

**Matter of Bey v New York City Civ. Serv. Commn.**

2012 NY Slip Op 31552(U)

June 11, 2012

Supreme Court, New York County

Docket Number: 101987/12

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

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In the Matter of the Application of

ELIJAH BEY,

Petitioner,

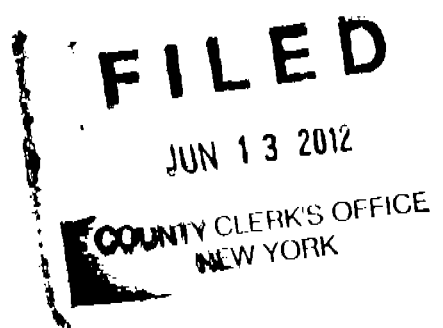
Index No. 101987/12

For an Order Pursuant to Article 78  
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

NEW YORK CITY CIVIL SERVICE COMMISSION  
and NANCY CHAFFETZ, in her official capacity as  
CHAIR OF THE NEW YORK CIVIL SERVICE  
COMMISSION,



Respondents.

-----x  
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner Elijah Bey brought this petition for an Order pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") (1) declaring that respondents New York City Civil Service Commission ("CSC") and Nancy Chaffetz, in her official capacity as Chair of the New York Civil Service Commission (hereinafter "respondents") engaged in conduct that was illegal, unconstitutional and/or outside of their jurisdiction when they failed to sustain the decision and penalty imposed by the New York City Housing Authority ("NYCHA") and overrule the

erroneous decision of NYCHA's Board; and (2) directing that respondents reinstate petitioner's employment in compliance with NYCHA's decision, crediting petitioner for time served and pay him all salary, benefits and other emoluments of employment to which he would have been entitled had he not been unlawfully terminated and removed from NYCHA's payroll.

Respondents cross-move to dismiss the petition on the ground that it fails to state a cause of action. For the reasons set forth below, respondents' cross-motion to dismiss the petition is granted and the petition is denied.

The relevant facts are as follows. Petitioner became employed by NYCHA as a Caretaker "J" in 1998. NYCHA later promoted petitioner to the position of Caretaker "X" and assigned him as the Caretaker of the Lafayette Houses, located at 433 Lafayette Avenue, Brooklyn, New York. On October 27, 2010, NYCHA charged petitioner with incompetency or misconduct arising out of three incidents: one that occurred on November 17, 2009, a second that occurred on August 25, 2010 and a third that occurred on August 27, 2010. In a letter addressed to petitioner from NYCHA, dated October 27, 2010, NYCHA alleged that (1) on or about August 27, 2010, petitioner acted in violation of NYCHA Human Resources Manual ("HR Manual"), Chapter I, Rule XII, Sections B(4), B(1) and/or (2), and C(1) by causing or permitting an unauthorized person to perform some or all of petitioner's duties or assigned tasks on August 27, 2010 at 345 Classon Avenue, Apartment 2F; (2) on or about August 25, 2010, petitioner acted in violation of NYCHA HR Manual, Chapter I, Rule XII, Sections B(1) and/or (2) by failing to clean the refrigerator on August 25, 2010 at 433 Lafayette Avenue, Apartment 6D, so that the apartment could be ready for occupancy; and (3) on or about November 17, 2009, petitioner acted in violation of NYCHA HR Manual, Chapter I, Rule XII, Section B(4) by refusing to leave

Assistant Superintendent Sean Chavez's ("AS Chavez") office, as he was directed to do.

On or about November 22, 2010, Trial Officer Craig Tessler ("Trial Officer Tessler") presided over a NYCHA administrative hearing on the above charges pursuant to Civil Service Law § 75 and Authority Resolution No. 86-11/26-13. Petitioner was represented by counsel at the hearing and pled "not guilty" to the charges. During the course of the hearing, petitioner was afforded the opportunity to present evidence, testify on his own behalf and call two witnesses.

In presenting its case at the hearing, NYCHA called two witnesses and one rebuttal witness and submitted eight documents into evidence. In support of Charge 1, AS Chavez testified that he had assigned petitioner to clean Apartment 2F in the Lafayette Houses on August 27, 2010, in preparation for a new occupancy. At approximately 10:10 a.m. on that date, AS Chavez inspected Apartment 2F, where he found petitioner accompanied by an unauthorized occupant who was placing items in a garbage bag. Just prior to this incident, on August 10, 2010, following complaints of incidents of prostitution in the basement of the Lafayette Houses, AS Chavez had advised petitioner that he was not to permit any unauthorized individuals in the "Authority buildings," which included the apartments and basements. AS Chavez also introduced into evidence his informal notes documenting the incident as well as an instructional and counseling memo that he had issued to petitioner following the incident.

In support of Charge 2, Rejee John, a NYCHA employee of 16 years and a manager at the Lafayette Houses, testified that on August 25, 2010, a new tenant complained of a dirty refrigerator in Apartment 6D. Petitioner had previously been assigned to clean Apartment 6D in preparation for a new occupancy. AS Chavez testified that after receiving the complaint, he pulled petitioner from another clean-up job to complete the cleaning of the refrigerator in

Apartment 6D.

In support of Charge 3, AS Chavez testified that on November 17, 2009, petitioner went to his office to demand the return of a Leave of Absence form that petitioner had submitted to AS Chavez the day before. According to AS Chavez, petitioner refused to leave his office until he returned the approved form to petitioner, stating "I'm not leaving until I have my LOA." Following the incident, AS Chavez issued a counseling memo to petitioner in which he addressed petitioner's insubordinate behavior. Petitioner, however, refused to accept the memo.

At the completion of the hearing, Trial Officer Tessler found petitioner guilty of Charges 1 and 3 and wrote that "[petitioner] knowingly flouted a directive not to allow unauthorized persons on Authority property" and that [petitioner's] work history indicates repeated insubordination, disregard for authority and rules, and poor time and attendance." In his decision dated March 18, 2011, Trial Officer Tessler recommended that petitioner be given a suspension of 44 work days from his position as Caretaker "X" at the Lafayette Houses. In sustaining Charges 1 and 3, Trial Officer Tessler noted that he reviewed petitioner's personnel file and disciplinary history, received oral testimony from six witnesses including petitioner and took into consideration eight documents submitted into evidence.

The NYCCHA Board issued its final determination on June 1, 2011 following a review of Trial Officer Tessler's decision and recommendation and petitioner's disciplinary record. Specifically, the Board adopted Trial Officer Tessler's findings of guilt on Charges 1 and 3 but rejected his recommended penalty of a 44 work day suspension as the misconduct in petitioner's case "involves two instances of blatant insubordination, as well as failure to perform [petitioner's] duties." Thus, the Board found that "termination is the appropriate penalty based

on the proven misconduct and taking into consideration Mr. Bey's prior disciplinary history." The Board further stated that it could not "countenance" petitioner's misconduct giving rise to the October 27, 2010 hearing as it represented an overall "inability to conform...despite repeated discipline and counseling." The Board noted that

[petitioner's] disciplinary record includes a General Trial in 1999, in which he was found guilty of engaging in unsafe, unprofessional and inappropriate behavior by pulling a chair out from underneath a secretary resulting in that secretary falling and sustaining an injury. For that misconduct, he received a twenty workday suspension which was affirmed by the Civil Service Commission. He also had a Local Hearing in 1998, where he was found guilty of being AWOL on seventeen occasions, failing to complete Leave of Absence Request forms on thirteen occasions, and absence with disapproved leave on seven additional occasions. He was penalized with a ten workday suspension, the maximum permitted after a Local Hearing.

Thus, the Board determined that termination was the appropriate penalty in petitioner's case.

On June 3, 2011, petitioner filed a Notice of Appeal to the CSC pursuant to Civil Service Law § 76, appealing the NYCHA Board's decision to terminate his employment. The CSC heard oral argument in the appeal on October 20, 2011 at which petitioner, petitioner's attorney, NYCHA's representative and six attendees from the CSC were present. On October 27, 2011, respondents issued a Notice of City Civil Service Commission Action affirming the determination of the NYCHA board to terminate petitioner's employment. Respondents found no reversible error and affirmed the NYCHA Board's decision and penalty imposed without issuing a formal legal opinion. In February 2012, petitioner commenced the instant Article 78 proceeding against respondents alleging that its decision to affirm NYCHA's Board's decision to terminate petitioner was illegal, unconstitutional and outside of their jurisdiction and requesting reinstatement of his position with backpay.

Given the clear legislative intent to hold CSC determinations on appeal as “final and conclusive,” courts will only review a CSC determination under very narrow circumstances. *See* Civil Service Law § 76(3). A CSC determination is unreviewable unless there is a showing that the commission has acted “in excess of its authority or in violation of the Constitution or of the laws of this State.” *NYC Dep’t of Envtl. Prot. v. New York City Civil Serv. Comm’n*, 78 N.Y.2d 318, 324 (1991); *see also Matter of Horn v. New York City Civil Serv. Comm’n*, 43 A.D.3d 760 (1<sup>st</sup> Dept 2007)(holding that an Article 78 challenge against the CSC was properly dismissed because the CSC did not act illegally, unconstitutionally, or outside its jurisdiction when it reinstated a Department of Correction employee). However, if such a showing is not made, the “merits of the determination of the Civil Service Commission” are not reviewable. *See NYC Dep’t of Envtl. Prot.*, 78 N.Y.2d at 321-22.

In the instant action, the court finds that the CSC’s affirmation of the determination of NYCHA’s Board that petitioner be terminated from his position as Caretaker “X” at the Lafayette Houses was not illegal, unconstitutional or in excess of the CSC’s jurisdiction. In reaching its determination, the CSC relied on testimony and evidence adduced at the NYCHA hearing which established that petitioner refused to comply with NYCHA directives on numerous occasions and failed to perform his duties as a Caretaker “X” in a satisfactory manner. Specifically, the CSC relied on the Board’s finding that petitioner’s misconduct involved “two instances of blatant insubordination, as well as failure to perform [his] duties” and that his past disciplinary history was replete with insubordination and inappropriate behavior. As the Board found that petitioner continues to disregard counseling and NYCHA authorities, the CSC was not in excess of its jurisdiction in affirming the Board’s decision to terminate petitioner.



