

**Matter of Burrell v New York City Hous. Auth.**

2013 NY Slip Op 31462(U)

July 9, 2013

Supreme Court, New York County

Docket Number: 401139/12

Judge: Doris Ling-Cohan

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**SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY**  
**PRESENT: Hon. Doris Ling-Cohan, Justice** **Part 36**

**IN THE MATTER OF THE APPLICATION OF  
KOREN BURRELL,**

**Petitioner,**

**INDEX NO. 401139/12**

**MOTION SEQ. NO. 001**

**FOR A JUDGMENT PURSUANT TO ARTICLE 78  
OF THE CIVIL PRACTICE LAW AND RULES**

**-against-**

**NEW YORK CITY HOUSING AUTHORITY,**

**Respondent.**

**FILED**  
**JUL 10 2013**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**

The following papers, numbered 1-4 were considered on this Article 78:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>
Cross-Motion: [ ] Yes [ X ] No	_____

**Upon the foregoing papers, it is ordered that this Article 78 is decided as indicated below.**

Petitioner Koren Burrell seeks an order pursuant to Article 78 of the Civil Practice Law and Rules (CPLR), reversing respondent New York City Housing Authority's (NYCHA) determination, dated February 16, 2012, sustaining the charges of non-desirability and breach of rules and regulations, and terminating petitioner's tenancy. Petitioner asserts that the decision should be reversed, as she is only guilty of having marijuana for personal use.

NYCHA, in opposition, states that the determination to terminate petitioner's tenancy was in accordance with NYCHA's policies and procedures, as well as the applicable law, and consistent with a rational policy to protect public housing residents. For the reasons stated below, the petition is denied and this proceeding dismissed.

## BACKGROUND

Petitioner currently resides in 438 Beach 40<sup>th</sup> Street, Apartment 6B, Far Rockaway, NY 11691 (Subject Apartment), and has resided there for over 15 years. The Subject Apartment is located at Beach 41<sup>st</sup> Street Houses in Queens, a public housing development owned and operated by NYCHA. In May 2011, New York City Police Department (NYPD) Detective Vincent Calderon (Detective Calderon) executed a search warrant for the Subject Apartment. The search warrant was obtained based on two incidents where a confidential informant observed an unidentified black male bagging crack-cocaine for distribution, and a firearm. Upon execution of the search warrant, the NYPD recovered approximately 47 ziploc bags of marijuana, a partially used marijuana cigarette, a starter pistol, an oxycodone pill, business records of narcotics transactions, and two ziploc bags containing smaller ziploc bags. Petitioner was arrested and charged with two counts of possession of marijuana, possession of a weapon, and possession of a controlled substance.

Thereafter, NYCHA was notified of the search and petitioner's arrest. NYCHA alleges that two letters were sent to petitioner requesting that she attend a meeting to discuss the matter. Petitioner, however, alleges that she did not receive the first letter on time and never received the second letter, and thus, was unable to meet with NYCHA, prior to her administrative hearing. In August 2011, charges, including non-desirability and breach of rules and regulations, were preferred against petitioner.

An administrative hearing was held on January 24, 2012, after two adjournments, and was conducted before hearing officer Ester Tomicic Hines of NYCHA. Petitioner appeared *pro se* and NYCHA appeared by counsel. During the hearing, petitioner admitted that the marijuana recovered was for personal use and that she still smoked marijuana in her apartment. Following the hearing, the hearing officer rendered a decision on February 16, 2012 (Decision), which sustained the charges of non-desirability and breach of rules, and recommended termination of petitioner's tenancy. On March 7,

2012, NYCHA adopted the Decision, issuing a determination to terminate petitioner's tenancy.

Thereafter, petitioner commenced this Article 78 proceeding.

### DISCUSSION

Judicial review of an administrative determination is limited to whether the "determination 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 deciding whether an agency's determination was arbitrary, capricious or an abuse of discretion, courts are limited to an assessment of whether a rational basis exists for the administrative determination and their review ends when a rational basis has been found. *See Heintz v Brown*, 80 NY2d 998, 1001 (1992); *Sullivan County Harness Racing Assoc., Inc. v Glasser*, 30 NY2d 269, 277-278 (1972). The Court of Appeals explained the "arbitrary and capricious" standard in *Matter of Pell v Board of Educ.*, 34 NY2d 222, 231 (1974) as follows:

"The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact' (1 N.Y. Jur., Administrative Law, § 184, p. 609). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts."

Thus, a court may not substitute its judgment for that of an administrative agency, if there is a rational basis for the agency's determination. *See Matter of Nehorayoff v Mills*, 95 NY2d 671, 675 (2001). The court may not overturn the determination of an administrative agency merely because it would have reached a contrary result. *See Matter of Sullivan County Harness Racing Assoc., Inc. v Glasser*, 30 NY2d 269, 278 (1972); *Matter of Kaplan v Bratton*, 249 AD2d 199, 201 (1<sup>st</sup> Dept 1998).

Moreover, it is well settled that "issues of credibility are the province of an administrative hearing officer, since the decision by an Administrative Hearing Officer to credit the testimony of a given witness is largely unreviewable by the courts." *Wooten v Finkle*, 285 AD2d 407, 408 (1<sup>st</sup> Dep't 2001)(internal quotations omitted). Courts may not weigh the evidence or reject the conclusion of the

administrative agency where the evidence is conflicting and room for choice exists. *Berenhaus v Ward*, 70 NY2d 436, 444 (1987).

Here, petitioner maintains that the decision should be reversed for the following reasons: (1) the search warrant was not shown to her prior to the police searching her apartment; (2) she did not receive a copy of the search warrant prior to the administrative hearing such that she may analyze and examine it; and (3) the marijuana recovered in the apartment was for personal use only. In her reply, petitioner further argues that she received improper notice from NYCHA to discuss the matter prior to the hearing. However, at the administrative hearing, petitioner failed to raise the claims that the search warrant was not shown to her prior to the police entering the apartment, that she did not receive a copy of the search warrant prior to the administrative hearing, and that she did not receive notice from NYCHA of its charges. Significantly, petitioner did not object to the search warrant being entered into evidence at the administrative hearing. An aggrieved party must make a timely claim at the administrative hearing in order to preserve such claim for judicial review. *Hughes v Suffolk County Dep't of Civil Service*, 74 NY2d 833, 834 (1989). Thus, the court will not consider or address such claims.

In opposition, NYCHA argues that the Decision was rational, and not arbitrary and capricious. The hearing officer found that petitioner's apartment was involved in the distribution and sales of marijuana, and that petitioner admitted to using marijuana in the apartment from 1995 through the date of the hearing.

Applying the above principles here, the Decision is rational. The court must defer to the hearing officer's determination that petitioner's testimony that she was storing 47 bags of marijuana for personal use was not credible. Significantly, it is uncontested that, at the administrative hearing, petitioner admitted the charge of non-desirability, in that she "did unlawfully possess marijuana, drug packaging material, \$371.00 in U.S. currency or other property reflecting illegal drug activity in [the Subject

A]partment". Verified Answer, Exh. F, Transcript, p. 39, l. 3-6. Moreover, petitioner admitted that illegal drugs were found in the Subject Apartment, and that such drugs belonged to her. The record reveals that petitioner was present during the search, and the vast majority of the 47 bags of marijuana were found in petitioner's bedroom. While petitioner is a long time tenant, such fact does not outweigh petitioner's admission that she has breached the NYCHA rules and regulations. In fact, at the administrative hearing, petitioner testified that she has been consistently smoking marijuana in her bedroom since 1995, and admitted that she was still smoking marijuana as of the hearing date. *See Id.* at p. 90, l. 2 - p. 91, l. 4. Thus, the Final Determination was not arbitrary and capricious, and the petition must be denied.

Accordingly, it is

ORDERED that the petition is denied, and the proceeding dismissed; and it is further

ORDERED that within 30 days of entry of this order, respondent NYCHA shall serve a copy upon plaintiff with notice of entry.

Dated: 7/9/13

  
DORIS LING-COHAN, J.S.C.

Check one:  FINAL DISPOSITION  
 Check if Appropriate:  DO NOT POST  
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NON-FINAL DISPOSITION  
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