

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice **Part 36**

IN THE MATTER OF THE APPLICATION OF
GARY SMITH,

Petitioner,

INDEX NO. 403147/11

MOTION SEQ. NO. 001

FOR A JUDGMENT PURSUANT TO ARTICLE 78
OF THE CIVIL PRACTICE LAW AND RULES

-against-

HPD APPEALS UNIT,

Respondent.

FILED

OCT 11 2013

COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1-4 were considered on this Article 78:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>
Cross-Motion: [] Yes [X] No	_____

Upon the foregoing papers, it is ordered that this Article 78 proceeding is decided as indicated below.

Pro se petitioner Gary Smith (Smith), seeks an order pursuant to Article 78 of the CPLR: (1) annulling respondent Department of Housing Preservation and Development's (HPD) determination, issued August 9, 2011, terminating petitioner Smith's Section 8 subsidy on default; and (2) reinstating petitioner Smith's Section 8 subsidy. Petitioner Smith asserts that HPD's determination was arbitrary and capricious, and unfair.

Respondent HPD answers the petition and argues that HPD's determination to terminate petitioner Smith's Section 8 subsidy was rationally based, not arbitrary and capricious, and in accordance with the applicable laws. Respondent HPD further argues that its initial decision to

terminate petitioner Smith from the Section 8 program, for failure to report income, was based on the record and the application of relevant law.

BACKGROUND

Petitioner Smith has been diagnosed with lung cancer. He has been a participant of the HPD Section 8 Tenant-Based Assistance Rental Voucher program since 2001. Petitioner Smith received Section 8 subsidy pursuant to the United States Housing Act of 1937 (Act). Section 8 of the Act authorizes the Secretary of Housing and Urban Development (HUD) “to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners of existing dwelling units in accordance with this Section.” 42 U.S.C. § 1437f(b)(1).

Respondent HPD is one of the public housing agencies charged with the duty and responsibility of administering the Section 8 subsidy pursuant to the Act. Respondent HPD administered petitioner Smith’s Section 8 subsidy. Respondent HPD issued an administrative agency decision to terminate petitioner Smith’s Section 8 subsidy on default, which is the subject of this Article 78 proceeding.

In December 2008, petitioner submitted a Section 8 recertification package to respondent HPD. Thereafter, respondent HPD discovered a discrepancy between the income reported by petitioner Smith and the income reported for him by the HUD Enterprise Income Verification. A pre-termination notice was sent to petitioner Smith who, thereafter, participated in a mandatory conference, and submitted documentation verifying that he was no longer employed at two moving companies.

In 2009 and 2010, petitioner Smith submitted Section 8 recertification packages to respondent HPD. Thereafter, respondent HPD discovered another discrepancy in petitioner Smith’s 2010 recertification package. Respondent HPD sent a pre-termination notice to petitioner Smith, who participated in another mandatory conference. Petitioner Smith subsequently provided respondent HPD

with all the requested additional documentation. Based on such documentation, respondent HPD calculated that it overpaid \$6,654.00 between 2008 and 2010, as a result of income which was not reported.

Respondent HPD sent a Notice of Section 8 Rent Subsidy Termination, dated March 25, 2011, to petitioner Smith, informing him that his Section 8 subsidy would be terminated as of April 30, 2011. Petitioner Smith submitted an appeal form requesting a hearing which was scheduled for May 27, 2011. Petitioner Smith requested an adjournment of such hearing date to obtain counsel. Respondent HPD granted the request and the hearing date was adjourned to July 1, 2011. Petitioner Smith did not appear at such hearing. Thereafter, the hearing officer issued the hearing decision, dated August 5, 2011, upholding the termination of petitioner Smith's Section 8 subsidy, based only upon petitioner Smith's failure to appear at the hearing. On August 9, 2011, respondent HPD issued the Notice of Determination after Informal Hearing (Final Determination), informing petitioner Smith that the termination of his Section 8 subsidy was upheld.

Petitioner Smith now seeks to annul the Final Determination. Respondent HPD answers the petition alleging that: (1) termination of petitioner Smith's Section 8 subsidy was not arbitrary and capricious, and was in accordance with the applicable statutes, laws, and regulations, and was supported by a rational basis.

DISCUSSION

Judicial review of an administrative determination is limited to whether the "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). The court has the power to remit a matter to the agency where "further agency action is necessary to cure deficiencies in the record". *Matter of Police Benevolent Assoc. of the*

New York State Troopers v Vacco, 253 AD2d 920, 921 (3d Dep't 1998), *lv denied* 92 NY2d 818 (1998). See also, *Matter of Montauk Improvement, Inc. v Proccacino*, 41 NY2d 913, 914 (1977). Additionally, a court may determine that an agency determination is shocking to one's sense of fairness and disproportionate to the offense such that a lesser penalty is warranted. See *Matter of Palmer v Rhea*, 78 AD3d 526, 526 (1st Dep't 2010). See also, *Matter of James v New York City Housing Authority*, 186 AD2d 498, 499-500 (1st Dep't 1992). The Appellate Division, First Department, has stated that "[t]he forfeiture of public housing accommodations is a drastic penalty because, for many of its residents, it constitutes a tenancy of last resort". *In re Wise v Morales*, 85 AD3d 571, 572 (1st Dep't 2011) (internal quotations omitted). To that effect, it is consistently held that "[t]ermination of petitioner's tenancy, under the circumstances was so disproportionate to the offense, underpayment of rent, in the light of all the circumstances, as to be shocking to one's sense of fairness". *Id.* See also, *Matter of Vazquez v New York City Housing Authority*, 57 AD3d 360, 361 (1st Dep't 2008).

Here, respondent HPD argues that its determination to terminate petitioner Smith's Section 8 subsidy on default was not arbitrary and capricious. However, the record is clear that petitioner Smith was provided with an adjournment of the hearing, to July 1, 2011, to seek representation. Thereafter, it is undisputed that the Legal Aid Society was considering taking petitioner Smith's case, and sought additional time, by letter dated June 28, 2011, to make a decision on representation. Petitioner Smith states that he went "to 100 Gold Street two days before the hearing with...[such letter] asking for more time to review the case". Verified Petition, p. 2. Respondent HPD argues that the letter from the Legal Aid Society does not have a date and time stamp, nor is there a memo in respondent HPD's file confirming that petitioner Smith delivered such letter in person two days before the hearing date. Thus, respondent HPD contends that the letter from the Legal Aid Society, requesting an adjournment of the July 1, 2011 hearing date, was not in the HPD file as of July 1, 2011.

Notwithstanding that such letter did not make it to the hearing officer on July 1, 2011, through apparent clerical error, it is undisputed that the letter from the Legal Aid Society was in the HPD file. Significantly, respondent HPD concedes that “[t]here is no information in HPD’s files as to when and how the letter came to HPD”. Verified Answer, ¶ 69. Thus, it was arbitrary and capricious to deny petitioner Smith and the Legal Aid Society an adjournment of the July 1, 2011 hearing date, and to terminate petitioner Smith’s Section 8 subsidy based solely on his excusable default. As such, the petition is granted to the extent that the decision, dated August 9, 2011, terminating petitioner Smith’s Section 8 subsidy, is vacated and this matter is remanded to the agency for a new hearing.

Accordingly, it is

ORDERED that the petition is granted to the extent that decision, dated August 9, 2011, terminating petitioner Smith’s Section 8 subsidy, is vacated; and it is further

ORDERED that this application is remanded to respondent Department of Housing Preservation and Development for a new hearing; and it is further

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

Dated: 10/11/13



DORIS LING-COHAN, J.S.C.

Check one: FINAL DISPOSITION
Check if Appropriate: DO NOT POST
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NON-FINAL DISPOSITION

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