

**Matter of Phoenix House Found., Inc. v New York
City Water Bd.**

2013 NY Slip Op 31658(U)

July 11, 2013

Supreme Court, Queens County

Docket Number: 9934/12

Judge: Darrell L. Gavrin

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

In the Matter of the Application of
PHOENIX HOUSE FOUNDATION, INC.,

Index No. 9934/12

Petitioner,

Motion

- against-

Date November 8, 2012

NEW YORK CITY WATER BOARD and NEW
YORK CITY DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

The following papers numbered 1 to 4 read on this petition by Phoenix House Foundation, Inc. (Phoenix House), for a judgment pursuant to CPLR Article 78, reversing the determination of Steven W. Lawitts, Executive Director of the New York City Water Board (the Executive Director), which denied Phoenix House exemptions from water charges.

	<u>Papers Numbered</u>
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Respondent's Memorandum of Law.....	3
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Phoenix House is a non-profit drug and alcohol rehabilitation organization operating 150 locations throughout the country, including nine properties in New York City. Phoenix House receives 95% of its funding from the New York State Office of Alcohol and Substance Abuse Services (OASAS) and Medicaid, and 5% from private philanthropic support. Pursuant to Internal Revenue Code § 501 (c) (3), Phoenix House is a charitable organization exempt from taxation.

The New York City Water Board (the Water Board) is an autonomous public benefit corporation empowered to set water and sewer rates sufficient to support New York City's water and sewer systems (Public Authority Law § 1045[f], [j]). The New York City Department of Environmental Protection (DEP) serves as the agent of the Water Board and is responsible for billing and collecting water and sewer charges, maintaining accounts, and issuing determinations upon applications for water and sewer exemptions. Properties located within New York City that are exempt from water charges are also exempt from sewer charges.

In 1887, the New York State Legislature deemed charitable organizations located within

New York City exempt from water charges, in “an act to provide hospitals, orphan asylums and other charitable institutions in the City of New York with water, and remitting assessments thereof.” 1887 N.Y. Laws, ch. 696.

The law was amended in 1980 by the “Silver Bill,” which provides:

Any social settlement, whether incorporated or unincorporated, which shall own or lease for a term not less than three years a building or buildings devoted exclusively to the purposes of such social settlement work . . . are hereby exempted from the payment of any sum of money whatever to said city, for the use of water taken by same from said city, and water shall be supplied to the same by said city, in sufficient quantity for all purposes for which it is now used by said corporations, societies and institutions, or which may be necessary to be used by the same, free of all charge whatsoever, and the real estate necessarily used for any . . . social settlements maintained or conducted by an incorporated or unincorporated social settlement . . . is hereby released, discharged and exempted from all lien and charge for water heretofore used or which may hereafter be used by an such institution, society or corporation.

1980 N.Y. Laws, ch. 893, amending 1887 N.Y. Laws, ch. 696.

By Executive Order No. 43, dated February 13, 1980, former Mayor Edward I. Koch ordered that all institutions, societies, or organizations that are eligible to receive reimbursement from the United States, the State of New York, the City of New York or any agency for their water charges would not be exempt.

It is undisputed that: (1) the DEP has granted water exemptions to Phoenix House since 1970, categorizing it as a social settlement; (2) the DEP advised Phoenix House that water exemptions would continue for as long as Phoenix House owned or leased the properties and used them in a manner that would qualify for an exemption; and (3) Phoenix House never received reimbursements from any government agency for water charges.

In response to a 2008 audit and programmatic review of all exemptions, the DEP requested resubmission of all exemption applications for New York City properties currently exempt.¹ In September 2010, Phoenix House resubmitted applications for exemptions of water charges on all nine properties, applying under the “social settlement” exemption category. On the recertification applications, the DEP requested the following information: “Describe any funds you receive from an agency of the federal, state or city government to pay for water charges” and Phoenix House answered, “OASAS contract funding for operations of the facility.”

¹This is an excerpt from the letter of the Executive Director dated January 10, 2012.

In October and December 2010, the DEP revoked Phoenix House's exemptions from water charges on all nine properties. Initially, the DEP informed Phoenix House that it had been denied exemptions because: (1) "residential properties are not eligible for exemption;"² and (2) "funding is included for operational costs" and "water and sewer charges are considered normal operating expenses."

Phoenix House appealed this decision by the DEP. By letter dated October 17, 2011, the DEP denied the appeal, claiming the properties no longer qualify for exemptions because Phoenix House receives funding from a governmental agency. The DEP further advised that "[w]hile the Water Board understands that water and sewer charges may not have been included in this year's budget request, they should be included in the next budget request."

On November 16, 2011, Phoenix House appealed the DEP's decision upholding its denial of water and sewer exemptions, and claimed, "[d]espite no significant change in (a) the law governing exemptions, (b) the nature of Phoenix House's programs or (c) the source of Phoenix House's funding, the DEP revoked Phoenix House's exemptions in October 2010."

By letter dated January 10, 2012, the Executive Director denied this appeal. The Executive Director found that the subject properties were not entitled to exemptions from water charges because: (1) Phoenix House provides a specific service, addiction treatment, and Phoenix House is not a social settlement; and (2) applications submitted indicate that Phoenix House receives governmental funding for operational expenses, and water and sewer charges are an operational expense.

Having exhausted its administrative remedies, Phoenix House brings this Article 78 proceeding for judicial review of the final determination of the Executive Director. Phoenix House seeks a judgment: (1) reversing the determination of the Executive Director; (2) declaring Phoenix House a social settlement, exempt from New York City water and sewer charges; and (3) canceling the unpaid assessments.

In an Article 78 proceeding, the court reviews the decision of an agency to determine if it was in violation of a lawful procedure, affected by an error of law, arbitrary and capricious, or an abuse of discretion. The court is not to substitute its judgment for that of the agency being reviewed, but is to determine whether proper procedures have been followed. (*Matter of Nawaz v State Univ. of N.Y. Univ. at Buffalo Sch. of Dental Medicine*, 295 AD2d 944 [4th Dept 2002].)

If the petition alleges that the decision was arbitrary and capricious, the court must examine whether the action taken by the agency had a rational basis (*Matter of Peckham v Calogero*, 12 NY3d 424 [2009]). A court will overturn an administrative action where it is "taken without sound basis in reason" or "regard to the facts" (*id.* at 431). A rational basis exists

² The Executive Director subsequently abandoned this argument in his final determination letter, stating "the residential issue is not dispositive of the case."

where the determination is “[supported] by proof sufficient to satisfy a reasonable [person], of all the facts necessary to be proved in order to authorize the determination” (*Ador Realty, LLC v Div. of Hous. and Community Renewal*, 25 AD3d 128, 139-140 [2d Dept 2005], quoting *Matter of Pell v Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). If the court concludes “that the determination is supported by a rational basis, the court must sustain the determination even if [this Court] concludes that it would have reached a different result than the one reached by the agency” (*Matter of Peckham*, 12 NY3d at 431).

Phoenix House avers that the Executive Director unjustifiably denied it exemptions from water charges in an attempt to generate more revenue, prompted by a 2008 audit and programmatic review of all exemptions. Phoenix House claims that the determination of the Executive Director that Phoenix House is not a social settlement and that there was a “change” in its recertification applications was arbitrary and capricious.

In opposition, the Executive Director maintains that Phoenix House is not a social settlement as that term is defined by the DEP because it is an addiction treatment center, and assuming *arguendo* that Phoenix House is in an exempt category, its applications for exemptions of water charges were denied because it receives government funding, a portion of which is intended to cover operational expenses, and water is an operating expense.

The court will first review the determination of the Executive Director that Phoenix House is not a social settlement. In support of its petition, Phoenix House relies on the “2004 General Instructions” provided by the DEP in its application for an exemption of water charges, which defined a social settlement as:

[A] charitable organization that provides moral and physical support to communities. It must provide services to all ages and races, without regard to religion or national origin. The purpose of the organization should be to develop individual potential and to achieve the best possible neighborhood life. Social [s]ettlements need not be located in poor neighborhoods to qualify. The organization must strive to improve the quality of life in the neighborhood in which it is located.

Phoenix House claims that it is a charitable organization that provides holistic services to individuals addicted to alcohol and/or drugs and strives to improve their lives, as well as their families and communities; therefore, it falls within the definition of a social settlement cited by the Executive Director in his final determination letter: “[A] [s]ocial [s]ettlement is distinguishable from other social service agencies not by the type of services they provide but by their holistic approach to strengthening neighborhoods and families.” Phoenix House avers that the Executive Director failed to provide a rational basis for treating substance abusers differently from recipients of other charities.

Phoenix House maintains that all nine facilities qualify as social settlements because

they are dedicated to improving the lives of New York City's men, women, and children regardless of their origin, race, creed, or economic status through substance abuse education, prevention, and treatment. Its goal has always been to provide people with the skills and resources necessary for their development as healthy individuals who maintain functional and productive relationships with their families, schools, workplaces, and neighborhoods. Thus, the goals of Phoenix House fit squarely within the Court's own interpretation of those of social settlements which "help the individual develop to his fullest potential and to achieve the best possible family and community life" (*Matter of Associated YM-YWHA'S of Greater N.Y. v D'Angelo*, 38 Misc 2d 1082, 1083-84 [Sup Ct, NY County 1963]).

However, the Executive Director puts forth his reasoning that:

[A]n addiction treatment center is not a [s]ocial [s]ettlement. Social [s]ettlements are defined institutions . . . a [s]ocial [s]ettlement is distinguishable from other social service agencies, not by the type of service they provide but by their holistic approach to strengthening neighborhoods and families. Social [s]ettlements develop citizens - not only those with specific problems - within a geographically defined area. In contrast, Phoenix House provides a specific service, addiction treatment; and Phoenix House is not a [s]ocial [s]ettlement.

The court notes that social settlements have been evolving to meet the needs of the communities in which they serve:

Settlement houses were characterized not by a set of services but by an approach: that initiative to correct social ills should come from indigenous neighborhood leaders or organizations. Settlement workers were not dispensing charity; they were working toward the general welfare . . . Settlement houses take on the needs of the time . . . Settlement houses today are more professionalized and more institutionalized than their predecessors, although the idea of neighborhood access hasn't changed.

(Barbara Trainin Blank, *Settlement Houses: Old Idea in New Form Builds Communities*, *The New Social Worker*, Summer 1998, <http://www.socialworker.com/settleme.htm>.)

The court takes judicial notice that alcohol abuse and drug addiction are social ills plaguing our country, with little regard for age, ethnicity, race, religion, or economic status. Drug addiction is impacting society with devastating effects on individuals, families, and communities:

The trafficking and abuse of illicit drugs in the United States has created a drain on the economic, physical, and social health of American society. In 2007 alone, the estimated cost of illicit drug use to society was \$193 billion, including direct and indirect public costs related to crime, health, and productivity, with the majority of

costs attributable to lost productivity.

(National Drug Intelligence Center, United States Department of Justice, Product No. 2011-Q0317-001, *National Drug Threat Assessment 2011*, at 4 [2011].)

Our society is in need of drug treatment centers that will toil to improve the general welfare of individuals, their families, and our communities. In order to qualify as a social settlement, it is not necessary that an organization confine its activities to furnishing the bare necessities of life, namely, food, shelter, and clothing (*Matter of Associated YM-YWHA'S of Greater N.Y.*, 38 Misc 2d at 1083-84).

The Executive Director determined that Phoenix House was not a social settlement on the ground that it is a drug treatment center, without offering a rational basis why the two are mutually exclusive. The Executive Director never contested the charitable nature of Phoenix House nor did he dispute its holistic approach to strengthening individuals, families, and communities. Although the Executive Director specifically stated, “a [s]ocial [s]ettlement is distinguishable from other social service agencies, not by the type of service they provide but by their holistic approach to strengthening individuals, neighborhoods and families,” he determined that Phoenix House was not a social settlement on the ground that it provides a specific type of service, drug treatment. His determination completely disregarded the definition of a social settlement cited in his final determination letter.

Furthermore, the Executive Director stated that the denial was not due to a change in Phoenix House’s operations. Phoenix House has always provided drug and alcohol treatment, and the DEP has categorized it as a social settlement for 40 years. Regardless, the Executive Director failed to provide a reason for the change in Phoenix House’s categorization. When an agency decides to alter its prior stated course, it must set forth its reasons for doing so. Unless an explanation is furnished, a reviewing court will be unable to determine whether the agency has changed its prior interpretation of the law for valid reasons. Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary. (*Matter of Field Delivery Serv. v Roberts*, 66 NY2d 516 [1985].)

The decision of the Executive Director that Phoenix House is not a social settlement was arbitrary and capricious; it was made without a sound basis in reason or regard to the facts. Given the social, educational and charitable work provided by Phoenix House, the organization comes within the DEP’s definition of a social settlement; thus, the determination of the Executive Director that Phoenix House is not a social settlement, is reversed.

The court next reviews the decision of the Executive Director denying Phoenix House an exemption from water charges on the ground that it receives government funding for operational expenses and alleging that water charges are an operational expense.

Phoenix House maintains that its source of funding has not changed, nor is there

evidence that it receives government funding for the reimbursement of water charges. Phoenix House avers that the DEP acknowledged that Phoenix House does not receive government funding for reimbursement of water charges in its October 17, 2011 letter, suggesting that it should request reimbursement for water charges in future budgets. Phoenix House claims that the Executive Director's decision was arbitrary and capricious, lacking any rational basis to deny Phoenix House exemptions from water charges.

The Executive Director stated in his determination letter:

[T]he new or recertification applications submitted indicate that Phoenix House receives governmental funding for operational expenses, and water and sewer charges are an operational expense. Previous applications affirmatively indicated that Phoenix House received no funding for water and sewer expenses. Therefore, the denial of the exemptions was based on a change in the new or recertification applications submitted; it was not due to a change in Phoenix House operations.

The DEP now claims that Phoenix House is barred from asserting, for the first time in this Article 78 proceeding, that it is not actually eligible to receive funding. This argument is unavailing to the court as the administrative record reveals that Phoenix House has continuously maintained that there has been no change in the source of its funding.

Furthermore, the DEP has not provided a scintilla of evidence that Phoenix House receives, or claims to have ever received, government funding for reimbursement of water charges. Its New York City properties have been exempt from paying water charges since their inception; thus, water charges have never been operational expenses of Phoenix House. Moreover, it is well-known that charitable organizations can receive government funding for operational expenses, as well as exemptions from water charges. However, the Executive Director arbitrarily decided to revoke Phoenix House's exemptions from water charges because it receives government funding.

Moreover, the Executive Director's reasoning that there was a "change" in the recertification applications submitted by Phoenix House is not supported by facts, nor is it based in law. As evidence to support this decision, the Executive Director asserts that Phoenix House affirmatively stated in earlier applications that it did not receive any government funding for reimbursement of water charges. Specifically, a Phoenix House application dated April 19, 1985, for property located at 480 East 185 Street and 2340 Washington Avenue, County of Bronx, was attached as an exhibit by each party. Interestingly, the following questions appeared on that application: "Is the institution eligible to receive reimbursement from the United States, the State of N.Y. or the City of N.Y., or any agency thereof, for payments for the use and supply of water?" Phoenix House answered, "No." "Is the institution receiving reimbursement from any government agency, for any reason?" Phoenix House answered, "No."

Indeed, the court agrees that there was a change, a change in the questions asked by the DEP on its application for an exemption from water charges. The court notes that Phoenix House did not affirmatively state in the 2010 resubmission application that it did not receive government funding for reimbursement of water charges because that specific question was not asked. The law is well-settled that an omission is not considered to be sufficient evidence unless the omission is in response to the same question. The Executive Director cannot impeach Phoenix House simply by showing that it omitted to state a fact, or to state it more fully at a different time. It need also be shown that at the prior time, the attention of Phoenix House was called to the matter and it was specifically asked about the facts embraced in the question at issue. (*People v Bornholdt*, 33 NY2d 75 [1973].) Having failed to ask the same question on the DEP's 2010 exemption application, the Executive Director's explanation that his decision was based on Phoenix House's failure to affirmatively state that it received no funding for the reimbursement of water charges has no sound basis in reason nor regard to the facts.

For the above stated reasons, the determination of the Executive Director neither adheres to the agency's own precedent nor indicates a sound basis in reason for reaching a different result on essentially the same facts and is, therefore, arbitrary and capricious (*Matter of Field Delivery Serv.*, 66 NY2d at 520). An exemption from New York City water charges for a charitable organization should be fairly, liberally, and reasonably construed with a view to maintain the spirit of the law and the intention of the legislature (*Matter of Associated YM-YWHA 'S of Greater N.Y.*, 38 Misc 2d at 1083-84). The decision of the Executive Director that government funding for operational expenses precludes Phoenix House from receiving an exemption from water charges is arbitrary and capricious.

ORDERED AND ADJUDGED that the decision of the Executive Director is reversed; and it is further

ORDERED AND ADJUDGED that Phoenix House is a social settlement; and it is further

ORDERED AND ADJUDGED that under the Silver Bill, Phoenix House is exempt from water and sewer charges; and it is further

ORDERED AND ADJUDGED that all unpaid water assessments are canceled.

Accordingly, petitioner is to serve a copy of this judgment with notice of entry on the Executive Director of the Water Board within 20 days.

Dated: July 11, 2013

DARRELL L. GAVRIN, J.S.C.