

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: LAS PART 6

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ANTHONY CAPPARELLI,

110308/09

Petitioner,

Index No. 117308/09

Decision, Order, and Judgment

-against-

NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT

UNFILED JUDGMENT

*This judgment has not been entered by the County Clerk
and notice of entry cannot be served by mail or otherwise. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Office, 110308/09
X*

JOAN B. LOBIS, J.S.C.:

Petitioner Anthony Capparelli brings this Article 78 proceeding seeking to annul the determination by respondent, the New York City Department of Housing Preservation and Development ("HPD"), to terminate his rent subsidy, which he received pursuant to Section 8 of the United States Housing Act of 1937 (42 U.S.C. § 1437f), commonly referred to as a "Section 8" subsidy. For the reasons discussed below, the petition is denied.

Petitioner has resided with his wife and three children in 310 Greenwich Street, Apartment 10-L, in Manhattan in a complex known as Independence Plaza (the "Apartment") for over twenty years. The complex was rent stabilized until 2004, when new owners took over and opted out of the Mitchell Lama rent stabilization program. In 2004, petitioner and several other tenants in the complex began receiving Section 8 subsidies through HPD in order to pay for the market-rate rent. Section 8 is a needs based rent subsidy program. Family income reporting is an integral part of the program. On his initial Section 8 application, dated April 21, 2004, petitioner reported that he was self-employed as an owner of a restaurant and listed his income as \$8,161 per year. He also reported that his wife was employed by the

Department of Education and listed her income as \$15,355.55 per year. In a notarized letter dated November 1, 2005, petitioner reported that he no longer owned the restaurant. He reported that he was unemployed, but was not collecting unemployment. In 2006, petitioner again reported that he was unemployed. In March 2007, HPD used the Department of Housing and Urban Development's Enterprise Income Verification database (the "EIV") to verify petitioner's application. EIV revealed that petitioner was employed by City & Suburban Delivery Systems, Inc., since on or about June 30, 2005. It further revealed that petitioner had earned over \$52,000 between June 30, 2005 and September 2006. The EIV also revealed that petitioner's son earned over \$6,000 in unreported income, while working for two youth recreational programs, from late 2005 to about September of 2006.

On March 30, 2007, HPD sent to petitioner a pre-termination notice, advising petitioner that his Section 8 subsidy may be terminated because the EIV revealed that he may have underreported his income. The notice listed the amount of income that it believed petitioner failed to report as well as the sources of the income. HPD set a date of April 13, 2007 for a conference in order "to resolve the discrepancies found and re-determine an accurate estimate of [the] household income." The notice set forth that the conference can only be adjourned due to an emergency and must be adjourned no later than three days before the conference. The notice also warned that failure to attend the conference could result in termination of the Section 8 subsidy. Petitioner failed to attend the conference. According to petitioner's testimony at the later informal hearing, he called to reschedule the conference. On April 13, 2007, a second pre-termination notice was sent to petitioner, setting down April 27, 2007 as the new conference date. Petitioner again failed to attend. According to his hearing testimony, petitioner contacted HPD to adjourn the conference. He also testified that the notice required that he and his son attend the conference.

Since his son could not attend, petitioner did not think he should attend the conference alone. On June 29, 2007, HPD sent petitioner a notice of Section 8 subsidy termination. The notice listed his failure to attend the April 13, 2007 conference and his failure to report the around \$58,000 in income as grounds for the termination. The notice gave petitioner twenty-one days to request an informal hearing to appeal the termination. Petitioner made such a request on July 10, 2007 writing that "[he] asked several times to have the April 13th hearing rescheduled." On November 13, 2007, HPD notified petitioner that his informal hearing would take place on April 9, 2008.

Petitioner attended the hearing without counsel before Hearing Officer Zachary Edinger. He admitted to underreporting his income. Petitioner said it was a "[d]umb error" for him to claim that he was unemployed. He apparently did not think he had to report his earnings from City & Suburban Delivery Systems, because it did not provide steady employment. Petitioner also testified that he is no longer employed by City & Suburban Delivery Systems.

On May 11, 2009, Hearing Officer Edinger issued his decision. He found that petitioner "essentially verified" the EIV report during the hearing. However, he could not use this information, alone, to sustain the decision to terminate petitioner's subsidy, because it "was not obtained prior to HPD's sending of the Termination Notice." The Hearing Officer did not consider petitioner's failure to report his son's income significant on its own. More important to Hearing Officer Edinger was petitioner's false letter from November 2005 as well as petitioner's unreasonable and unexcused failure to attend two mandatory conferences. Hearing Officer Edinger considered this to be evidence of petitioner's persistent, "intentional obfuscation or delay in submitting information" to HPD that allowed petitioner to unfairly

collect around \$17,000 in subsidies. Hearing Officer Edinger upheld HPD's decision to terminate petitioner's subsidy and made the termination effective on June 30, 2009.

Around July 9, 2009 petitioner filed a pro se Article 78 petition. The petition was assigned to the Honorable Richard Braun. Justice Braun recused himself from the case on September 3, 2009 and it was randomly reassigned to the undersigned. On September 21, 2009, attorneys for respondents and newly retained counsel for petitioner signed a stipulation, so-ordered by the undersigned, in which petitioner agreed to withdraw the pro se petition and file an amended petition.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. C.P.L.R. § 7803(3); In re Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified * * * and whether the administrative action is without foundation in fact.'" Id. (citation omitted). A determination is considered "arbitrary" when it is made "without sound basis in reason and is generally taken without regard to the facts." Id. In an Article 78 review, the court cannot redetermine findings of fact or credibility. In re Porter v. New York City Hous. Auth., 42 A.D.3d 314 (1st Dep't 2007). An administrative determination—even if not arbitrary and capacious—may be set aside only if the punishment or penalty imposed "is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." Pell, 34 N.Y.2d at 233 (internal quotations and citations omitted).

Petitioner argues that HPD's decision to terminate his Section 8 subsidy is arbitrary and capricious and that the penalty is shocking to one's sense of fairness. Respondent opposes the petition and argues that the matter must be transferred to the Appellate Division. Generally, when a determination is made from a hearing, and a claim of "substantial evidence" is raised, pursuant to C.P.L.R. § 7803(4), the matter must be transferred to the Appellate Division. But, if no issues are raised involving substantial evidence, a transfer is not required. In re Duboff Elec. v. Goldin, 95 A.D.2d 666, 667 (1st Dep't 1983); In re Mays-Watt v. Hernandez, 196 Misc.2d 56, 58 (Sup. Ct. Bronx Co. 2003). Here petitioner's pleadings do not raise any factual issues.

Petitioner does not dispute that he failed to report income. He does dispute the Hearing Officer's determination of his reasoning for not reporting income. This determination was based on the Hearing Officer's findings of fact and credibility. As such, the determination was not arbitrary and capricious.

Termination of Section 8 due to the failure to report income is typically not shocking to one's sense of fairness. See In re Graceffo v. City of New York, 2010 N.Y. Slip Op. 02667, ___ A.D.3d ___ (1st Dept 2010); In re Perez-Frangie v. Donovan, 59 A.D.3d 269 (1st Dep't 2009). Although petitioner has been a tenant in the Apartment for twenty years, he has only been a Section 8 subsidy recipient since 2004 and his misconduct—i.e. withholding information about his income and failing to attend mandatory conferences—occurred in 2005, 2006, and 2007. He knowingly, repeatedly misstated his employment status and did not provide good cause for his failure to appear at the April 27, 2007 rescheduled, mandatory conference. The cases that petitioner cites involving tenants from Independence Plaza, who filed Article

78 petitions after losing their Section 8 subsidies and regained their eligibility pursuant to stipulations of settlement, are distinguishable from the facts above. A review of the petition from Everston v. New York City Department of Housing Preservation and Development (Index No. 112807/08) reveals that the tenant there failed to report a bonus that he received. A review of the petitions from Fanelli v. New York City Department of Housing Preservation and Development (Index No. 112806/08) and Miller v. New York City Department of Housing Preservation and Development (Index No. 113278/08) reveals that those tenants failed to report the income that a child earned from a part-time job. In Fanelli, the total unreported income was approximately \$8,000. Here, petitioner withheld reporting a significant amount of income and HPD's Hearing Officer found that he did so intentionally. In light of petitioner's misconduct and the benefits he misappropriated from it, it cannot be said that the termination of the Section 8 subsidy is shocking to one's sense of fairness. See In re Smith v. New York City Hous. Auth., 40 A.D.3d 235 (1st Dep't 2007).

Accordingly, the petition is denied and the proceeding is dismissed. This constitutes the decision, order, and judgment of the court.

Dated: April 21, 2010


JOAN B. LOBIS, J.S.C.

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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 1410).