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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART 4

Justice

Index Number : 402798/2011
DUBOSE, ALLEN
vs.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion to/for Article 78

	PAPERS NUMBERED
Notice of ~~Motion~~/ Petition/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering ~~Affidavits~~ Verified — Exhibits	2
~~Replying Affidavits~~ Petitioner's Memos	3-4
Respondent's Memos	5

Cross-Motion: ☐ Yes ☒ No

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

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: 9/20/12

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 4

Index No.: 402798/11

In the Matter of the Application of
Allen Dubose,

Petitioner,

-against-

New York City Housing Authority,

Respondent.

DECISION, ORDER AND JUDGMENT
Present: HON. ARLENE P. BLUTH

It is ORDERED and ADJUDGED the petition is denied and the proceeding is dismissed.

Petitioner seeks to reverse respondent New York City Housing Authority's (NYCHA's) June 29, 2011 Determination of Status which upheld the hearing officer's June 14, 2011 decision to terminate his tenancy on the grounds that the penalty of termination was excessive. Specifically, petitioner contends that the hearing officer's decision "contains assumptions and conclusions unsupported by the record and is seemingly motivated by bias". Respondent NYCHA opposes the petition and contends that it acted reasonably, lawfully and properly in terminating petitioner's tenancy based on petitioner's undesirability, and that the penalty of termination should not be disturbed.

Because this petition seeks to review only the penalty imposed, and does not raise issues of substantial evidence, this Court shall address the issues raised and need not transfer the matter to the Appellate Division. *See Matter of Kerney v Hernandez*, 60 AD3d 544, 874 NYS2d 804 (1st Dept 2009).

Applicable law and procedures regarding criminal activity

Until his tenancy was terminated, petitioner was the tenant of record of apartment 1C at 65 East 99th Street in Manhattan, which is part of a NYCHA development. Because NYCHA receives federal funds, it must comply with the federal rules and regulations disseminated through the US Department of Housing and Urban Development.

These federal regulations are incorporated into the terms and conditions of NYCHA's leases, and specifically petitioner's lease, under the heading "Tenant Obligations". The lease prohibits tenants, members of the tenant's household, guests, or other persons under tenant's control from engaging in "criminal activity that threatens the health, safety or right to peaceful enjoyment of the Development by other residents" or "[a]ny violent or drug-related criminal activity on or off the Leased Premises or the Development", and requires tenants to act in a manner "conducive to maintaining the Development in a decent, safe and sanitary condition" (see exh A to answer, para.12).

Federal regulations empower NYCHA to terminate a tenancy if it determines that a tenant, any member of a tenant's household, a guest or another person under the tenant's control has engaged in criminal behavior, regardless of whether the person was "arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction." 24 CFR §966.4(1)(5)(iii).

Charges against petitioner

The police executed a search warrant in petitioner's apartment on March 4, 2010, arrested petitioner and recovered, among other things, one gun, one box of bullets, two bags of cocaine, two bags of marijuana, one scale, lactose cutting agent, one strainer and $887 in cash.

A hearing was held before hearing officer Ester Tomicic-Hines on April 7, 2011 and May 12, 2011 on the charges of petitioner's non-desirability based on criminal activity in his apartment relating to the March 4, 2010 arrest.

The hearing officer heard testimony and reviewed documentary evidence from NYPD Detective McBrearty which showed that cocaine and marijuana were found on petitioner's bed, along with a loaded firearm which was later determined to be inoperable (although nothing about the appearance of the gun would indicate that it was in fact inoperable).

Petitioner admitted the charges and requested a mitigated sanction based on the fact he is a wheelchair-bound paraplegic who needs a handicapped-accessible apartment in close proximity to the hospitals where he receives treatment. The hearing officer considered petitioner's personal circumstances and the testimony he presented that he has a low likelihood of reoffending, but concluded that his criminal conduct poses a serious threat to the other tenants, as petitioner, a former member of the tenant patrol, should be have known. The hearing officer also found that petitioner did not voluntarily participate in a drug treatment program, and that it was premature to conclude that he would not reoffend as petitioner had, at the time of the hearing, had been on probation only six months of a five-year term imposed by the Criminal Court.

Standard of review

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 Board of Education*, 34 NY2d 222, 231 [1974]). 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 New York Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *aff'd* 11 NY3d 859 [2008]).

The Appellate Division, First Department routinely has upheld determinations to terminate tenancies for illegal drug activity when the charges are supported by substantial evidence. *See Rodriguez v New York City Hous. Auth.*, 84 AD3d 630 (1st Dept 2011). Based on its review of the record, and petitioner's admitting to the charges, the Court finds that a rational basis exists for NYCHA's decision to terminate petitioner's tenancy, and thus that decision cannot be disturbed by this Court. Contrary to being arbitrary and capricious, here, since the illegal drug activity in the apartment was admitted by petitioner's plea, NYCHA's decision to terminate petitioner's tenancy is in keeping with its statutory obligation to adhere to its procedures for the safety and well-being of all public housing tenants.

Contrary to petitioner's argument, the hearing officer did not improperly substituted her

own opinion for that of a trial expert simply because the hearing officer made a finding that differs from the expert's testimony; a trier of fact may accept or reject the opinion of an expert just as he or she may that of a layperson. *See Currie v Town of Davenport*, 37 NY2d 472, 476 (1975).

Moreover, petitioner, although conclusorily alleging bias, has failed to support that claim with anything but "apparently [the hearing officer] made the assumption that a criminal [will not be rehabilitated until his probation is over] suggests personal bias played a role in her decision". The mere fact that the hearing officer ruled against petitioner does not, standing alone, establish bias, and petitioner has not set forth any evidence of bias. *See Poyster v Goord,* 26 AD3d 503, 505 (2006); *Zrake v New York City Dep't of Educ.*, 41 AD3d 118 (1st Dept 2007). Finding a tenant who admitted to crimes involving drugs and guns on NYCHA property undesirable and being unwilling to impose probation does not equal bias.

Finally, for a reviewing court to overturn a penalty imposed by an administrative agency, the punishment must be "so disproportionate to the offense as to be shocking to one's sense of fairness". *Matter of Pell v Board of Education*, 34 NY2d 222, 231 (1974). Here, where the presence of drugs and a weapon poses a threat to community health and safety, termination of petitioner's tenancy is not so disproportionate to his offense as to shock one's sense of fairness. *See Matter of Zimmerman v New York City Hous. Auth.,* 84 A.D.3d 526 (1st Dept 2011) (termination of tenancy not shocking to one's sense of fairness where drugs, drug paraphernalia, and ammunition found in petitioner's apartment and petitioner violated lease terms by permitting such activity to occur there); *Harris v Hernandez,* 30 A.D.3d 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 paraphernalia in apartment and does not shock conscience).

NYCHA has a statutory obligation to protect its tenants from illegal drug activity in the public housing community. Contrary to being arbitrary and capricious, NYCHA's decision to terminate petitioner's tenancy is in keeping with its statutorily mandated obligation to protect NYCHA's law-abiding residents. Accordingly, it is ORDERED and ADJUDGED that this Article 78 petition is denied and the proceeding is dismissed. Any stays are hereby vacated.

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

Dated: September 20, 2012
New York, New York

HON. ARLENE P. BLUTH, JSC