benefits within four years of a conviction for controlled substances, a conviction which petitioner failed to disclose in his initial application. He reviewed petitioner's evidence and reasonably found insufficient proof of rehabilitation, and there is no basis for finding that he failed to take into account the character references, the evidence that petitioner tested negative for drug use, was awarded custody of his children, and was an attentive father. To the extent that the hearing officer was permitted to waive the rule that petitioner was ineligible based on the conviction, it was well within his discretion to decline to do so based on the evidence.

IV. CONCLUSION

Accordingly, it is hereby

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

This constitutes the decision and order of the court.

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: April 13, 2011
New York, New York

APR 13 2011

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).