

Matter of Bonseiro v New York City Dept. of Hous. Preserv. & Dev.
2012 NY Slip Op 50259(U)
Decided on February 15, 2012
Supreme Court, Kings County
Edwards, J.
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Decided on February 15, 2012 Supreme Court, Kings County

**In the Matter of the Application of Andy Bonseiro, Petitioner, For
a Judgment Pursuant to Article 78 of the Civil Practice Law and
Rules**

against

**The New York City Department of Housing Preservation and
Development, Respondent.**

14793/11

Petitioner was represented by Jared M. Langenthal, Esq. of Brooklyn Legal Services Corporation
A. Respondent was represented by Rachel K. Moston, Assistant Corporation Counsel of the NYC
Law Dept.

Genine D. Edwards, J.

In this Article 78 proceeding, petitioner seeks review of the decision of the New
York City Department of Housing Preservation and Development ("HPD"), which terminated his

Section 8 rent subsidy because he is a Level 2 sex offender, who is subject to a lifetime registration requirement. Petitioner asserts that the determination was arbitrary and capricious because it misinterprets HPD's own termination policy as well as federal statutes and regulations. HPD submits a verified answer and a memorandum of law in opposition to the petition.

FACTS

After more than three years of providing Section 8 subsidies to petitioner, HPD terminated the assistance because he is a Level 2 sex offender [\[FN1\]](#), who is subject to a lifetime registration [\[*1\]](#) requirement. [\[FN2\]](#) Petitioner received the requisite notifications and participated in an Informal Hearing. [\[FN3\]](#) The hearing officer upheld the decision, finding that HPD's 2010 Administrative Plan reasonably interpreted federal statutes and regulations to require Amandatory termination of any sex offender subject to a lifetime registration. [\[FN4\]](#)

In determining that HPD's decision was reasonable, the hearing officer relied upon guidance HPD received from the Department of Housing and Urban Development (AHUD). [\[FN5\]](#) HPD states that a *Question and Answer* sheet issued by HUD to Housing Finance Agencies that administer project based assistance recite essentially the same guidance it received. In pertinent, the sheet states:

Question:

3. What should PHAs [Public Housing Authoritys (sic)] do if they know of current residents of Section 8 properties who are listed on the sex offender register, but have done nothing to break the terms of their current lease?

Answer:

The statutory prohibition is limited to admissions and screening provisions. The statute and its implementing regulations are silent with respect to termination of tenancy for sex offenders subject to a lifetime registration requirement Current residents of units with Section 8 project-based assistance are not subject to the prohibition of admission to Federally-assisted housing if any member of the household is subject to a lifetime registration requirement . . .

[\[FN6\]](#)

In addition to the guidance HPD received from HUD, the hearing officer relied upon federal regulation 24 CFR 982.553(a)(2), which prohibits the admission of persons subject to a lifetime sex offender registration requirement to the Section 8 Program. [\[FN7\]](#) The regulation is silent as to lifetime sex offenders who already receive Section 8 subsidies. [\[FN8\]](#) [\[*2\]](#)

LAW

At the outset, it is clear that this proceeding need not be transferred to the Appellate Division because it only raises questions of law, and not substantial evidence issues. *See* CPLR 7804(g).

It is well established law that judicial review of an administrative agency's determination is limited to whether the determination was arbitrary and capricious; an abuse of discretion; made in violation of a lawful procedure or was affected by an error of law. CPLR 7803; *Flacke v. Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 514 N.Y.S.2d 689 (1987); *Matter of Pell*, 34 NY2d 222, 356 N.Y.S.2d 833 (1974); [Halperin v. City of New Rochelle, 24 AD3d 768](#), 809 N.Y.S.2d 98 (2d Dept. 2005); *Rivers v. Rhea*, 2010 NY Slip Op. 31894(U) (Sup. Ct., New York County 2010).

Where a statute is ambiguous and requires interpretation, the construction given to the statute by [the] administrative agency responsible for its administration [will] be upheld by the courts, unless the agency's interpretation is irrational, unreasonable, or inconsistent with the governing statute. [Brown v. New York State Racing and Wagering Bd., 60 AD3d 107](#), 871 N.Y.S.2d 623 (2d Dept. 2009). However, when a question is one of pure legal interpretation of statutory terms, deference to the agency is not required, and the Court's primary consideration is to ascertain and give effect to the intention of the Legislature. *Id.* In such instances, the courts should construe clear and unambiguous statutory language as to give effect to the plain meaning of the words used. Statutes 76.

DISCUSSION

Contrary to the hearing officer's findings, HPD's 2010 Administrative Plan does not require mandatory termination of assistance for participants who are lifetime sex offender registrants. Instead, the Plan explicitly states that HPD *may* . . . terminate program assistance for a participant . . . [i]f any member of a household is subject to a lifetime registration requirement

under a State sex offender registration program (Emphasis added)."[\[FN9\]](#)

Likewise, federal statutes and regulations do not provide for mandatory termination of assistance for participants who are lifetime sex offender registrants. 42 U.S.C. 13663(a),[\[FN10\]](#) the applicable federal statute, provides: [\[*3\]](#)

Notwithstanding any other provision of law, an owner of federally assisted housing shall prohibit admission to such housing for any household that includes any individual who is subject to a lifetime registration requirement under a State sex offender registration program.

Regulation 24 CFR 982.553 [\[FN11\]](#) provides:

(a) Denial of admission.

(1) Prohibiting admission of drug criminals.

(i) The PHA must prohibit admission to the program of an applicant for three years from the date of eviction if a household member has been evicted from federally assisted housing for drug-related criminal activity. However, the PHA may admit the household if the PHA determines:

(A) That the evicted household member who engaged in drug-related criminal activity has successfully completed a supervised drug rehabilitation program approved by the PHA; or

(B) That the circumstances leading to eviction no longer exist (for example, the criminal household member has died or is imprisoned).

(ii) The PHA must establish standards that prohibit admission if:

(A) The PHA determines that any household member is currently engaging in illegal use of a drug;

(B) The PHA determines that it has reasonable cause to believe that a household member's illegal drug use or a pattern of illegal drug use may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents; or

(C) Any household member has ever been convicted of drug-related criminal activity for

manufacture or production of methamphetamine on the premises of federally assisted housing.

(2) Prohibiting admission of other criminals—

(i) Mandatory prohibition. The PHA must establish standards that prohibit admission to the program if any member of the household is subject to a lifetime registration requirement under a State sex offender registration program. In this screening of applicants, the PHA must perform criminal history background checks necessary to determine whether any household member is subject to a lifetime sex offender registration requirement in the State where the housing is located and in other States where the household members are known to have resided.

(ii) Permissive prohibitions.

(A) The PHA may prohibit admission of a household to the program if the PHA determines that any household member is currently engaged in, or has engaged in during a reasonable time before the admission:

(1) Drug-related criminal activity;

(2) Violent criminal activity; [*4]

(3) Other criminal activity which may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity; or

(4) Other criminal activity which may threaten the health or safety of the owner, property management staff, or persons performing a contract administration function or responsibility on behalf of the PHA (including a PHA employee or a PHA contractor, subcontractor or agent).

(B) The PHA may establish a period before the admission decision during which an applicant must not to have engaged in the activities specified in paragraph (a)(2)(i) of this section (A reasonable time).

(C) If the PHA previously denied admission to an applicant because a member of the household engaged in criminal activity, the PHA may reconsider the applicant if the PHA has sufficient evidence that the members of the household are not currently engaged in, and have not engaged in, such criminal activity during a reasonable period, as determined by the PHA, before the

admission decision.

(1) The PHA would have sufficient evidence if the household member submitted a certification that she or he is not currently engaged in and has not engaged in such criminal activity during the specified period and provided supporting information from such sources as a probation officer, a landlord, neighbors, social service agency workers and criminal records, which the PHA verified.

(2) For purposes of this section, a household member is currently engaged in criminal activity if the person has engaged in the behavior recently enough to justify a reasonable belief that the behavior is current.

(3) Prohibiting admission of alcohol abusers. The PHA must establish standards that prohibit admission to the program if the PHA determines that it has reasonable cause to believe that a household member's abuse or pattern of abuse of alcohol may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.

(b) Terminating assistance—

(1) Terminating assistance for drug criminals.

(i) The PHA must establish standards that allow the PHA to terminate assistance for a family under the program if the PHA determines that:

(A) Any household member is currently engaged in any illegal use of a drug; or

(B) A pattern of illegal use of a drug by any household member interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

(ii) The PHA must immediately terminate assistance for a family under the program if the PHA determines that any member of the household has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.

(iii) The PHA must establish standards that allow the PHA to terminate assistance under the program for a family if the PHA determines that any family member has violated the family's

obligation under '982.551 not to engage in any drug-related criminal activity.

(2) Terminating assistance for other criminals. The PHA must establish standards that allow the PHA to [*5] terminate assistance under the program for a family if the PHA determines that any household member has violated the family's obligation under '982.551 not to engage in violent criminal activity.

(3) Terminating assistance for alcohol abusers. The PHA must establish standards that allow termination of assistance for a family if the PHA determines that a household member's abuse or pattern of abuse of alcohol may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.

A perusal of the foregoing federal statute and regulation bear out that they apply

only to applicants seeking admission to a federally assisted housing

program. [FN12]

HUD, itself, acknowledges that there is no regulatory authority in any

assisted housing program that provides for termination of assistance based [on] a tenant's lifetime sex offender registration status" [FN13] It believes, however, that 42 U.S.C. 13663(a) [FN14] is sound legal basis to terminate the assistance of sex offenders erroneously admitted. [FN15]

The plain language of the statute does not support HUD's position. Instead, it

reveals that the legislature intended to treat lifetime sex offender registrants who are applicants for federal housing assistance differently from those who are program participants. *See* 37 No. CD-8 HDRCURDEV 36; *Perkins-Bey v. Housing Authority of St. Louis County*, 2011 WL 939292 (E.D. Mo. 2011); *Miller v. McCormick*, 605 F.Supp.2d 296 (D.Me 2009) (Public housing agency (PHA) could not terminate lifetime sex offender registrant's participation in Section 8 home ownership program because the relevant statute was directed to prohibiting [*6] admission of lifetime registrants, not to their removal from participation.).

This Court finds that the hearing officer's determination was arbitrary and capricious. The

prohibition of assistance is only applicable to applicants and admission. Indeed, the federal statute and the implementing regulation fail to address the scenario presented here, a participant in the Section 8 program who is also a lifetime sex offender registrant. Thus, HPD's interpretation of the law was erroneous and invalid. Further, although the hearing officer indicated that HPD's applicable Administrative Plan requires mandatory termination that was in fact not the case. The applicable provision indicated that HPD *may* terminate petitioner's subsidy. Therefore, the hearing officer had the discretion to consider all circumstances relevant to this matter, including the seriousness of the offending action and the effects that the eviction would have on family members not involved in the offending activity.

Accordingly it is,

ADJUDGED that this matter is remanded to the hearing officer for reconsideration.

This constitutes the decision, order and judgment of this Court

ENTER,

Genine D. Edwards

A.J.S.C.

Footnotes

[Footnote 1:](#) Correction Law '168-1

[Footnote 2:](#) Informal Hearing Decision, In the Matter of Andy Bonseiro, p. 3.

[Footnote 3:](#) Informal Hearing Decision, In the Matter of Andy Bonseiro, p. 3.

[Footnote 4:](#) Informal Hearing Decision, In the Matter of Andy Bonseiro, pgs. 7-8. Hearing Officer emphasized that the termination of assistance was *Amandatory*.

[Footnote 5:](#) Informal Hearing Decision, In the Matter of Andy Bonseiro, p. 6.

[Footnote 6:](#) Informal Hearing Decision, In the Matter of Andy Bonseiro, p. 6; U.S. Department

of Housing and Urban Development, AHFA (Housing Finance Agency) Questions and Concerns About the Screening and Eviction for Drug Use and Other Criminal Activity Final Rule.

Footnote 7: Informal Hearing Decision, In the Matter of Andy Bonseiro, p. 6.

Footnote 8: Informal Hearing Decision, In the Matter of Andy Bonseiro, p. 6.

Footnote 9: Id. The Administrative Plan for 2009 indicates that it is mandatory for HPD to terminate the Section 8 subsidy and the Administrative Plan for 2011 is completely silent with regard to termination of the Section 8 subsidy for current residents, who are lifetime sex offender registrants.

Footnote 10: Congress enacted the Quality Housing and Work Responsibility Act (QHWRA) in 1998. In pertinent parts, the Act bars drug users, alcohol abusers and sex offenders subject to lifetime registration from admission to federally assisted housing. The Act is codified at 42 U.S.C. 13661-64. 42 U.S.C. 13661 prohibits the admission of illegal drug users and alcohol abusers. 42 U.S.C. 13662 terminates the tenancy and assistance for illegal drug users and alcohol abusers. 42 U.S.C. 13663 prohibits the admission of lifetime sex offender registrants. 42 U.S.C. 13664 defines relevant terms.

Footnote 11: In 2001, HUD promulgated final regulations that implemented QHWRA.

Footnote 12: A court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended. Statutes 74. Moreover, 42 U.S.C. 13663(a) and 24 CFR 982.553 silence regarding termination of assistance to participants is particularly significant when read in conjunction with 42 U.S.C. 13661 (addresses the prohibition of admission of illegal drug users and alcohol abusers) and 42 U.S.C. 13662 (addresses the termination of illegal drug users and alcohol abusers).

Footnote 13: US Department of Housing and Urban Development, Letter, stamped July 16, 2009, Section I.

Footnote 14: Quality Housing and Work Responsibility Act. In pertinent part, it states the following: Owners of federally assisted housing (including public housing and Section 8) must prohibit admission of persons who are subject to a lifetime registration requirement under a State sex offender registration program. Similar to criminal record checks under '575, PHAs must conduct the sex offender criminal history background checks and make further sex offender inquiries with State and local agencies on behalf of owners of federally assisted housing.

Footnote 15: US Department of Housing and Urban Development, Letter, stamped July 16, 2009, Section I.

[Return to Decision List](#)