

**Matter of Horowitz v New York City Civ. Serv.  
Commn.**

2011 NY Slip Op 31101(U)

April 26, 2011

Supreme Court, New York County

Docket Number: 110216/10

Judge: Barbara Jaffe

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: JAFFE BARBARA JAFFE  
J.S.C.  
Justice

PART 5

Index Number : 110216/2010  
HOROWITZ, NORMAN  
VS.  
MUC CIVIL SERVICE COMMISSION  
SEQUENCE NUMBER : 001  
ARTICLE 78  
CAL # 43

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for article 78

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1, 2, 3  
4  
5

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**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: 4/26/11  
APR 26 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

-----X

In the Matter of Application of  
  
NORMAN HOROWITZ,

Petitioner,

-against-

NEW YORK CITY CIVIL SERVICE COMMISSION,

Respondent,

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

-----X

BARBARA JAFFE, JSC:

**For petitioner:**

Kalmon Glovin, Esq.  
1066 East 27<sup>th</sup> Street  
Brooklyn, NY 11210  
347-539-7949

**For respondent:**

Eric Eichenholtz, ACC  
Diana Goell Voigt, ACC  
Asad Rizvi, ACC  
Michael A. Cardozo  
Corp. Counsel of the City of NY  
100 Church Street Room 2-170  
New York, NY 10007  
212-788-6838

By notice of petition dated August 2, 2010, petitioner moves pursuant to CPLR Article 78 for an order annulling and otherwise reversing the decision of the New York City Civil Service Commission (Commission), directing that the Commission reverse the decision of the New York City Housing Authority (NYCHA) and implement the recommendation of the trial officer, or in the alternative, remanding the matter to the Commission for a further evidentiary hearing, or in the alternative, remanding the proceeding to this court for a plenary hearing.

By notice of cross motion dated October 8, 2010, respondent cross-moves to dismiss the petition.

**DECISION & JUDGMENT**

Index No. 110216/10  
Motion Date: 2/22/11  
Motion Seq. No.: 001

## I. PERTINENT FACTS

On October 15, 2007, a disciplinary hearing was held relating to alleged misconduct by petitioner, a former Administrative Storekeeper with NYCHA for some 16 years. By letter dated May 5, 2008, NYCHA advised petitioner that specific disciplinary charges were being preferred against him in connection with his employment, which were the subject of a hearing held on November 6, 2008, December 2, 2008, and January 20, 2009. (Affirmation of Eric Eichenholtz, ACC, dated Oct. 8, 2010, Exh. 2). By decision dated April 16, 2009, a trial officer sustained the charges and recommended that petitioner be suspended for 20 work days. (*Id.*, Exh. 1). By letter dated May 20, 2009, NYCHA advised petitioner that he had been found guilty of the charges against him and that while it accepted the trial officer's findings, it rejected her recommendation that he be suspended and replaced it with its determination that his employment be terminated. (*Id.*, Exh. 3). By notice to the Commission dated June 9, 2009, petitioner timely filed his notice of appeal from NYCHA's determination, and by notice of City Civil Service Commission Action, dated April 1, 2010, petitioner was notified that the determination appealed from was affirmed. (*Id.*, Exhs. 4, 5; Verified Petition, dated Aug. 2, 2010).

## II. CONTENTIONS

Petitioner maintains that he was denied due process during the investigative hearing held in that he was not apprised of his right to have counsel present or of the subject matter of the hearing, all of which is recorded on a tape that was before the trial officer. In connection with the hearing before the trial officer and its ultimate affirmance by the Commission, petitioner alleges that he was deprived of his right to receive a warning of his alleged misconduct before receiving the drastic penalty of termination, that it was never alleged that his misconduct

interfered with his job performance, that the Commission failed to review and discern from the testimony that the trial officer never found certain material facts and that his violations of NYCHA's policies do not rise to the level of misconduct, and he takes issue with the findings themselves and contends that the Commission merely "rubber-stamped" the decision terminating his employment. He also maintains that in imposing the penalty of termination, the Commission retaliated for his having brought an action against NYCHA on April 29, 2009. Thus, he concludes, the affirmance of the penalty of termination was arbitrary and capricious, and not supported by substantial evidence. (Verified Petition, Exh. A).

Respondent argues that pursuant to New York Civil Service Law 76, having sought from the Commission a review of NYCHA's termination of his employment and having failed to allege that respondent acted illegally, unconstitutionally, or in excess of its jurisdiction in the method it employed in conducting its appellate review, petitioner waived his right to seek review by this court of NYCHA's determination and thus failed to state a cause of action against the Commission. Rather, respondent contends, petitioner was given a hearing and notice and an opportunity to be heard and thus was not deprived of any due process rights. In any event, respondent observes that having been advised in the May 2008 letter of the charges brought against him, petitioner was on notice of his alleged misconduct well before he received the May 2009 termination letter, and in denying that petitioner's claim of retaliation has merit, respondent observes that he failed to raise the issue before the Commission. (Mem. of Law in Support of Respondent's Cross-Motion to Dismiss the Petition, dated Oct. 8, 2011).

In opposition to respondent's cross motion, petitioner reiterates the arguments set forth in his petition and observes that at the hearing before the Commission on January 7, 2010, "there

was some discussion relative as to whether [he] was accorded due process of law [at the investigative hearing on October 15, 2007].” He complains that in contravention of the NYCHA Human Resources Manual of Personnel Rules and Regulations, the trial officer did not give him an opportunity to produce any witnesses, lists the Commission’s rubber-stamping of NYCHA’s determination and failure to consider facts and evidence, and argues that in affirming an arbitrary and capricious decision, the Commission acted illegally, unconstitutionally, and in excess of its jurisdiction and is thus reviewable by this court. He also maintains that the penalty imposed of termination is “shocking to one’s sense of fairness,” and analogizes his case to that set forth in *Schnaars v Copiague Union Free School Dist.*, 275 AD2d 462 (2d Dept 2000). (Affirmation of Kalmon Glovin, Esq. in Opposition to Respondent’s Cross-Motion to Dismiss the Petition, dated Jan. 21, 2011).

In reply, respondent distinguishes *Schnaars*, argues that petitioner failed to support his argument that the Commission’s decision can be reviewed here, and observes that his assertions that he was deprived of due process at the investigative hearing were made and considered at his appeal of the determination. (Reply Mem. of Law in Further Support of Respondent’s Cross-Motion to Dismiss the Petition, dated Feb. 11, 2011).

### III. ANALYSIS

Pursuant to New York Civil Service Law § 76(3), certain aggrieved employees may appeal a disciplinary decision via a CPLR Article 78 proceeding, or to the Civil Service Commission. When the appeal is to the Commission, its decision is “final and conclusive, and not subject to further review in any court.” (*New York City Dept. of Env’tl. Prot. v New York City Civil Serv. Commn.*, 78 NY2d 318, 322 [1991]). “However, [e]ven where judicial review is

proscribed by statute, the courts have the power and the duty to make certain that the administrative official has not acted in excess of the grant of authority given . . . by statute or in disregard of the standard prescribed by the legislature.” (*Id.* at 323). The Court also held that an “arbitrary and capricious” determination is not equivalent to an illegal or unconstitutional agency act, or one performed in excess of the agency’s jurisdiction. (*Id.* at 323-324).

Here, having appealed the disciplinary decision in his case to the Commission, petitioner may not seek judicial review of it unless he demonstrates that the Commission acted illegally, unconstitutionally, or in excess of its jurisdiction. Petitioner’s conclusory allegation that the trial officer’s failure to give him an opportunity to produce witnesses and the Commission’s rubber-stamping of NYCHA’s determination and failure to consider facts and evidence, thereby acting illegally, unconstitutionally, or in excess of its jurisdiction, falls far short of demonstrating that respondent acted illegally, unconstitutionally, or in excess of its jurisdiction. (*See eg Saini v City Civ. Svce. Commn. of City of New York*, 186 AD2d 436 [1<sup>st</sup> Dept 1992] [administrative law judge’s consideration of memorandum in petitioner’s file, although in error, did not raise issue as to whether respondent acted illegally, unconstitutionally, or in excess of authority]; *see also Blount v New York City Civ. Svce. Commn.*, 12 AD3d 304 [1<sup>st</sup> Dept 2004] [Commissioner’s determination unreviewable absent allegations implicating constitutional right or sufficient to show Commission acted illegally, unconstitutionally, or in excess of jurisdiction]). Moreover, petitioner’s own equation of an arbitrary and capricious decision with an illegal or unconstitutional act or an act in excess of its jurisdiction was rejected in *New York City Dept. of Env’tl. Prot.*, 78 NY2d 318, 322. His remaining contentions likewise to do constitute illegal or unconstitutional acts or any taken in excess of the Commission’s jurisdiction.

As petitioner does not establish that the Commission acted illegally, unconstitutionally, or in excess of its jurisdiction, the penalty imposed by the Commission is likewise unreviewable. (See *Griffin v New York City Dept. of Correction*, 179 AD2d 585 [1<sup>st</sup> Dept 1992] [when employee appeals to Commission, penalty is not subject to judicial review]; cf *Blount*, 12 AD3d at 304 [while finding Commission's determination unreviewable, also finding that, in any event, penalty of dismissal did not shock sense of fairness]).

In any event, Petitioner's case is distinguishable from *Schnaars*, as there the petitioner had not appealed the hearing officer's decision to the Commission, and it was not there alleged that the petitioner had used work resources for personal benefit or that his actions has created a conflict of interest. (Compare *Finigan v Lent*, 189 AD2d 935 [3d Dept 1983], *lv denied* 82 NY2d 657 [upholding dismissal based on findings that petitioner had breached public trust and engaged in favoritism], with *Stevenson v Spencerport Cent. School Dist.*, 97 AD2d 969 [4<sup>th</sup> Dept 1983], *lv denied* 61 NY2d 758 [1984] [dismissal was disproportionate penalty as charges against petitioner did not involve allegations of moral turpitude or personal benefit]).

IV. CONCLUSION

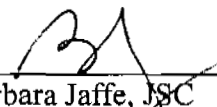
Accordingly, it is hereby

ADJUDGED and ORDERED, that the petition is denied; and it is further

ADJUDGED and ORDERED, that respondent's cross motion for an order dismissing the

petition is granted and the proceeding is dismissed, with costs and disbursements to 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 141B).

ENTER:

  
Barbara Jaffe, JSC  
**BARBARA JAFFE**  
J.S.C.

DATED: April 26, 2011  
New York, New York

APR 26 2011