

<b>Jackson v Brezenoff</b>
2019 NY Slip Op 31149(U)
April 22, 2019
Supreme Court, New York County
Docket Number: 451469/2018
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM**

*Justice*

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INDEX NO. 451469/2018

ROSE JACKSON,

MOTION DATE 10/19/2018

Petitioner,

MOTION SEQ. NO. 001

- v -

STANLEY BREZENOFF, as Interim Chairperson and Member of  
the New York City Housing Authority,

**DECISION AND ORDER**

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, the Verified Petition is denied and dismissed.

Background

In this Article 78 proceeding petitioner, Rose Jackson, asks this Court to overturn the determination of the New York City Housing Authority ("NYCHA") dated February 13, 2018, to terminate petitioner's tenancy, which was approved by a Determination of Status dated April 9, 2018. Petitioner alleges that the NYCHA determination is: (1) arbitrary and capricious, (2) an abuse of discretion, including abuse of discretion as to the measure or mode of penalty imposed, (3) in violation of petitioner's due process rights, and (4) contrary to law.

A brief statement of the pertinent facts is necessary and follows. In the fall of 2013, petitioner become the tenant of record for the apartment located at 131 St. Nicholas Avenue, Apt. 6C, New York, NY 10026, also known as the Taft Houses, a public housing project located in the City of New York, which is operated by NYCHA (the "Apartment"). Petitioner is 55 years old and has resided at the Apartment for the past 15 years. According to the verified petition and petitioner's medical records, petitioner is disabled; specifically, petitioner has suffered from epileptic seizures her entire life and her disability was exacerbated by injuries sustained in a serious car accident in 2010 which left her with cognitive impairments. Petitioner is on public assistance. Respondent Stanley Brezenoff is the interim chairperson of NYCHA.

In the summer of 2009, NYCHA charged petitioner with non-desirability and breach of NYCHA rules and regulations, alleging that on or about June 1, 2009, petitioner's ex-partner, Theodore Smith ("Smith"), assaulted a NYCHA employee. The parties resolved the matter by stipulation signed January 15, 2010, which was approved by a Determination of Status dated February 3, 2010 (the "Permanent Exclusion Agreement"). Pursuant to the Permanent Exclusion Agreement, petitioner agreed: (1) to permanently exclude Smith from the Apartment (i.e., Smith could not

reside or visit the Apartment for any reason); (2) to permit NYCHA investigators to make unannounced visits to the Apartment to inspect and confirm Smith's absence; (3) that failure to allow such entry by a NYCHA investigator would constitute a violation of the Permanent Exclusion Agreement which may result in additional penalties, including termination; and (4) that she could request that management change her lock without charge. Petitioner was also placed on a one-year probation.

In the spring of 2013, NYCHA charged petitioner with violating the Permanent Exclusion Agreement, alleging that NYCHA investigators were denied entry into the Apartment on two separate occasions. Petitioner was also charged with non-desirability and breach of NYCHA's rules and regulations, alleging that Smith unlawfully urinated in public on the grounds of the Taft House or in the immediate vicinity thereof. Following an administrative hearing on May 24, 2013 and July 18, 2018, the hearing officer determined that petitioner violated the Permanent Exclusion Agreement by not providing NYCHA investigators access to the Apartment. The remaining charges of non-desirability and breach of rules and regulations were not sustained. The hearing officer determined that petitioner was eligible for continued tenancy under a one-year probationary term and subject to the continued exclusion of Smith from the Apartment. On August 6, 2013, NYCHA issued its determination, which was approved the same day by a Determination of Status.

In the spring of 2014, NYCHA again charged petitioner with violating the Permanent Exclusion Agreement and her probation, alleging that NYCHA investigators were denied entry into the Apartment. The parties resolved the matter by stipulation signed September 12, 2014, which was approved by a Determination of Status dated October 6, 2014. Pursuant to the stipulation, petitioner agreed to the continuation of the Permanent Exclusion Agreement and an additional one-year probation in exchange for the preservation of her tenancy.

On or about February 9, 2015, while petitioner was still on probation pursuant to the stipulation signed September 12, 2014, NYCHA investigators discovered Smith in the Apartment. Pursuant to NYCHA's procedures, the property manager sent petitioner two letters advising her that he was considering terminating her lease for breach of NYCHA's rules and regulations/ breach of lease due to petitioner's violation of the Permanent Exclusion Agreement. The property manager also offered petitioner an opportunity to meet and discuss the matter in detail. Petitioner failed to meet with the property manager. As a result, by letter dated April 23, 2015, the housing manager informed petitioner that he was forwarding petitioner's tenancy record to NYCHA's central office for possible termination of tenancy. On March 14, 2016, NYCHA charged petitioner with violating the Permanent Exclusion Agreement and her probation based on Smith being present in the Apartment. On June 2, 2017, NYCHA amended the charges to include non-desirability charges alleging Smith possessed and/or sold a controlled substance on four separate dates and charges for breach of NYCHA's rules and regulations based upon petitioner failing to cause Smith to refrain from illegal activity and based upon petitioner allowing Smith to take up residence in the Apartment since about February 6, 2014. Following multiple administrative hearings, the hearing officer issued its decision dismissing the charges alleging non-desirability for narcotics activity by Smith and sustaining the charges alleging violation of the Permanent Exclusion Agreement and violation of probation and determining that the appropriate disposition of the matter was termination (the "Termination Decision").

On July 25, 2018, petitioner commenced the instant Article 78 proceeding for a judgment: (1) annulling and setting aside the Termination Decision that terminated petitioner's tenancy at the Apartment; (2) staying any action against petitioner to enforce the Termination Decision during the pendency of this action; (3) ordering respondent to restore petitioner's eligibility for public housing and reinstate the proper remedy (i.e., probation, continued permanent exclusion and referral to social services); (4) awarding petitioner costs and disbursements; and (5) awarding petitioner attorney's fees.

### Discussion

In an Article 78 proceeding, the scope of judicial review is limited to the issue of whether the administrative action is rationally based. Matter of Pell v Board of Educ., 34 NY2d 222, 230-31 (1974). It is well settled that "a court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion." Id. at 232 (internal citation omitted). Furthermore, "[t]he determination of an agency, acting pursuant to its authority and in its area of expertise, is entitled to deference." Nelson v Roberts, 304 AD2d 20, 23 (1<sup>st</sup> Dept 2003).

The Termination Decision was based upon a factual foundation that had a rational basis. The record before this Court demonstrates that NYCHA has provided petitioner with multiple opportunities to preserve her tenancy by complying with the Permanent Exclusion Agreement. As set forth in the Termination Decision, "[t]his is not [petitioner's] first exclusion violation... Smith was previously permanently excluded in an effort to preserve the tenancy while also protecting the welfare of the tenant community. That measure proved insufficient. The appropriate disposition now is termination." These factual foundations (i.e., repeated violations of the Permanent Exclusion Agreement) demonstrate that respondent had a rational basis for terminating petitioner's tenancy.

Petitioner's argument that the Termination Decision should be reversed based upon NYCHA's failure to follow its own termination procedures in that the hearing officer either failed to properly consider all mitigating factors raised by petitioner during the administrative hearings or precluded petitioner from introducing mitigating evidence as mandated by 24 CFR 966.4 and by NYCHA's termination procedures is unavailing. The NYCHA termination procedures states, in pertinent part,

[b]efore close of the hearing, the tenant... shall be permitted to make a general statement, in mitigation, as to why his/her tenancy should not be terminated. This will enable [NYCHA] to consider matters which do not strictly pertain to the stated grounds for termination, but relate more properly to the family situation or other extenuating circumstances. [NYCHA] may reply thereto for the record.

Petitioner claims that the hearing officer precluded her from introducing mitigating evidence about her health conditions, the impact homelessness would have on her, and her relationship with Smith. However, the record before this Court illustrates that at the administrative hearings' petitioner was permitted to introduce the following as evidence: medical documentation; a letter from petitioner's social worker; testimony by petitioner's social worker; testimony by petitioner;

and testimony by petitioner’s daughter. Petitioner argues that the hearing officer asked petitioner to move on during certain parts of her testimony when discussing mitigating factors, such as her medical issues, her relationship with Smith, and the effect termination would have. However, this Court does not find such actions to be prejudicial to petitioner in light of the administrative hearing transcript demonstrating the hearing officer acknowledged petitioner’s mitigating circumstances.

Petitioner also argues that the hearing officer misconstrued the propose of the mitigating evidence that was admitted; the Court finds that argument to be unfounded. Petitioner relies on Yancey v New York City Hous. Auth., 23 Misc3d 740, 746 (Sup Ct New York County 2009) in which the court noted, “[b]ecause the Hearing Officer... failed to make a determination in writing as to whether the mitigating factors should affect the disposition, the deposition was made in violation of the Housing Authority’s own procedures.” Here, the hearing officer, in her discretion, found that petitioner’s mitigating factors did not justify a mitigated sanction given the repeated violations of the Permanent Exclusion Agreement. In fact, in the findings and conclusions section of the Termination Decision, the hearing officer acknowledged that the lesser penalties imposed in the prior determinations had proven to be ineffective. Clearly, the hearing officer made a determination that petitioner’s mitigating factors shouldn’t affect the disposition, given the repeated violations and insufficiency of previous lesser punishments.

Although the penalty imposed by the Termination Decision is harsh, petitioner’s repeated violations of the Permanent Exclusion Agreement allow the hearing officer to impose it.

The Court has considered the petitioner’s other arguments and finds them to be unavailing or without merit.

Conclusion

The Verified Petition is hereby denied, and the Clerk is directed to enter judgment dismissing this Article 78 proceeding.

ARTHUR F. ENGORON, J.S.C.

4/22/2019

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE