

Matter of Baum v New York City Hous. Auth.
2012 NY Slip Op 31014(U)
April 16, 2012
Supreme Court, New York County
Docket Number: 100097/2011
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BARBARA JAFFE
J.S.C. *Jaffe*

PRESENT: _____

PART 5

Index Number : 100097/2011

BAUM, BRADLEY

VS.

NYC HOUSING AUTHORITY

SEQUENCE NUMBER : 001

ARTICLE 78

CAL # 154

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

1

2,3

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

**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: 4/16/12

APR 16 2012

[Signature]
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 the Application of:
BRADLEY BAUM & DAVID BAUM,

Petitioners,

Index No. 100097/11

Argued: 12/13/11
Motion Seq. No.: 001
Motion Cal. No.: 154

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

DECISION & JUDGMENT

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.
-----X

BARBARA JAFFE, JSC:

For petitioners:

Bradley and David Baum, self-represented
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By notice of petition dated November 30, 2011, petitioners bring this Article 78 proceeding seeking an order vacating and annulling respondent's denial of their remaining family member grievance. Respondent opposes.

I. BACKGROUND

A. Statutory framework

Respondent New York City Housing Authority (NYCHA) was created by the New York legislature to, *inter alia*, build and operate low-income apartments in New York City. (Verified Ans.).

Pursuant to federal regulations, NYCHA “must conduct a reexamination of family income and composition at least annually and must make appropriate adjustments in the rent after consultation with the family and upon verification of the information.” (24 CFR 960.257 [a]). To add a family member as an additional occupant, a tenant must request NYCHA’s approval and provide any information necessary for its reexamination of family income and composition. (24 CFR 960.259[a][2]).

Pursuant to NYCHA policy, a “remaining family member,” which is defined as, *inter alia*, “a person who w[as] [a] member of the original tenant family,” may succeed to a former tenant’s lease if, as pertinent here, he or she “is otherwise eligible for public housing in accordance with the admissions standards for applicants.” (*Id.*, Exhs. B, C, D).

NYCHA’s Standards for Admission provide that a person convicted of a class B felony is ineligible until he has served his sentence, including probation, parole, and the payment of a fine, and six years have elapsed without further convictions or pending charges. (*Id.*, Exh. E). The same rule applies to a person convicted of a class A misdemeanor, except that he is eligible after four years without further convictions or charges. (*Id.*). In making eligibility determinations, NYCHA considers whether a person convicted of a crime has been rehabilitated. (*Id.*).

A person may challenge an eligibility determination through NYCHA’s grievance procedures, the final step of which is a hearing before an impartial hearing officer. (*Id.*, Exh. F). Once the hearing officer issues his or her decision, NYCHA’s Board reviews it and makes a final determination. (*Id.*).

B. Pertinent factual background

Since 1977, petitioners have lived in Apartment 6F of the Robert Fulton Houses, a

NYCHA-owned housing development in Manhattan. (*Id.*, Exh. O). David's daughter, of whom he has custody, was born there. Petitioners' mother was the tenant of record until her death on April 28, 2009. (*Id.*, Exhs. G, H).

Sometime thereafter, petitioners brought a remaining family member grievance, and on May 20, 2009, they met with the Robert Fulton Houses's Property Manager to discuss it. (*Id.*, Exh. I). After performing a criminal background check, the Property Manager determined that petitioners are ineligible for public housing. (*Id.*). They then met with NYCHA's Borough Manager, who concurred with the Property Manager and denied their remaining family member claim. (*Id.*, Exh. K).

At petitioners' request, a hearing was held on June 22, 2010, at which NYCHA offered evidence demonstrating that on November 15, 2006, Bradley pleaded guilty to criminal sale of a controlled substance in the third degree, a class B felony, and was sentenced to three years imprisonment, a six-month license suspension, and two years of parole. (*Id.*, Exhs. Q, P). NYCHA also offered proof that in November 2009, Bradley pleaded guilty to criminal possession of a controlled substance in the seventh degree, a class A misdemeanor, and was sentenced to a one-year conditional discharge, community service, and a six-month license suspension. (*Id.*, Exh. R). And NYCHA established that David had committed a crime, having pleaded guilty to criminal possession of a controlled substance in the seventh degree in 2007, for which he was sentenced to a six-month license suspension. (*Id.*, Exh S).

Bradley explained that he was arrested in 2009 because he was "just in the wrong place at the wrong time" and claimed that, as he had "paid his dues," worked for the same company for three years without incident, and engendered no community complaints, he has been

rehabilitated. (*Id.*, Exh. O). David asserted that he didn't commit a crime, having "taken the blame for somebody," and that he and his daughter will have nowhere to live if denied public housing. (*Id.*).

On August 20, 2010, the hearing officer issued his decision, which provides, in pertinent part, as follows:

[Bradley's] two arrests show a pattern of his drug related conduct. [He] is ineligible for public housing until 2017, failed to present sufficient evidence of rehabilitation to warrant revocation of ineligibility and therefore, [his] grievance . . . is not sustained.

Although [David] stated that he was hanging out with friends, took the blame and was stupid these explanations alone do not demonstrate rehabilitation and are insufficient to overcome the revocation of ineligibility in view of his drug related conduct and the negative effect that drug related conduct has on the community. [David's] custody of his daughter and the fact that he has nowhere else to go are mitigating circumstances which cannot be considered under the circumstances of this proceeding and therefore, [his] . . . grievance is not sustained.

(*Id.*, Exh. W).

On September 8, 2010 NYCHA's Board adopted the hearing officer's decision. (*Id.*, Exh. X).

II. CONTENTIONS

Petitioners contend that the hearing officer's decision is arbitrary and capricious, as they demonstrated that they have been rehabilitated and have paid rent, and David provided proof of mitigating circumstances insofar as he and his daughter will have nowhere else to life if denied public housing. (Pet.). Moreover, as to David, they assert that the decision amounts to a punishment of eviction that is disproportionate to his offense. (*Id.*).

In opposition, respondent maintains that the hearing officer's decision is rational, as petitioners are ineligible for public housing, and mitigating circumstances may not be considered

in determining remaining family member eligibility. (Resp. Mem. of Law). Additionally, respondent argues that petitioners' rent payment history is irrelevant and denies that the decision constitutes a punishment, as the hearing officer did not terminate petitioners' tenancy but rather determined their eligibility for same. (*Id.*).

III. ANALYSIS

A. 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 Assocs., 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], *aff'd* 11 NY3d 859 [2008]).

Here, petitioners' criminal histories render them ineligible for public housing pursuant to

NYCHA policy, and there exists support in the record for the hearing officer's conclusions as to rehabilitation, as Bradley committed multiple drug offenses, and David failed to address the issue beyond denying criminal responsibility. As mitigating circumstances may not be considered in reviewing a remaining family member eligibility determination (*Matter of Guzman v New York City Hous. Auth.*, 85 AD3d 514 [1st Dept 2011]; *Matter of Fermin v New York City Hous. Auth.*, 67 AD3d 433 [1st Dept 2009]), and as the payment of rent does not confer succession rights on a public housing occupant (*Matter of Muhammad v New York City Hous. Auth.*, 81 AD3d 526, 527 [1st Dept 2011]), neither David's hardship nor petitioners' rent payment history provides a basis for vacating the hearing officer's decision.

B. Proportionality of penalty

The standard for reviewing a penalty imposed after an administrative hearing is whether the punishment imposed "is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." (*Matter of Pell*, 34 NY2d at 233).

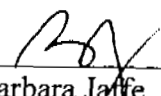
Here, to the extent that the hearing officer's decision punishes petitioners by denying them public housing, drug-related conduct adversely affects public health and safety, and I am bound by the hearing officer's determination that petitioners failed to demonstrate rehabilitation. Consequently, absent sufficient proof of rehabilitation, and given the relatively recent offense committed by one of the petitioners, the penalty cannot be said to be so disproportionate to their offenses as to shock one's sense of fairness. (*Cf. Matter of Bond v Howard Houses [NYCHA]*, 89 AD3d 730 [2d Dept 2011] [penalty of lease termination on ground of undesirability, as tenant engaged in "drug-related criminal activity," not shocking to one's sense of fairness]).

IV. CONCLUSION

Accordingly, it is hereby

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

ENTER:


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

DATED: April 16, 2012
New York, New York

APR 16 2012

UNFILED JUDGMENT

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