SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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VENUS KING

Plaintiff,

- v -

GREGORY RUSS,

Defendant.

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INDEX NO. 451886/2020

MOTION DATE 09/03/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 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, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

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

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Venus King (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent New York City Housing Authority shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

In this Article 78 proceeding, petitioner Venus King (King) seeks an order to overturn a determination by the respondent New York City Housing Authority (NYCHA) and its chair, Gregory Russ, as arbitrary and capricious (motion sequence number 001). For the following reasons, the petition is denied and this proceeding is dismissed.

FACTS

King is the tenant of record of apartment 11B in a residential apartment building located at 370 Bushwick Avenue in the County of Kings, City and State of New York (the building). *See* verified petition, ¶ 2. The building is part of the Bushwick/Hylan Housing Development, a NYCHA-owned, low-income public housing project. *Id*.

King's tenancy in apartment 11B commenced on January 1, 2006 pursuant to the terms of a lease, subparagraph 12 (r) of which required her:

> "To assure that Tenant [i.e., King], any member of the household, a guest, or another person under the Tenant's control, shall not engage in:
> (i) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the Development by other residents or by [NYCHA's] employees, or
> (ii) Any violent or drug-related criminal activity on or off the Leased Premises or the Development, or
> (iii) Any activity, on or off the Leased Premises or the Development, that results in a felony conviction; . . ."

See verified answer, exhibit B.

In February 2010, NYCHA filed charges and specifications of "non-desirability" against King alleging that her son, Akeem King (Akeem), an authorized occupant of her apartment, possessed crack-cocaine at the premises with the intent to sell it. *See* verified answer ¶ 40; exhibit E. On March 25, 2010, King executed a stipulation with NYCHA which provided, in pertinent part, as follows:

> "3. The above-entitled administrative proceeding shall be disposed of by a determination of the PERMANENT EXCLUSION of AKEEM KING. The Tenant [i.e., King] represents that she will not permit AKEEM KING to reside in or visit the Tenant at

> the subject apartment or any other Authority apartment or premises in which the Tenant may subsequently reside. Furthermore, the PERMANENT EXCLUSION of AKEEM KING shall last beyond any probation period set forth in (5) below and shall last for as long as Tenant is a tenant with the Authority."

Id., exhibit E (emphasis in original).

On December 6, 2017, Akeem was arrested in King's apartment for participating in a conspiracy to sell controlled substances at the Bushwick/Hylan Housing Development. *Id*., ¶ 42. On March 23, 2018, NYCHA thereafter filed new charges and specifications against King for breaching the 2010 stipulation, and for undesirability by permitting Akeem and her other son, Saquan Warlick (Saquan), to sell narcotics at the Bushwick/Hylan Housing Development on several occasions. *Id*.; exhibit G.

King appeared for an administrative hearing on the charges before a NYCHA hearing Officer (HO) on September 19, 2019, and returned on a number of subsequent dates at which evidence was taken. *See* verified answer, ¶¶ 44-70; exhibits A-KK. On January 8, 2020, the HO issued a decision that upheld most of the charges against King (the HO's decision), and specifically found as follows:

> "Charge 1 is sustained based upon the arrest report (Exhibit 4) and Determination of Status in Case No. 2385/10 with the correlative stipulation. Charges 3T, 3V and 10 are sustained pertaining to Akeem King's attempted unlawful possession of heroin on October 12, 2017 based upon the certificate of disposition and plea minutes. T he documentary evidence established Akeem King's occupancy of the subject apartment on October 12, 2017; this breach has since been cured. Charge 2 is sustained for the period 2016 through 2017; charge 3 is dismissed. Charges 3 A), 3 B), 3 C), 3 D), 3 E), 3 F), 3 G), 3 H), 3 I), 3 J), 3 K), 3 L), 3 M), 3 N), 3 O), 3 P), 3 Q), 3 R), 3 S), and 3 U) are dismissed for lack of sufficient evidence.
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> "Charges 4, 5, 6 and 8 are dismissed for lack of sufficient evidence. Charges 7 and 9 are sustained based upon the pertinent certificate and disposition(s) along with the lease addendum and rent notice. The permanent exclusion stipulation has not been an effective means to preserve the tenancy; the evidence established illegal drug activities on or in the vicinity of NYCHA premises have continued since the condition of permanent exclusion was imposed, by persons residing in the subject apartment and it has not been established that illegal drug activity of an occupant of the subject apartment, is not likely to repeat."

Id., ¶ 71; exhibit LL; verified petition, exhibit A. On February 28, 2020, NYCHA issued a Determination of Status which adopted the HO's decision and terminated King's tenancy, specifically stating as follows:

> "In accordance with the Hearing Officer's decision and disposition in this proceeding finding the tenant(s) ineligible for continued occupancy, the tenancy is terminated."

Id., ¶ 72; exhibit MM.

King thereafter commenced this Article 78 proceeding on September 17, 2020 to challenge NYCHA's termination of her tenancy. *See* verified petition. NYCHA filed an answer on November 11, 2020. *See* verified answer. This matter is now fully submitted (motion sequence number 001).

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302, 302 (1st Dept 1996). A determination will only be found arbitrary and capricious if it is "without sound basis in reason, and in disregard of the . . . facts . . .." *See Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, if there is a rational basis for the administrative determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232.

At the outset, the court notes that neither party's argument addresses the above, correct standard of review. King asserts that "the test for the reviewing court is whether such punishment is as 'disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness,'" and that NYCHA's "imposition of the most severe remedy possible under the circumstances of the instant case . . . was unduly harsh and an abuse of discretion." *See* verified petition, ¶¶ 45-50. NYCHA answers King's argument, but also asserts that "substantial evidence supports the . . . determination to terminate petitioner's tenancy." *See* respondent's mem of law at 4-11. The court will address King's argument below, but must first address NYCHA's reference to the "substantial evidence" standard.

CPLR 7804 (g) permits the Supreme Court to transfer an Article 78 petition to the appropriate Appellate Division if a challenged agency determination was "made as a result of a hearing held, and at which evidence was taken," and where a party asserts that the determination was not supported by "substantial evidence." However, the mere presence of a substantial evidence question does not mandate transfer to Appellate Division. Instead, "where a petition raises issues that can terminate a proceeding without reference to the question of substantial evidence, the Supreme Court is to decide those questions in the first instance." *Matter of Robinson v Finkel*, 194 Misc 2d 55, 63-64 (Sup Ct, NY County 2002), affd 308 AD2d 355 (1st Dept 2003). In making this determination, the court may look to whether the petition simply challenges "the respondent's application of a rule to undisputed facts," (194 Misc 2d at 64) and, if this is the case, may conclude that "[w]here there are no issues of fact, no substantial evidence question arises." *Matter of Persico v New York City Dept. of Bldgs.*, 34 Misc 3d 1204(A), 2011 NY Slip Op 52424(U) (Sup Ct, NY County 2011). Here, there is no question of fact of whether King breached the portion of the 2010 stipulation that required her to permanently exclude

Akeem from apartment 11B, because the administrative record includes his admission that the apartment was his permanent address when he was arrested there in 2017. *See* verified answer, ¶¶ 46-53; exhibits K-O. Indeed, King's petition does not contest this fact, but only argues that NYCHA's termination decision was an improper exercise of discretion in light of other undisputed facts. Because this case clearly involves "applying a rule [i.e., NYCHA's termination directive]" to undisputed facts, the court concludes that this case does not present a "substantial evidence" question, and discounts so much of NYCHA's argument as is based on the "substantial evidence" standard.

Returning to the "arbitrary and capricious" standard, NYCHA asserts that the HO's decision to uphold the undesirability charge against King was rationally based on the evidence in the administrative record. *See* respondent's mem of law at 4-11. NYCHA specifically refers to: 1) the 2010 stipulation in which King agreed to permanently exclude Akeem from apartment 11B; 2) the hearing testimony of the narcotics officer who arrested Akeem; 3) physical evidence taken from Akeem including his driver's license (which designated apartment 11B as his place of residence) and the keys to apartment 11B; and 4) King's own admission that Akeem was arrested in apartment 11B in 2017, even though he had no right to be there. *Id*., at 5-6; verified petition, ¶ 15; exhibits E, K, O, R. NYCHA avers that "it is absurd for [King] to insist that police coincidentally arrested Akeem in [her] apartment, based on an arrest warrant that identified [her] apartment as the place he was most likely to be, on the one day in seven years that he happened to be there." *See* respondent's mem of law at 5-6. NYCHA also argues that the foregoing evidence "amply supports the [HO's] conclusion Akeem lived with [King]," and that this "constitutes a violation of [King's] agreement to exclude him." *Id*., at 7. The court agrees that the cited evidence provided a rational basis to support the HO's finding that King had violated

the stipulation. *See Matter of Pell*, 34 NY2d at 230-231. The court also notes that the Appellate Division, First Department, holds that even "a single incident of violation" of a permanent exclusion stipulation provides sufficient grounds to terminate a NYCHA tenancy. *See e.g.*, *Matter of Hernandez v New York City Hous. Auth.*, 135 AD3d 643, 643 (1st Dept 2016). King nevertheless argues that NYCHA's decision to terminate her tenancy was an arbitrary and capricious ruling. *See* verified petition, ¶¶ 45-50.

King specifically contends that it was an abuse of discretion for NYCHA to impose the most severe remedy possible without considering less harsh penalties than termination in light of the facts that: 1) Akeem is currently serving a 12-year jail sentence which precludes him from entering apartment 11B for the foreseeable future; and 2) Petitioner's other son was a teenage one-time offender at the time of his arrest, and is currently complying with the terms of a three-year sentence of probation. *See* verified petition, ¶¶ 45-50. However, this contention is belied by the text of the HO's decision, which plainly recites that: 1) King introduced this same fact evidence at the hearing; 2) the HO considered it; and 3) the HO nevertheless found that "[t]he permanent exclusion stipulation has not been an effective means to preserve the tenancy" because "illegal drug activities on or in the vicinity of [apartment 11B] have continued since the condition of permanent exclusion was imposed . . . and it has not been established that illegal drug activity . . . is not likely to repeat." *Id.*; exhibit A. King's reply papers assert that the HO "failed to give any weight to NYCHA's 'Mitigating Factor Analysis'" in violation of NYCHA's own policies and procedures. *See* petitioner's reply mem at 1-4. This essentially restates King's original argument that the HO failed to consider evidence that might mitigate against recommending termination. However, this argument fails no matter how King restates it, since

the administrative record clearly shows that the HO did consider the subject evidence. Therefore the court rejects King's argument.

King also contends that the penalty of termination is so "disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." *See* verified petition, ¶ 45. However, as was mentioned earlier, the First Department routinely holds that termination of a NYCHA tenancy due to a tenant's violation of a permanent exclusion stipulation does not shock the conscience. *See e.g. Matter of Curry v New York City Hous. Auth.*, 161 AD3d 578 (1st Dept 2018); *Matter of Hernandez v New York City Hous. Auth.*, 135 AD3d at 643; *Matter of Rasnick v New York City Hous. Auth.*, 128 AD3d 598 (1st Dept 2015); *Matter of Pagan v Rhea*, 122 AD3d 543 (1st Dept 2014). This body of case law holds that the penalty of termination is so *not* so severe as to "shock one's sense of fairness." Therefore, the court rejects King's "severe penalty" argument as legally incorrect.

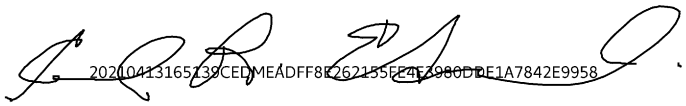
Accordingly, the court concludes that King's Article 78 petition should be denied as meritless, and that this proceeding should be dismissed.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Venus King (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent New York City Housing Authority shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.



4/13/2021
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE