

Matter of Sarwar v Wambua
2013 NY Slip Op 30486(U)
March 7, 2013
Supreme Court, New York County
Docket Number: 109250/2011
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Hon. Doris Ling-Cohan

PART 36

Index Number : 109250/2011

SARWAR, KAMAR

vs

WAMBUA, MATHEW M.

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Article 78 proceeding
PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2

Answering Affidavits — Exhibits *(memo)*

3

Replying Affidavits *memo*

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Article 78 proceeding

is denied & dismissed in accordance

with the attached memorandum decision.

FILED

MAR 11 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/7/13

JUSTICE DORIS LING-COHAN

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 36**

In the Matter of the Application of
KAMAR SARWAR,
Petitioner,

-against-

MATHEW M. WAMBUA, as Commissioner
of the New York City Department of Housing
Preservation and Development, THE NEW YORK
CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT,
Respondents,

INDEX NUMBER 109250/2011
Motion Sequence 001
**DECISION, ORDER &
JUDGMENT**

For a Judgment under Article 78 of the
Civil Practice Law and Rules.

FILED
MAR 11 2013
COUNTY CLERK'S OFFICE
NEW YORK

DORIS LING-COHAN, J.:

Petitioner Kamar Sarwar petitions this court for a judgment, pursuant to CPLR Article 78, annulling the determination by respondents to terminate her Section 8 housing subsidy. In addition to this civil case, a criminal case is pending.

Factual Background

Petitioner has lived in her apartment for about 26 years, since she came to the United States, from Afghanistan. Since 2006, petitioner has participated in the New York City Department of Housing Preservation and Development's (HPD) tenant-based housing assistance program, authorized by Section 8 of the United States Housing Act of 1937, 42 USC 1437f (Section 8). Previously, she had been in a program of rent subsidies administered by the federal Department of Housing and Urban Development (HUD). Under Section 8, low-income tenants pay the greater of 10% of their gross income or 30% of their adjusted income towards rent, with the balance of the rent owed covered by vouchers.

On November 16, 2009, petitioner met with HPD, after it issued a notice that her Section 8

assistance would be suspended or terminated, due to inaccurate financial information on the annual recertification forms. It is undisputed that petitioner's adult children Lila Sarwar (Lila) and Mahboob Sarwar (Mahboob), who were listed as living in petitioner's household, submitted false statements, over a three (3) year period, indicating no income or financial benefits and that the federal computer database found significant income for both. An "informal hearing" (as identified by HPD) on her case was held on February 24, 2011, and a decision was issued on April 11, 2011, upholding the termination of her Section 8 rent subsidy. Ex. A attached to petition.

Legal Standards

An Article 78 proceeding may only ask "whether a determination 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). "Judicial review of a discretionary administrative determination is limited to deciding whether the agency's actions were arbitrary and capricious. The agency's determination must be upheld if the record shows a rational basis for it, even where the court might have reached a contrary result." *Kaplan v Bratton*, 249 AD2d 199, 201 (1st Dept 1998) (citation omitted); *see also Matter of Chinese Staff & Workers' Assn. v Burden*, 88 AD3d 425, 429 (1st Dept 2011) ("It is not the role of the court to weigh the desirability of the proposed action or to choose among alternatives, resolve disagreements among experts, or to substitute its judgment for that of the agency").¹

Discussion

Petitioner claims that her "primary language is Pashto, and she can read and write in Pashto, . . . [but] cannot read or write in English, and her understanding of the English language is very limited." Petition, ¶ 24. Her difficulties with HPD allegedly arose from the differences in the

¹ The court notes that neither side has requested transfer to the Appellate Division claiming the "substantial evidence" standard is applicable.

recertification procedure between the Section 8 program and the prior rent subsidy program. In the past, she states that her building’s “management office put papers in front of her to sign; none of the documents were read to or translated for her into Pashto.” *Id.*, ¶ 25. When the Section 8 procedure was introduced, someone “simply transferred the information from the prior year’s recertification, had Petitioner sign the forms . . . [without] ask[ing] her whether the household composition or income information for any household member other than her had changed.” *Id.*, ¶¶ 28-29. She claims that “[a]t no time was Petitioner informed or made aware of the fact that she was pro-actively expected to provide additional information or documentation at any recertification.” *Id.*, ¶ 32.

Petitioner contends that several erroneous factors were involved in HPD’s determination, including not providing her with adequate, if any, translation or interpretation support at a mandatory conference, prior to any hearing, not providing her with any meaningful opportunity to review her file prior to the hearing, refusing to allow her to introduce any mitigating evidence at the hearing, issuing a report written by someone other than the hearing officer, and the report writer, not present at the hearing, was not able to judge petitioner’s credibility and English language proficiency, or question petitioner directly. In addition, the petition asserts that the penalty of losing her Section 8 rent subsidy is disproportionately harsh in light of her physical and mental disabilities², information about which she claims was excluded from the informal hearing, citing *Peoples v N.Y. City Hous. Auth.*, 281 AD2d 259, 260 (1st Dept 2001). In *Peoples v N.Y. City Hous. Auth.*, the Court held that

“[t]his Court has the authority to review an administrative sanction that ‘shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law’ (*Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]). The drastically disproportionate remedy of expelling petitioner from her home for this incident, after her long and unblemished tenancy, amounts to such an abuse of discretion.”

HPD, as a public housing authority (PHA) administering a Section 8 program, was obliged

² The court notes that the petition is noticeably silent as to any details of such disabilities; nor is medical documentation provided.

by 24 CFR § 982.54 to adopt an administrative plan to govern its policies. Portions of HPD's prevailing plan are attached as exhibit A to respondents' verified answer. Predictably, it requires participants to supply any information that HPD determines is necessary to administer the program, particularly family composition and income. Plan, Chapter 7.1.2. Participants must promptly report any change in household income. *Id.* Violation of these obligations, among others, are grounds to deny or terminate assistance. *Id.*, Chapter 15 *passim*.

Conferences and informal hearings are among the "ways for program applicants and participants to clarify, resolve, review, and appeal matters and decisions concerning their eligibility to receive Section 8 rent subsidies." *Id.*, Chapter 16 introduction. The plan continues: "HPD will take affirmative steps to communicate with people who need services or information in a language other than English. Interpreters will be available if requested in writing at least three business days before the informal review, conference or informal hearing by the participants." *Id.* While petitioner does not claim to have asked for a Pashto interpreter to assist her in preparing the documents, she points to respondents' exhibit N, a page of HPD's recertification package, offering language assistance to complete the package. It lists only choices of Spanish, French, Haitian Creole, Russian, Cantonese, Chinese Mandarin and Arabic; Pashto is not included. Petitioner fails to mention, however, that a choice of "Other", with room to "indicate your language of preference", is given space equal to the other choices. Were petitioner living alone, or only with family members unable to help her with paperwork, such as, small children or infirm relatives, this language choice form might pose an arguable issue. However, her daughter Lila Sarwar was a full-time sophomore (second year) student at John Jay College, age 23, as of November 4, 2009 (Ex. W attached to verified answer), and her son Mahboob Sarwar (Mahboob) was a full-time freshman (first year) student at Queensborough Community College, age 27, as of August 6, 2009 (Ex. Q attached to verified answer). Both children lived with their mother in 2006, when she first encountered the

Section 8 program. Significantly, both were adults and English-speaking and also submitted statements that they were unemployed, with no income or financial benefits. Thus, even if an interpreter had been provided to petitioner, it would not have absolved the responsibility of her adult children to tell the truth as to their financial income, as it is undisputed that they submitted false statements as to income.

On December 25, 2010, another son Ahmed Jabid Sarwar (Ahmed), was added to the household for Section 8 purposes, identified as a US citizen and a student. Ex. X attached to verified answer. Only Ahmed accompanied his mother to the appeal hearing on February 24, 2011, and he testified under oath. Mahboob (also known as Mahbu), born in Afghanistan, is included in the Section 8 Participant Household Summary, dated August 9, 2009, but allegedly moved out as early as 2007, according to testimony from his mother and brother Ahmed, at the Section 8 appeal. Appeal Transcript, attached as Ex. CC to verified answer, at 24-25, 29. Mahboob was removed from the household, on paper, on December 25, 2010. Ex. X attached to verified answer. There is no evidence that Lila, born in New York City, has left her mother's household. In sum, petitioner's alleged issues with the Section 8 paperwork, discussed below, did not arise or result from HPD's alleged mis-handling of the recertification, but, rather from the false information supplied by petitioner's children.

When petitioner initially applied for Section 8 assistance, on July 11, 2006, she listed Mahboob and Lila, then 24 years old and 20 years old respectively, as living with her, unemployed and receiving no income or financial benefits. Exs. B and C attached to verified answer. This information was repeated for recertification on or about September 11, 2007 (Exs. F and H attached to verified answer), July 28, 2008 (Exs. J and L) and August 8, 2009 (Exs. N and P). Each time, Mahboob and Lila signed statements to this effect. HPD's notice of a pre-termination hearing, dated

October 28, 2009, referenced unreported income from Mahboob and Lila. Ex. U attached to verified answer. HPD's Section 8 rent subsidy termination notice, dated April 28, 2010, was based on the failure to disclose Mahboob's and Lila's income. Ex. Y attached to verified answer. The written decision after the hearing held on February 24, 2011, referencing income verification information from a federal computer database (EIV) for Mahboob and Lila, "adults and English speakers," found that they had falsely certified that they were unemployed and that petitioner "submitted these false documents to HPD." Ex. EE attached to verified answer, at 11. The EIV reports showed that a significant amount was earned: Mahboob earned almost \$83,000 from the third quarter of 2007 through the first quarter of 2009, and Lila over \$40,000 in the same period of time. *Id.*, at 6.

While petitioner seeks to frame this as an issue of the failure to provide interpreting services, her adult children Lila and Mahboob, who clearly and undisputably gave false statements as to their income, spoke English, were educated in this country and attended college. It is not disputed that petitioner's adult children were not entitled to interpreting services and, even if interpreting services were provided to petitioner/mother, it would not have changed the result and her adult English-speaking children would still have engaged in the submission of fraudulent statements of no income.

Petitioner claims that she "did not at any time fill in the recertification forms" and "whoever prepared the recertification forms in her behalf simply transferred the information from the prior year's recertification, [and] had Petitioner sign the forms." Petition ¶¶ 26, 28. Even if this accurately described petitioner's handling of the forms, it does not explain or excuse the conduct of her adult, English-speaking children, who falsely stated for three years that they were unemployed and without income. The fact that all three were in accord in their false claim that no income was received by both adult children, undermines her argument, as both adult children spoke English. It is rational for HPD to expect accurate reporting of family financial data for calculating Section 8 rent

subsidies. Further, significantly, as stated by the Hearing Officer:

“The case file indicates that the [p]articipant understood and responded to HPD notices and requests for information throughout her participation. Ms. Sarwar correctly and adequately disclosed her supplemental security income and also provided documents verifying these benefits, which is evidence of her understanding of disclosure”.

Exh. EE, Verified Petition. It is, thus, not capricious to determine that selective reporting and falsity in reporting household composition and income over several years violates established program regulations.

Petitioner’s conclusory arguments that she did not have a meaningful opportunity to review her file prior to the hearing and that she was not permitted to introduce any mitigating evidence at the hearing, also do not provide a basis to annul HPD’s determination to terminate her Section 8 rent subsidy. Significantly, petitioner, offers no specifics as to such arguments or as to particular mitigating evidence which was excluded. Further, the Record does not support her allegations. Both petitioner, who had the benefit of a translator at the hearing, and her son, testified regarding their excuse for failing to report income. Moreover, petitioner does not detail how a further review of her file prior to the hearing, would have changed the fact that she failed to disclose accurate information as to her household income, which is a fundamental obligation of a participant in the Section 8 Program. Significantly, the adult, English speaking children, failed to appear at the hearing to dispute the claims of their income. Further, the only witness to appear, the other adult son, Ahmed, had no specific knowledge. Thus, petitioner has offered no basis for annulling HPD’s determination because of her failure to follow the legal guidelines of family income reporting.

It is undisputed that the February 24, 2011 hearing was held before Dominador Pascual, Esq., who left HPD before writing the decision. HPD states that the decision was written by substitute hearing officer Shalini Gajadharsingh, Esq., “after having reviewed the entire Hearing Record. The Hearing Record is comprised of the audio recording of the Informal Hearing, all submitted exhibits,

and Participant's entire HPD case file." Ex. EE attached to verified answer, at 1-2. These circumstances have not been found to invalidate the challenged determination. State Administrative Procedure Act § 303 ("Whenever a presiding officer is disqualified or it becomes impractical for him to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom"); *Matter of Smith v New York City Dept. of Educ.*, 67 AD3d 555, 556 (1st Dept 2009) ("The fact that a replacement arbitrator, who was not present during the receipt of evidence, made the arbitration award based on a review of the record, did not deny petitioner due process of law"); *Kreppein v New York State & Local Police & Fire Retirement Sys.*, 270 AD2d 732 (3d Dept 2000) ("In view of petitioner's failure to demonstrate any actual prejudice, the substitution of a new Hearing Officer following the close of the hearing, which was authorized by State Administrative Procedure Act § 303, provides no basis to disturb the determination"); *Gupta v New York State Dept of Social Servs.*, 208 AD2d 629 (2d Dept 1994) ("due process of law and the concept of a fair administrative hearing do not require that the actual taking of evidence be before the same Hearing Officer who makes the final determination").

While petitioner relies upon the decision in *James v. New York City Dept. of Housing Preservation and Development*, (85 AD3d 637[1st Dept 2011]), arguing that it has virtually identical relevant facts, is dispositive on the within issues and warrants a reversal and reinstatement of petitioner's section 8 subsidy, this court disagrees, as such case is clearly distinguishable. In *James*, while the substitute hearing officer that issued the decision was not present at the hearing, his decision which was ultimately vacated, was based upon an *incomplete* audio record, the hearing officer failed to have a copy of the hearing transcript, and the decision was rendered almost two (2) years after the informal hearing was conducted. *Id.* at 637-38. Here, however, while the subject decision was in fact rendered by a hearing officer who was not present at the hearing, the decision was based upon a *complete* audio recording, as well as a copy of the *entire* hearing transcript and

petitioner's HPD case file, and was rendered a mere one and a half months from the informal hearing. Thus, *James* is not controlling here. Therefore, under these facts, there is nothing inherently improper in having the decision in Petitioner's matter written by a substitute hearing officer.

Petitioner's undisputed family income reporting, not her demeanor³, for better or worse, was at issue, and HPD's determination was rationally based and consistent with the prescribed outcomes. Petitioner's resulting penalty denied her subsidy, not tenancy, and is not, therefore, akin to *Peoples v N.Y. City Hous. Auth.* (281 AD2d 259, *supra*), where a long-term tenant was terminated from public housing after a physical altercation with a building staff member. *See also Perez v. Rhea*, ___ NY3d ___, 2013 NY Slip Op 00953, 2013 WL 530564 (2013)(termination of tenancy is not so disproportionate to misconduct of not reporting earnings, "as to shock the judicial conscience"). As the Court of Appeals recently stated in *Perez v. Rhea, supra*, "[i]f income reporting violations were to be ignored...there would be...no meaningful deterrent to residents...of income-based...housing who misstate their earnings".

Accordingly, it is

ORDERED and ADJUDGED that the Petition is denied and the proceeding is dismissed; and it is further

ORDERED that within 30 days of entry of this order, respondents shall serve a copy upon petitioner, with notice of entry.

DATED: March 7, 2013


Doris Ling-Cohan, J.S.C.

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³ The adult children who submitted the false statements of "no income" did not even appear at the hearing.