

Matter of Velez v Wanbua

2012 NY Slip Op 32565(U)

October 3, 2012

Supreme Court, New York County

Docket Number: 401368/2012

Judge: Alexander W. Hunter Jr

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JR
Justice

PART 33

Index Number : 401368/2012
VELEZ, CARMEN
vs.
WAMBUA, MATHEW M.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 31, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) 1-6

Answering Affidavits — Exhibits _____ | No(s) 7-30

Replying Affidavits _____ | No(s) 31


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

See memorandum decision and order annexed hereto.

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

FILED
OCT 09 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/3/12



ALEXANDER W. HUNTER JR, 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 33**

-----X
In the Matter of the Application of
Carmen Velez,

Index No.: 401368/12

Petitioner,

Decision and Order

-against-

Mathew M. Wanbua, as Commissioner of the
New York City Department of Housing
Preservation & Development,

Respondent.

-----X
HON. ALEXANDER W. HUNTER, JR.

FILED
OCT 09 2012
**NEW YORK
COUNTY CLERK'S OFFICE**

The application by petitioner for an order pursuant to C.P.L.R. Article 78, annulling and vacating the New York City Department of Housing Preservation & Development's ("HPD") determination, to terminate petitioner's Section 8 rent subsidy, is hereby transferred to the Appellate Division, First Department.

HPD is the public housing authority responsible for administering the Section 8 program in New York City. This program is designed to assist lower income families in obtaining safe and affordable privately owned rental housing and to promote economically mixed housing. See, 42 U.S.C. § 1437(f)(a) and 24 C.F.R. § 982.1(a)(1). HPD is required to conduct annual and interim reexaminations of family income and composition. 24 C.F.R. § 982.516. HPD has the authority to deny or terminate Section 8 assistance if the family has: 1) misrepresented income, household members, or any other information reported to HPD; 2) violated one of the family obligations; or 3) failed to provide information requested by HPD. 24 C.F.R. § 982.552.

On or about February 12, 2010, petitioner submitted her annual Section 8 Recertification Package ("recertification package"). In the 2010 recertification package, petitioner listed herself, her husband, and her two children as members of the household. Petitioner further indicated that her listed wages of \$300.00 per week and \$15,600.00 annually was incorrect. She also submitted a letter dated January 21, 2010, from Josephine Sanatamaria stating that petitioner no longer worked for her.

By a "Request for Additional Information" form, dated May 5, 2010, HPD requested petitioner to submit a "Statement of Non-Employment". Petitioner signed and dated the requested form on May 11, 2010. In the "Statement of Non-Employment", petitioner affirmed that she was last employed by Josephine Santamaria. Thereafter, by letter dated July 1, 2010, HPD notified petitioner that her portion of the rent payment would decrease and HPD's portion of the rent payment would increase, effective August 1, 2010.

On or about May 3, 2011, petitioner submitted her 2011 recertification package to HPD. In the 2011 recertification package, petitioner listed herself and her two children as members of the household. She also indicated that she was employed. On or about July 8, 2011, respondent sent petitioner a "Request for Additional Information" directing petitioner to submit a "Debts Owed and Adverse Termination" form for all household members. As part of the recertification process, HPD conducted a search on the U.S. Department of Housing and Urban Development's Enterprise Income Verification ("EIV") system for all household members. The EIV search revealed that from the first through the fourth quarter of 2010, petitioner had earned a total of \$21,496.19 from Home Health Care Services of New York, Inc. ("HCS"). Petitioner failed to report any of this income to HPD.

Respondent sent petitioner a "Notice of Section 8 Pre-Termination & Mandatory Conference", dated August 17, 2011. The notice indicated that petitioner's rent subsidy could be terminated because petitioner misrepresented her annual income by more than \$5,000.00. The notice directed petitioner to attend a mandatory conference on August 31, 2011 and to bring various financial documents. At the conference, petitioner submitted six pay stubs from HCS, her 2010 federal tax return, and a letter from HCS stating that petitioner had been employed by HCS since March 17, 2010 as a home health care aide at a rate of \$8.00 per hour before deductions. On September 14, 2011, HPD received a "Verification of Wages" form completed by HCS indicating petitioner's gross earnings during the last twelve months as \$29,927.67.

HPD informed petitioner that her Section 8 rent subsidy was terminated, effective November 30, 2011, for failure to disclose household income. Petitioner appealed the termination by requesting an informal hearing. The informal hearing was held on December 16, 2011 before Hearing Officer Angelique Fabiani, Esq. ("H.O. Fabiani"). On February 28, 2012, H.O. Fabiani issued an informal hearing decision upholding HPD's determination to terminate petitioner's rent subsidy. By notice dated February 29, 2012, petitioner was informed that her Section 8 rent subsidy was terminated, effective March 31, 2012.

Petitioner argues that respondent's determination should be vacated and the matter should be remanded for the imposition of a lesser penalty. Petitioner asserts that HPD's determination to terminate her rent subsidy was: 1) not supported by substantial evidence; 2) an abuse of discretion; and 3) so disproportionate to the offense that it shocks the conscience.

Petitioner avers that in mid-March 2010, she was hired by HCS, but was only given temporary assignments. In April 2010, petitioner asserts that she contacted HPD to inform the agency that she had secured employment on a temporary basis. Petitioner contends that she spoke with an HPD representative named Mr. Coombs and he instructed her to wait until her employment with HCS became more permanent before mailing HPD any pay stubs. After receiving a more permanent assignment from HCS, petitioner mailed several pay stubs along with a letter indicating her employment status in July 2010. Petitioner asserts that she tried to inform HPD of her employment status several times and simply did as she was instructed by an HPD representative.

Petitioner argues that there is no rational basis in the record to conclude that she intentionally misrepresented her employment status and income to HPD. Moreover, petitioner cites to several cases in which courts have held that the termination of a tenant's rental subsidy is shocking and disproportionate to the offense of failing to accurately report household income. Petitioner avers that she is willing to reimburse respondent for the overpayments she received in the amount of \$6,487.84.

Respondent first argues that the instant proceeding should be transferred to the Appellate Division for a substantial evidence analysis. Respondent also asserts that its finding against petitioner was supported by substantial evidence in the record and was reasonable and lawful. HPD also avers that its determination to terminate petitioner's Section 8 rent subsidy is not so disproportionate to petitioner's misconduct as to shock one's conscience.

Respondent avers that petitioner violated the rules and regulations of the Section 8 program by misrepresenting both her employment status and her income. HPD has no record of petitioner's conversation with HPD representative, Mr. Coombs, in April 2010. HPD also has no record of the pay stubs petitioner claims that she mailed to HPD in July 2010. Respondent further asserts that termination of petitioner's rental subsidy is appropriate in light of the fact that petitioner misrepresented her household income for almost a full year. Although she was employed by HCS in March 2010, petitioner did not disclose her employment status or income to HPD until she submitted her recertification package on or about May 3, 2011. Therefore, respondent argues that it was entirely reasonable and rational to terminate petitioner's rental subsidy.

Petitioner argues that in light of all the circumstances, her penalty is so disproportionate to the offense that it shocks the conscience. She also reiterates that HPD's determination was not supported by substantial evidence and therefore must be vacated.

In the case at bar, since the Article 78 application involves the issue of whether or not there was substantial evidence to support respondent's determination, this matter should be transferred to the Appellate Division, First Department pursuant to C.P.L.R. 7804(g). There are no other procedural issues for this court to decide.

Accordingly, it is hereby

ORDERED that, pursuant to C.P.L.R. 7804(g), the application by petitioner seeking to vacate and annul a determination by respondent is respectfully transferred to the Appellate Division, First Department, for disposition. This proceeding involves an issue as to whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction of law, is, on the entire record, supported by substantial evidence.

Petitioner is directed to serve a copy of this order with notice of entry upon the County Clerk (Room 141B), who is directed to transfer the file to the Appellate Division, First

Department.

Dated: October 3, 2012

ENTER:



J.S.C.

ALEXANDER W. HUNTER

FILED
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