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| Matter of Miller v New York City Hous. Auth. |
| 2012 NY Slip Op 30564(U) |
| March 5, 2012 |
| Sup Ct, NY County |
| Docket Number: 101210/11 |
| Judge: Saliann Scarpulla |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Index Number : 101210/2011

SALIANN SCARPULLA

MILLER TINA

vs.

NYC HOUSING AUTHORITY

SEQUENCE NUMBER : 001

ARTICLE 78

PART 19

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

| PAPERS NUMBERED |
|-----------------|
| _____ |
| _____ |
| _____ |

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the accompanying memorandum decision.

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).

Dated: 3/5/12

Saliann Scarpulla

SALIANN SCARPULLA 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: CIVIL TERM: PART 19

-----X
IN THE MATTER OF THE APPLICATION OF
TINA MILLER,

Petitioner,

Index No.: 101210/11

Submission Date: 11/16/2011

For a Judgment Pursuant to Article 78
of the Civil practice Law and Rules,

- against-

NEW YORK CITY HOUSING AUTHORITY,

DECISION AND ORDER

Respondent.

-----X

Petitioner, Pro se:
Tina Miller
1672 Ralph Avenue, # 1C
Brooklyn, NY 11236

For Respondent:
Sonya M. Kaloyanides
New York City Housing Authority
250 Broadway, 9th Floor
New York, NY 10007

Papers considered in review of this petition:
Verified Petition 1
Verified Answer 2
Mem of Law 3

UNFILED JUDGMENT

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HON. SALIANN SCARPULLA, J.:

In this Article 78 proceeding, petitioner Tina Miller ("Miller") challenges the October 15, 2010 decision of the respondent New York City Housing Authority ("NYCHA"), which sustained a determination that she was ineligible for public housing, due to her brother Henry Jones' ("Jones") criminal convictions. In her petition, Miller

alleges that the determination should be reversed because her brother has been -
rehabilitated, having completed substance abuse treatment.

Miller applied to NYCHA for public housing for herself and her family, which included her husband, her niece, and her brother, Henry Jones. As a result of these applications, Miller was interviewed in November 2008 and April 2009 by NYCHA to determine her eligibility for public housing. At these interviews, Miller was asked by NYCHA if any family members had been convicted of a crime, and Miller replied that they had not.

However, when NYCHA completed a criminal background check on Miller's family, it determined that Jones had been convicted of nine offenses between 1994 and 2009. Miller stated that she was unaware of these convictions. The two most recent convictions were in May 2008, when he was convicted of criminal possession of a controlled substance, a class A misdemeanor, which resulted in a sentence of imprisonment with time served, and in January 2009, when he was convicted of criminal possession of a controlled substance, a class A misdemeanor which resulted in a fifteen (15) day sentence and a six-month license suspension. NYCHA found that pursuant to its guidelines, a family member convicted of a class A misdemeanor is ineligible for public housing until four years after the sentence, and as a result Jones and his family were ineligible for public housing until July 2013.

In June 2009, NYCHA informed Miller of the results of the criminal background check, and invited her to visit the Applications Information Office within thirty (30) days to review the results and challenge NYCHA's evaluation. The June 8, 2009 notice also indicated

If you intend to claim that the offender will not present a problem in the future, please bring with you any information you have which might indicate a reasonable probability of the offender's favorable future conduct, such as evidence of the offender's rehabilitation since the offense, or evidence of the offender's participation in or willingness to participate in social service or other appropriate counseling service programs and the availability of such programs.

As a result, Miller submitted to NYCHA additional documentation in support of Jones' alleged rehabilitation, including a letter from Miller dated June 15, 2009; letters from a psychiatrist at Brookdale University Hospital and Medical Center ("Brookdale") dated June 15, 2009 and June 25, 2009, discussing Jones' care in Brookdale's outpatient psychiatric clinic; a letter from the pastor at the Pentecostal House of Prayer dated June 15, 2009 discussing Henry's involvement in the church and the availability of counseling; a copy of Jones' prescription for psychiatric medication and Jones's appointment dates at the Brookdale clinic. Miller also met with a NYCHA representative to discuss the matter. After meeting with Miller and reviewing her submissions, NYCHA determined that she had not provided sufficient information to conclude that Jones was rehabilitated.

NYCHA informed Miller in a notice dated July 9, 2009 that she was ineligible for public housing. The only reason given was Jones' 2008 and 2009 criminal convictions.

The notice indicates that she had the right to request an administrative hearing within ninety (90) days of the date of the letter. In the letter there is nothing to indicate what proof would be required at the hearing, and there is no reference to NYCHA guidelines.

Miller timely submitted a request for an informal hearing, which NYCHA granted. An administrative hearing was held on May 7, 2010 before Hearing Officer Kenneth Cox ("hearing officer"). At the hearing, NYCHA submitted documentation, including Miller's application documents and the criminal background check.

At the hearing, Miller admitted that Jones would be a part of her family composition, but that she was not aware of his prior criminal convictions. Miller stated that Jones completed a substance abuse treatment program at Kingsboro Addiction Treatment Center ("ATC") on November 30, 2009, and submitted documentation reflecting that. In addition, Miller submitted other documentary evidence, including letters from Canarsie Aware, Inc. stating that Jones was enrolled in a mental health program and substance abuse program there; a letter from Brookdale stating that Jones is receiving treatment in their outpatient clinic; a certificate from Kingsboro ATC that Jones successfully completed their substance abuse program; documentation reflecting Jones' completion and discharge from a substance abuse treatment program from the New York State Office of Alcoholism and Substance Abuse Services; a letter from the Pentecostal House of Prayer; and a letter from Realization Center, Inc. stating that Jones has been in their chemical dependence program since February 22, 2010.

In a written decision dated October 15, 2010 the hearing officer noted that NYCHA “had adopted standards to exclude persons who, based on their past behavior, might adversely affect the health, safety or welfare of other tenants, Authority staff, or an Authority project,” and found that NYCHA “made an appropriate determination based on Federal housing guidelines.” The hearing officer determined that Miller was made ineligible for public housing due to Jones’ 2008 and 2009 criminal conviction, as Jones is a part of Miller’s household. The hearing officer further found that Miller failed to submit

sufficient documentary evidence to prove that Henry Jones has been rehabilitated in accordance with Housing Authority Guidelines. Housing guidelines require an offender . . . to provide documentary evidence of participation in a licensed treatment program for at least (6) months with a positive history, and also documentary proof that they have been free of illicit substances for at least one year. The documentary evidence for Henry Jones indicates that he completed a 28 day program. [Miller] did not provide documentary evidence to prove that Henry Jones is free of illicit substances.

The hearing officer sustained NYCHA’s original determination that Miller was ineligible for public housing.

Miller commenced this Article 78 proceeding on or about November 8, 2010, requesting that the Court reverse NYCHA’s October 15, 2010 determination. In her verified petition, Miller argues that Jones was rehabilitated and that “he has been free of all illicit substances for a year (presently). Also, he has been in a licensed treatment program for at least (6) months.” Miller submits a number of exhibits in support,

including letters attesting to Jones' participation in substance abuse treatment and mental health programs.

In its verified answer and in opposition to Miller's Article 78 petition, NYCHA asserts that the hearing officer's determination was not arbitrary and capricious, that Miller cannot now rely on documents that were not previously submitted to the hearing officer at the administrative hearing, and that Miller fails to state a cause of action for which relief may be granted. NYCHA asserts that to prove rehabilitation, Miller must submit proof, in the form of toxicology reports, that Jones has been drug free for twelve (12) months.

Discussion

It is well settled that judicial review of an administrative determination pursuant to CPLR Article 78 is limited to a review of the record before the agency and the question of whether its determination was arbitrary or capricious and has a rational basis in the record. *See* CPLR §7803(3); *Gilman v. N.Y. State Div. of Hous. & Community Renewal*, 99 N.Y.2d 144 (2002); *Nestor v. New York State Div. of Hous. & Community Renewal*, 257 A.D.2d 395 (1st Dep't 1999). "In short, '[j]udicial review of an administrative determination is limited to the grounds invoked by the agency.'" *Matter of Rizzo v. DHCR*, 6 N.Y.3d 104, 110 (2005) (quoting *Matter of Aronosky v. Board of Educ., Community School Dist. No. 22 of City of N.Y.*, 75 N.Y.2d 997, 1000 (1990)). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken 'without

sound basis in reason and without regard to the facts.” *Matter of Rohan v. New York City Housing Authority*, 2009 NY Slip Op 30177U, at *6-*7 (Sup. Ct. N.Y. Co. Jan. 23, 2009) (quoting *Matter of Pell v. Board of Education*, 23 N.Y. 2d 222,231 (1974)).

Moreover, it is well settled that the “construction given statutes and regulations by the agency responsible for their administration, ‘if not irrational or unreasonable,’ should be upheld.” *Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 79 (2008) (citing *Matter of Chesterfield Assoc. v. New York State Dept. of Labor*, 4 N.Y.3d 597, 604 (2005)).

NYCHA and the hearing officer rely on and refer to so-called “Housing guidelines” for the determination that Miller failed to establish that Jones was rehabilitated, and therefore ineligible for public housing. NYCHA submits with its answer a document entitled “Applications and Tenancy Administration Department Manual - Chapter V. Eligibility Division – Public Housing Program” (the “manual”). The manual provides that if a member of an applicant family has a conviction for a class A misdemeanor, the family is ineligible for public housing until four years after the sentence. The manual also provides that if a member of an applicant family has engaged in the illegal use of a controlled substance within the last three years, then the family is ineligible until the earliest of (1) three years; (2) “[u]ntil the family provides both written verification from a state-licensed drug treatment agency that the offending person has been drug free for 12 months and also submits a current clean toxicology report;” or (3)

until NYCHA “is convinced . . . that the offending person is no longer engaging in the illegal use of a controlled substance and has otherwise been rehabilitated successfully....”

The hearing officer determined that NYCHA “made an appropriate determination based on Federal housing guidelines.” Which Federal housing guidelines, however, are not specified.¹ The hearing officer further found that Miller was ineligible as a result of Jones’ criminal convictions in 2008 and 2009, and that Miller was unable to provide sufficient evidence that Jones “had been rehabilitated in accordance with Housing Authority Guidelines.” The section or provisions of the Housing Authority guidelines are not specified. The hearing officer concludes by stating that the “Housing guidelines” require proof that an offender had participated in a licensed treatment program for at least

¹ It is possible the hearing officer was referring to Federal regulation 24 CFR 960.203(2), which addresses when to consider rehabilitation when offenders are applying for public housing. It provides

Consideration of rehabilitation. (i) In determining whether to deny admission for illegal drug use or a pattern of illegal drug use by a household member who is no longer engaging in such use, or for abuse or a pattern of abuse of alcohol by a household member who is no longer engaging in such abuse, the PHA may consider whether such household member is participating in or has successfully completed a supervised drug or alcohol rehabilitation program, or has otherwise been rehabilitated successfully (42 U.S.C. 13661). For this purpose, the PHA may require the applicant to submit evidence of the household member's current participation in, or successful completion of, a supervised drug or alcohol rehabilitation program or evidence of otherwise having been rehabilitated successfully.

This regulation, however, does not provide specific requirements an offender must satisfy in order to prove rehabilitation.

six (6) months with a “positive history,” and also “documentary proof that they have been-free of illicit substances for at least one year.” The hearing officer found that Miller failed to meet these requirements, as she established only that Jones completed a 28 day program and that Miller did not provide any evidence that Jones was “free of illicit substances.”

From the record before me, there is nothing to indicate that Miller was ever provided with a copy of the manual relied on by NYCHA, or with the guidelines referred to by the hearing officer, or informed of their sum and substance.² The notice provided to Miller dated June 8, 2009 regarding her challenge to NYCHA’s initial determination of ineligibility informed Miller to “bring with you any information you have which might indicate a reasonable probability of the offender’s favorable future conduct, such as evidence of the offender’s rehabilitation since the offence” There is no reference to the guidelines or the manual, nor any other specific requirements Miller would have to

² There is also discrepancy between NYCHA and the hearing officer as to what those “guidelines” required. The hearing officer noted that the “guidelines” require proof of participation in a treatment program for six (6) months and proof of being drug-free for twelve (12) months. In its opposition to the petition, NYCHA argues that to prove rehabilitation, Miller must provide “a toxicology report showing Henry was drug free for at least one year,” citing the Manual at F(4)(f). This provision, however, deals with persons who have behaved violently or destroyed property, which is not applicable here. The Applications Manual annexed to NYCHA’s verified answer indicates at F(4)(i) that to prove rehabilitation an applicant can provide “both written verification from a state-licensed drug treatment agency that the offending person has been drug free for 12 months and also submit[] a current clean toxicology report” or otherwise convince NYCHA “that the offending person is no longer engaging in the illegal use of a controlled substance and has otherwise been rehabilitated successfully”

satisfy to prove Jones' rehabilitation. The July 9, 2009 notice, which advised Miller of her right to request an administrative hearing, similarly made no mention of the guidelines or proof required to prove an offender's rehabilitation.³

As Miller was not provided with or given access to the manual, and was not told what was required of her to meet NYCHA's requirements to prove Jones was rehabilitated, the determination by the hearing officer that she failed to satisfy the guidelines was irrational and unreasonable. As Miller was never provided the NYCHA manual, she was deprived of a full and fair opportunity to prove that Jones was rehabilitated.

In accordance with the foregoing, it is hereby

ORDERED and ADJUDGED that the petition of Tina Miller to vacate the decision of respondent New York City Housing Authority on October 15, 2010 and to find her eligible for public housing is granted, and it is further

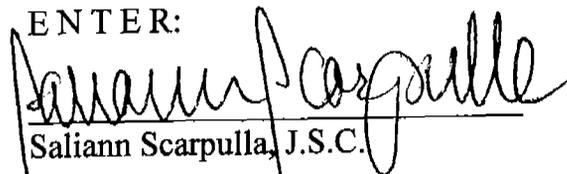
ORDERED and ADJUDGED that the matter is remanded to the New York City Housing Authority to provide Tina Miller with an administrative hearing at which she will have a full and fair opportunity to provide evidence that her brother, Henry Jones, has been rehabilitated, by providing to the hearing officer written verification from a state-

³ Moreover, a search of the NYCHA website did not show a publicly available copy of the manual.

licensed drug treatment agency that Henry Jones has been drug free for 12 months and a current clean toxicology report for Henry Jones.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York
March 5, 2012

ENTER:

Saliann Scarpulla, J.S.C.

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).