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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

PART 5

Index Number : 402696/2011
RIVERA, CLARA
vs.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78 CPLR 90

INDEX NO. _____
MOTION DATE 1/17/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for vacate administrative decision

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2,3
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

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).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/15/12
BARBARA JAFFE
J.S.C.

MAY 15 2012

_____, J.S.C.
BARBARA JAFFE
J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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In the Matter of the Application of:
CLARA RIVERA,

Petitioner,

Index No. 402696/11

Argued: 1/17/12
Motion Seq. No.: 001
Motion Cal. No.: 90

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 petitioner:
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Bronx, NY 10456
347-348-7832

For respondent:
Byron S. Menegakis, Esq.
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General Counsel
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By notice of petition dated October 4, 2011, petitioner brings this Article 78 proceeding seeking an order reversing respondent's termination of her tenancy for non-desirability. Respondent opposes.

I. BACKGROUND

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.). Respondent is required by federal and state law to provide safe, decent, and sanitary housing to public housing tenants. (*Id.*). Pursuant to 42 USC § 1437d(l)(6), leases must include

the following provision:

> [A]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

Regulations promulgated by the United States Department of Housing and Urban Development also require that respondent's leases contain provisions obligating tenants to assure that neither they nor any member or guest of their households engage in "[a]ny drug-related criminal activity on or off the premises" and providing that drug-related activity constitutes grounds for the termination of a tenancy. (*Id.*).

Respondent's Termination of Tenancy Procedures provide that a tenancy may be terminated for, *inter alia*, "non-desirability," which includes a tenant's conduct or behavior constituting "a danger to the health and safety of the tenant's neighbors," or breach of respondent rules and regulations. (*Id.*, Exh. B).

By lease commencing December 1, 2004, petitioner agreed that in exchange for residing in apartment 1-F at 320 East 156th Street, Bronx, New York, neither she nor any member or guest would engage in "[a]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the [d]evelopment by other residents or by the [l]andlord's employees" or "[a]ny violent or drug-related criminal activity on or off the [l]eased [p]remises or the [d]evelopment," and that respondent may terminate the lease for "violation of [its] material terms." (*Id.*, Exh. A).

On November 11, 2010, following a two month investigation into narcotic sales from petitioner's apartment, New York City Police Department Detective Andy Urena searched the apartment pursuant to a warrant. (*Id.*, Exhs. G, Q). The search yielded, *inter alia*, one plastic

bottle of methadone and one metal cap containing heroin residue. (*Id.* Exhs. K, S). Urena arrested petitioner and one Michael Brown. (*Id.*, Exh. R). Petitioner pleaded guilty to criminal possession of a controlled substance in the seventh degree and was sentenced to a conditional discharge. (*Id.*, Exh. G).

On or about March 16, 2011, respondent served petitioner with a notice and specification of charges alleging, *inter alia,* that she, in concert with Brown, her unauthorized occupant or guest, unlawfully possessed, sold or attempted to sell heroin or methadone, a quantity of which was recovered during the execution of a search warrant, and that she failed to cause Brown to refrain from illegal activity, conduct constituting non-desirability and a breach of the rules and regulations, and providing that a hearing on these charges would be held on April 12, 2010. (*Id.*, Exh. D). On April 12, 2011, the parties entered into a stipulation whereby petitioner admitted that Brown was an unauthorized occupant of the apartment and that she would not permit him to reside with or visit her there or at any other NYCHA apartment. (*Id.*, Exh. E). She also agreed to be placed on general probation for two years and that should the agreement be disapproved by NYCHA, the matter would be restored to the hearing calendar and the agreement would be null and void and without prejudice. (*Id.*).

By letter dated May 6, 2011, respondent notified petitioner that the stipulation of April 12, 2011 was not approved and that the hearing was scheduled for May 25, 2011. (*Id.*, Exh. F).

Petitioner and Urena testified at the hearing. According to petitioner, Brown was a guest at her apartment, and she merely permitted him to use her apartment for mailing purposes after he was released from jail. (*Id.*, Exh. G). Urena testified as to the investigation of the sales at the apartment and the execution of the search warrant. (*Id.*).

By written decision dated July 20, 2011, the hearing officer found, in pertinent part, that Urena's testimony was credible, that petitioner's guilty plea demonstrates that she knew there were illegal drugs in her apartment, and that Brown's status as a visitor in her apartment is immaterial, as petitioner was obligated to ensure that illegal activities were not being conducted in her apartment. (*Id.*, Exh. U). She recommended that petitioner's tenancy be terminated as her conduct compromised the health and safety of other tenants in her building. (*Id.*).

Sometime thereafter, the Board adopted the hearing officer's decision and issued a Determination of Status terminating petitioner's tenancy. (*Id.*, Exh. V).

II. ANALYSIS

A. Waiver

In an Article 78 proceeding, a court may not consider arguments or evidence not presented during the administrative hearing. (*Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]; *Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]; *Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330 [1st Dept 2007]; *Matter of Patrick v Hernandez*, 309 AD2d 566, 566 [1st Dept 2003]). "To authorize a petitioner to raise [ ] issues for the first time in an [A]rticle 78 proceeding . . . would deprive the administrative agency of the opportunity 'to prepare a record reflective of its expertise and judgment' . . . . and would render judicial review meaningless." (*Yarbough*, 95 NY2d at 347). By failing to offer at the hearing the letter and accompanying signatures now annexed to the petitioner, petitioner waived her right to present such documentation here. I therefore do not consider it.

B. 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, 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], *affd* 11 NY3d 859 [2008]). And an agency's credibility determinations are "largely unreviewable because [ ] hearing officer[s] observed the witnesses and w[ere] able to perceive . . . all the nuances of speech and manner that combine to form an impression of either candor or deception." (*Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]).

Here, the hearing officer's decision is supported by federal and state law providing that NYCHA may terminate tenancy for illegal drug activity, provisions of petitioner's lease prohibiting petitioner, her guests, and members of her household from engaging in illegal drug activity, NYCHA's Termination of Tenancy Procedures, documentary evidence of the presence of heroin residue and methadone in petitioner's apartment, her decision to credit Urena's

testimony, and her conclusion that petitioner's guilty plea evidenced her knowledge of the drug activity occurring in her apartment. Although, as petitioner maintains, it may be true that she was unaware of the presence of illegal drugs in her apartment, there exists no basis for disturbing the hearing officer's credibility determination to the contrary, and in any event, her knowledge of the presence of drugs in her apartment is immaterial. (*See Satterwhite v Hernandez,* 16 AD3d 131 [1st Dept 2005] [where police officer testified that he found marijuana and ammunition in petitioner's apartment, and hearing officer decided not to credit petitioner's claim of ignorance, propriety of termination of tenancy did not depend on petitioner's knowledge of drug activity]). Moreover, as petitioner's probation was vacated when NYCHA rejected the stipulation, the hearing officer was not obligated to consider petitioner's probation in rendering her decision. Therefore, respondent's determination is neither arbitrary nor capricious.

C. Proportionality of penalty

The standard for reviewing a penalty imposed by an administrative agency 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 v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]; *Matter of Quercia*, 41 AD3d at 297).

Here, as the presence and sale of drugs compromises community health and safety, termination of petitioner's tenancy is not so disproportionate to her offense as to shock one's sense of fairness. (*See Matter of Zimmerman v New York City Hous. Auth.*, 84 AD3d 526 [1st Dept 2011] [termination of tenancy not shocking to one's sense of fairness where drugs, drug paraphenalia, and ammunition found in petitioner's apartment and petitioner violated lease terms by permitting such activity to occur there]; *Matter of Kerney v Hernandez*, 60 AD3d 544 [1st

Dept 2009] [termination of petitioner's tenancy for non-desirability does not shock conscience where she "knowingly permitted possession and sale of drugs on the premises"]; *Harris v Hernandez,* 30 AD3d 269 [1st Dept 2006] [termination of petitioner's tenancy on basis of non-desirability rationally supported by evidence of controlled buys of illegal drugs from petitioner, execution of search warrant on basis of controlled buys, and discovery of illegal drugs and paraphenalia in apartment and does not shock conscience]; *Satterwhite*, 16 AD3d 131 [termination of petitioner's tenancy on basis of non-desirability rationally supported by evidence of drugs and ammunition in apartment and does not shock conscience]).

IV. CONCLUSION

Accordingly, it is hereby

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

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: May 15, 2012
New York, New York

MAY 15 2012

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).