

**Matter of Frey v New York City Dept. of Hous.
Preserv. & Dev.**

2011 NY Slip Op 31258(U)

May 10, 2011

Sup Ct, NY County

Docket Number: 402490/10

Judge: Barbara Jaffe

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

BARBARA JAFFE
J.S.C.

PART 5

Index Number : 402490/2010

FREY, DENISIA

vs

CESTERO, RAFAEL

Sequence Number : 001

ARTICLE 78

INDEX NO. 402490/10

MOTION DATE 3/14/11

MOTION SEQ. NO. 001

MOTION CAL. NO. 38

The following papers, numbered 1 to 3 were read on this motion to/for Article 78 reversal of administrative decision

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3

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: 5/10/11

BARBARA JAFFE J.S.C.
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 the Application of

DENISIA FREY,

Petitioner,

Index No. 402490/10

Motion Date: 3/14/11
Motion Seq. No.: 001
Calendar No.: 38

DECISION & JUDGMENT

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

-against-

THE NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT and RAFAEL
CESTERO, as Commissioner of the Department of
Housing Preservation and Development,

Respondents.

-----X
BARBARA JAFFE, JSC:

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By notice of petition dated August 23, 2010, petitioner brings this Article 78 proceeding seeking an order annulling respondents' decision to terminate her section 8 rent subsidy and compelling and enjoining them to reinstate the subsidy retroactive to the effective date of its termination, July 31, 2010. Respondents oppose.

I. BACKGROUND

The New York City Department of Housing Preservation and Development (HPD),

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which is organized under the New York City Charter and New York enabling legislation (Verified Answer, dated Dec. 7, 2010 [Ans.], Exh. A), administers the section 8 Housing Choice Voucher Program, a federally funded program that provides rent subsidies to low-income families (42 USC § 1437f[a]). Program participants must complete annual recertifications of their household income and, at HPD's discretion, periodic interim recertifications. (Ans., Exh. A; 24 CFR 982.516). In applying for recertification, participants must "include all income of all family members," and HPD may terminate assistance if it determines that a participant misrepresented his family's income or otherwise failed to provide the documentation HPD requested. (Ans., Exh. A; 24 CFR 982.552). In determining whether or not to terminate assistance, HPD may decide to enter into a repayment agreement with the participant or decrease his future benefits instead. (Ans., Exh. A). If a participant's benefits are terminated, he may appeal by requesting an informal hearing to contest it. (*Id.*; 24 CFR 982.555).

On April 1, 1991, petitioner began living in apartment 4R of 1749 Grand Concourse, Bronx, New York and receiving section 8 benefits. (Ans.). She completed annual recertifications in 2003, 2004, and 2005 without incident. (*Id.*, Exh. B). In February of 2006, petitioner received a recertification form providing that she must "[l]ist and provide proof of all income for ALL family members" and "[l]ist all family members, including children, who are employed and their gross earnings." (*Id.*, Exh. C). Petitioner completed the form, indicating that she lived with her two children and that their household income was limited to her Social Security Disability benefits and her son's Human Resources Administration (HRA) benefits. (*Id.*, Exh. C). Based upon this representation, HPD recertified her subsidy in the amount of \$966 per month and sent her a "Rent Breakdown" letter providing that she must notify HPD of "any changes in her

household income during the year.” (*Id.*, Exh. D).

Petitioner completed another recertification form in November of 2006, and, again, she represented that she lived with her children and that her household income was limited to her Social Security Disability benefits and her son’s HRA benefits. (*Id.*, Exhs. H, I). On January 18, 2007, HPD sent petitioner a “Request for Additional Information,” informing her that she must provide third party verifications signed by all members of her family eighteen years of age and older and an “Unemployment Statement” for her daughter in order to complete her recertification. (*Id.*, Exh. G). Petitioner then met with HPD caseworker Eddie Williams on January 25, 2007 and January 29, 2007 to discuss her recertification. (*Id.*, Exh. S). In January of 2007, petitioner submitted two of her daughter’s pay stubs from Abercrombie and Fitch, dated December 29, 2006 and January 12, 2007. (*Id.*, Exh. S). On February 15, 2007, her subsidy was recertified in the amount of \$1,000.13 per month. (*Id.*, Exh. H).

In November of 2007, petitioner completed an additional recertification, representing that her household received only her Social Security Disability benefits. (*Id.*, Exh. I). On February 4, 2008, HPD conducted an income verification of petitioner’s household and discovered that her daughter had earned \$3,115 from Wendy’s during the fourth quarter of 2005, \$10,264.00 and \$2,013.00 from Wendy’s and Abercrombie, respectively, during 2006, and \$980 from Abercrombie during the first quarter of 2007. (*Id.*, Exh. J). HPD then sent petitioner a “Notice of Pre-Termination & Mandatory Conference,” dated February 4, 2008, which provided that there was a \$11,949.50 difference between the household income she reported and the income actually received and that her benefits could be terminated on the basis of the apparent misrepresentation. (*Id.*, Exh. L). Petitioner attended a conference with HPD’s Division of Tenant Resources

Coordinator, Marilyn Farrer, on February 20, 2008, during which she submitted her daughter's 2006 W-2 form from Wendy's and alleged that she had already submitted four of her daughter's pay stubs to Williams during their January 2007 meetings. (*Id.*, Exh. M). On February 26, 2008, Farrer recommended that petitioner's benefits be terminated due to the misrepresentation of her household income. (*Id.*, Exh. N). Farrer's recommendation was approved that day, and petitioner's benefits were terminated effective March 31, 2008; petitioner received "A Notice of Section 8 Rent Subsidy Termination" dated February 27, 2008. (*Id.*, Exhs. N, O).

On February 27, 2008, petitioner appealed her termination and requested an informal hearing to contest it. (Verified Petition, dated Aug. 23, 2010 [Pet.], Exh. D). An informal hearing was held on January 7, 2009, during which petitioner testified and presented evidence. (*Id.*, Exh. E). Specifically, petitioner alleged that she had complied with HPD's requirements for recertification by submitting to Williams her daughter's Wendy's pay stubs from 2006 during their January 2007 meetings, that she failed to submit these materials earlier because her daughter's manager was on vacation at the time her recertification was due, and that HPD had no record of its receipt of these materials because it either lost them or failed to clock them in. (*Id.*). Petitioner also claimed that she failed to submit her daughter's Abercrombie pay stubs with her recertification because her daughter's manager could not complete the verification form before the recertification was due. (*Id.*). Petitioner denied any intent to defraud HPD. (*Id.*).

As the hearing officer's employment with HPD ended before he could render a decision, another hearing officer reviewed the entire HPD administrative record, the audio tape of the hearing, and the evidence presented at the hearing, and issued a decision upholding HPD's termination of petitioner's subsidy. (*Id.*). In the decision, dated June 11, 2010, the hearing officer

held that petitioner's late submission of her daughter's pay stubs did not constitute compliance with the program's requirements, as she did not declare these wages on her recertification forms, and "it is questionable whether the Wendy's pay stubs were submitted at all." (*Id.*) He also concluded that petitioner's claim that she did not intend to defraud the section 8 Program was without basis, as she did just that in failing to report her daughter's income and receiving \$8,842.00 in unqualified section 8 benefits as a result. (*Id.*, Exh. S). It was also noted that HPD was not required to enter into a repayment agreement with petitioner and that termination of her subsidy was not too harsh a penalty for her first infraction, as HPD had just started using its income verification system, and petitioner may have misrepresented her family's income in the past without being caught. (*Id.*) A "Notice of Determination After Informal Hearing," dated June 15, 2010, notified petitioner of the hearing officer's decision and of the termination of her section 8 benefits, effective July 31, 2010. (*Id.*, Exh. T).

II. CONTENTIONS

Petitioner claims that HPD's termination of her section 8 benefits was arbitrary and capricious because neither federal regulations nor HPD guidelines mandate termination for a participant's failure to report household income correctly, that there is no evidence that HPD took into account the effects of termination on her and her family, and that HPD should have sent petitioner a "Rent Breakdown letter" and entered into a repayment agreement with her rather than terminating her benefits. (Pet.). Additionally, petitioner argues that the decision was not supported by adequate evidence because the deciding hearing officer was not present at the hearing and could not consider petitioner's demeanor in making credibility determinations. (*Id.*).

In opposition, respondents contend that HPD's termination of petitioner's benefits was

neither arbitrary nor capricious, as it was based upon the undisputed fact that petitioner failed to report her daughter's wages in completing her recertifications, and a participant's failure to do so provides grounds for termination of his section 8 benefits. (Memorandum of Law of the Respondents, dated Dec. 7, 2010). And, insofar as petitioner raises an issue of substantial evidence, they claim that this matter should be transferred to the Appellate Division. (*Id.*).

III. ANALYSIS

Pursuant to Article 78, a party aggrieved by an administrative decision may challenge it in court, although the grounds for annulment or vacatur of the decision are limited. Where the petitioner challenges a determination rendered after a hearing required by law on the ground that it was not supported by substantial evidence, the action 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, the action need not be transferred. (*Matter of Kinard v New York City Hous. Auth.*, 2009 NY Misc LEXIS 4922, 2009 NY Slip Op 32584[U] [Sup Ct, New York County 2009]; *Matter of Rolon v New York City Hous. Auth.*, 23 Misc 3d 1114[A], 2009 NY Slip Op 50751[U] [Sup Ct, New York County 2009]).

Here, a decision was rendered after the second hearing officer reviewed the administrative record, the audio recording of the hearing, and all of the evidence presented, and although he doubted that petitioner gave Williams the Wendy's pay stubs, he did not predicate his decision on petitioner's credibility. Rather, he found that HPD's termination of petitioner's subsidy was appropriate in light of her repeated failure to report her daughter's wages, and thus whether or not he witnessed petitioner's demeanor is irrelevant.

As there is ample evidence in the record showing that petitioner did not report her

daughter's income, no issues of substantial evidence warranting transfer to the Appellate Division have been raised. (See *Matter of Verdell v Lincoln Amsterdam House, Inc.*, 27 AD3d 388, 390 [1st Dept 2006] ["Substantial evidence 'means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.'"]). Consequently, I review the proceeding to discern whether the determination reached is arbitrary or 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 or 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 evaluating whether an administrative agency's determination is arbitrary or capricious, courts consider 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, 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], *aff'd* 11 NY3d 859 [2008]).

Here, the decision was based on the factual record and clearly applicable federal regulations and HPD guidelines providing that a participant's section 8 subsidy may be terminated for her misrepresentation of household income. Petitioner did just that in repeatedly

representing to HPD that her household income was limited to her Social Security Disability benefits and her son's HRA benefits. Although it is true, as petitioner argues, that HPD was not required to terminate her benefits, HPD had the discretion to do so, and the hearing officer reasonably determined that its decision to terminate petitioner's subsidy was appropriate under the circumstances. Similarly, although HPD had the discretion to consider the effects of subsidy termination on petitioner and her children and could have entered into a repayment agreement with petitioner, neither federal regulations nor HPD guidelines require it, and the hearing officer properly emphasized the scope of petitioner's misrepresentation in upholding HPD's decision.

IV. CONCLUSION

Accordingly, it is hereby

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

ADJUDGED and ORDERED, that the proceeding is dismissed.

ENTER:



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: May 10, 2011
New York, New York
MAY 10 2011

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