

<b>Matter of McCadney v Olatoye</b>
2018 NY Slip Op 30140(U)
January 24, 2018
Supreme Court, New York County
Docket Number: 452139/2017
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 32**

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**In the Matter of the Application of**

**MORGAN MCCADNEY,**

**Petitioner,**

**-against-**

**SHOLA OLATOYE, Chairwoman of the New York  
City Housing Authority,**

**Respondent.**

**Index No. 452139/2017  
Motion Seq: 001**

**DECISION, ORDER &  
JUDGMENT**

**HON. ARLENE P. BLUTH**

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

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The petition to annul respondent's termination of petitioner's Section 8 subsidy is denied, and this proceeding is dismissed.

**Background**

This proceeding arises out of petitioner's former status as a Section 8 voucher holder. In 2008, petitioner pled guilty to robbery in the second degree (a felony) arising out of a 2007 incident at a subway station. Petitioner took \$80 from a couple trying to buy a Metrocard at a vending machine, punched a man and ran away. Petitioner was sentenced to seven years in prison and five years post-release parole supervision. Petitioner was incarcerated for a little more than five years.

In March 2008, while petitioner was awaiting resolution of the robbery charge, respondent terminated petitioner from its Section 8 program for failure to comply with his annual

recertification obligation. After his release, petitioner requested that respondent restore his subsidy. Petitioner commenced an Article 78 proceeding challenging respondent's determination terminating his Section 8 benefits for failure to recertify. That proceeding settled when respondent agreed to vacate the 2008 determination and brought new charges against petitioner based on his criminal activity and failure to occupy the subsidized unit.

After an administrative hearing, a Hearing Officer sustained the charges against petitioner and terminated the subsidy. The Hearing Officer concluded that someone convicted of a C felony, like petitioner, was not eligible to receive Section 8 housing benefits until five years after release from incarceration.

The petition seeks to overturn this determination and points to the progress petitioner has made since being released from prison. Petitioner contends that he was a drug addict when he engaged in criminal behavior in 2007 and that he has overcome his substance abuse. Petitioner maintains that even though he has been sleeping in shelters, he is now clean and deserves a second chance. Petitioner stresses that the Hearing Officer erred by classifying petitioner as an applicant for Section 8 benefits rather than a program participant. Petitioner insists that the Hearing Officer rendered a disproportionate penalty in light of his rehabilitation.

### **Discussion**

In an article 78 proceeding, "the issue is whether the action taken had a rational basis and was not arbitrary and capricious" (*Ward v City of Long Beach*, 20 NY3d 1042, 1043, 962 NYS2d 587 [2013] [internal quotations and citation omitted]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*id.*). "If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable"

(*id.*). “Arbitrary action is without sound basis in reason and is generally taken without regard to the facts” (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231, 356 NYS2d 833 [1974]).

The Hearing Officer concluded that “It may have been Participant’s understanding that he could reacquire a Section 8 subsidy after he was released from jail, but no Section 8 agent would have had the jurisdiction to make such a promise; it is likely that Participant was informed he could reapply. However, NYCHA’s regulations provide that a person who has been convicted of a C felony is generally not eligible for Section 8 for five years after release from incarceration, making Participant ineligible until 2018. Mitigating factors may be considered to lessen the period; the mitigating factors here have been considered but are insufficient: Participant remains in transitional housing in an alcohol rehab program and thus remains in treatment. He is nevertheless to be commended on his progress” (NYSCEF Doc. No. 31). The Hearing Officer noted that petitioner submitted a packet of 19 documents showing his rehabilitation (*id.*).

This Court finds that the Hearing Officer’s determination terminating petitioner’s subsidy is rational. The Hearing Officer evaluated the rehabilitative evidence submitted by petitioner and concluded that it was not sufficient to entitle petitioner to receive a Section 8 benefit in light of his felony conviction for robbery. This Court may not, in an Article 78 proceeding, second guess a Hearing Officer’s determination simply because it disagrees with that conclusion. The Court must find that the Hearing Officer’s determination was arbitrary or capricious— a finding not possible here, where petitioner admits he failed to occupy his apartment due to his incarceration and that he was convicted of a serious and violent felony.

Petitioner’s claim that he was not provided with proper procedure is meritless. Petitioner

insists that because he was considered an applicant rather than a participant in the Hearing Officer's determination, he was not afforded complete due process. But petitioner fails to identify what other standard or process is used for participants rather than applicants. And, as respondent points out, the Hearing Officer considered mitigation evidence submitted by petitioner. Petitioner was afforded a hearing to explain why his subsidy should not be terminated, he was represented by an attorney and petitioner testified on his own behalf (NYSCEF Doc. No. 19 [Administrative Hearing Transcript]).

Petitioner can only speculate as to the role that petitioner's efforts to get and stay sober would have factored into the decision had he been considered a participant rather than an applicant: "The Hearing Officer may have given less weight to his rehabilitative evidence. She may have failed to consider the length of his participation in the program as a factor" (NYSCEF Doc. No. 35, ¶ 16 [petitioner's reply]). Petitioner does not cite any case law for this proposition nor does he not specify a more generous standard used for participants.

In any event, it does not appear that petitioner could be considered a participant because he had not used his subsidy since he was incarcerated in 2008 (*see* 24 CFR § 982.4[b] [defining participant as someone "currently assisted in the program"]).

Moreover, and unfortunately for petitioner, this Court cannot create an exception, even for a petitioner who has turned his life around, because in an article 78 proceeding the courts lack "any discretionary authority or interest of justice jurisdiction" (*Featherstone v Franco*, 95 NY2d 550, 554, 720 NYS2d 93 [2000]). This Court can only assess whether respondent acted in an arbitrary manner, and, as set forth above, the decision was rational.

**Penalty**

Petitioner claims that the penalty of termination is too harsh because he has made great strides in his rehabilitation and that he faces long term homelessness without access to the subsidy. Petitioner suffers from a variety of health conditions, including hypertension, sleep apnea and chronic heart failure all of which he claims are negatively affected by an unstable housing situation.

Respondent claims that termination is proper because petitioner has been absent from the subsidized unit since 2008, pled guilty to a violent felony and was incarcerated for five years.

“[T]he mere fact that a penalty is harsh, and imposes severe consequences on an individual, does not so affront our sense of fairness that it shocks the conscience, unless it is obviously disproportionate to the misconduct and in contravention of the public interest and policy reflected in the agency’s mission” (*Bolt v New York City Dept. of Educ.*, 2018 WL 341034, \*3, 2018 NY SlipOp 00090 [2018] [Rivera, J., concurring]).

While petitioner’s efforts to stay sober are admirable, especially given his unstable housing situation, this Court cannot overturn the Hearing Officer’s termination of petitioner’s subsidy. This Court is unable to find that terminating a Section 8 subsidy due to a violent felony conviction is so disproportionate that it contravenes the public interest. Whether this Court may have viewed petitioner’s success in overcoming his drug abuse differently is irrelevant.

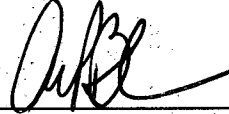
The fact is that the Hearing Officer’s decision to terminate petitioner’s subsidy was rational and the Court cannot reduce that penalty even if the Court might have made a different decision.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied, this proceeding is dismissed and the clerk is directed to enter judgment accordingly.

This is the Decision, Order and Judgment of the Court.

Dated: January 24, 2018  
New York, New York



ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH