No. 26
In the Matter of Jacqueline Perez,
Respondent,
v.
John B. Rhea, &c.,
Appellant.

Seth E. Kramer, for appellant.
Marc Sackin, for respondent.
Housing Court Answers, Inc., amicus curiae.

PIGOTT, J.:

The question presented by this case is whether the New York City Housing Authority's termination of petitioner's tenancy was, in light of the circumstances, so disproportionate to her misconduct as to shock the judicial conscience, thereby

constituting an abuse of discretion as a matter of law (see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 233 [1974]; Matter of Featherstone v Franco, 95 NY2d 550, 554 [2000]). We hold that it was not.

Petitioner is a tenant in a New York City Housing Authority ("NYCHA") public housing apartment in Manhattan. In the late 1990s, she became employed, for the first time, as a bookkeeper. She failed to disclose her new earnings to her landlord, each year stating in an affidavit of income that she did not work. This omission allowed petitioner to pay a substantially lower rent than she would have had she revealed the income.

When NYCHA officials discovered the misrepresentation, the matter was referred to its Office of Inspector General. In December 2006 petitioner was charged criminally with grand larceny in the third degree and offering a false instrument for filing in the first degree, for failing to report her income, "thereby causing NYCHA to be defrauded of $27,144.00." In July 2008, petitioner pleaded guilty to a reduced charge of petit larceny and received a conditional discharge, upon her agreement to pay restitution to NYCHA in monthly installments totaling $20,000.

Thereafter, NYCHA sought to terminate petitioner's tenancy, on the grounds of non-desirability, misrepresentation,

non-verifiable income, and breach of rules and regulations. In hearings in the spring of 2009, petitioner admitted that at the time she failed to report her employment, she had been aware that her rent was based on income. She also testified that her three children, two of whom have learning disabilities, live with her, and that she needed a larger home for her family, but could not afford to rent one.

The Hearing Officer ruled that, despite "[t]he plight of the family," termination of petitioner's tenancy was "the only appropriate disposition." Petitioner, the Hearing Officer reasoned, had given no explanation for her misrepresentations that might tend to "show that she did not intend to defraud NYCHA." The Hearing Officer concluded that "[a]n individual who through misrepresentation obtains from the tax-paying public a greater subsidy than that to which she is entitled is not eligible for tenancy." NYCHA approved the Hearing Officer's decision and ordered that petitioner's tenancy be terminated.

Petitioner then commenced this article 78 proceeding, challenging that determination. She contended that the penalty of termination was so harsh as to constitute an abuse of discretion as a matter of law. For the first time, petitioner claimed that eviction might leave her homeless. She included documentary evidence concerning her sons' learning disabilities and the negative impact on their schooling should the family be forced to move to a homeless shelter.

Supreme Court confirmed NYCHA's determination, denied the article 78 petition, and dismissed the proceeding, holding that "termination is appropriate when the tenant conceals a large amount of income over an extended period causing a substantial rent underpayment, even if a child is part of the household."

The Appellate Division reversed Supreme Court's judgment, granted the article 78 petition to the extent of vacating the penalty of termination, and remanded the matter to NYCHA for the imposition of a lesser penalty (87 AD3d 476 [1st Dept 2011]). It concluded that termination of tenancy was so disproportionate to the offense, in the light of all the circumstances, as to shock the judicial conscience. The court stated that "forfeiture of public housing accommodations is a drastic penalty because, for many of its residents, it constitutes a tenancy of last resort" (87 AD3d at 479, quoting Matter of Holiday v Franco, 268 AD2d 138, 142 [1st Dept 2000]).

One Justice dissented, reasoning that "[i]n accordance with her plea agreement, petitioner was required to repay only $20,000 of the more than $27,000 in rent that she avoided paying, which amounts to no penalty at all. If defrauding a governmental agency incurs no adverse consequence, others will be encouraged to engage in similar fraudulent conduct — hardly an outcome that promotes the ends of justice" (87 AD3d at 481 [Tom, J.P., dissenting]).

We granted NYCHA's motion for leave to appeal, and now

reverse.

The principal reason that the Appellate Division overturned NYCHA's determination and Supreme Court's judgment is that the Appellate Division considered public housing accommodation to be "a tenancy of last resort" (87 AD3d at 479); the quotation is from a dictum in Matter of Holiday (268 AD2d at 142). The Appellate Division's decision begins with the premise that termination "would likely leave petitioner . . . homeless" (87 AD3d at 476).

Absent from the Appellate Division's analysis, however, is any estimate of how probable it is that petitioner's eviction would result in homelessness. Unlike some residents of public housing, petitioner, of course, has an income. Notably, while petitioner testified that she could not afford a larger apartment, she did not claim at her hearings that she would become homeless if evicted. That assertion originates in her petition in this article 78 proceeding, which states, conclusorily, that "[i]f petitioner is evicted from her apartment, she and her family will be rendered homeless." Implicit in petitioner's statement is the claim that the income that she earns from her employment is insufficient to allow her to afford appropriate accommodation. But the petition has no affidavit from petitioner to this effect, nor any support for her claim. Nor is it alleged that petitioner would lose her job, or

be forced to resign, if she were obliged to move.[1] Indeed, on appeal to this Court, petitioner asserts, more narrowly, that "if she loses her employment, she certainly would not be able to afford an apartment for her family" (emphasis added).

The Appellate Division erred by importing its prior dictum that public housing is "a tenancy of last resort" into its analysis, thus giving rise to an implicit assumption that any termination of tenancy is a "drastic penalty" (87 AD3d at 479, quoting Holiday, 268 AD2d at 142) that, by default, is excessive. In short, we share the dissenting Justice's concern that "universal application" of the Appellate Division majority's principles "would result in no tenant of public housing ever being evicted, whatever the grounds" (87 AD3d at 480-481 [Tom, J.P., dissenting]). Instead, reviewing courts must consider each petition on its own merit. The Appellate Division failed to do that here.

The remaining question, then, is whether the penalty of termination of petitioner's tenancy was an abuse of discretion as to the measure or mode of penalty (CPLR § 7803 [3]). "It is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion" (Matter of Pell, 34 NY2d at 232). Petitioner, whose

[1] Petitioner focuses exclusively on the consequences if she were "to move to a homeless shelter that is a significant distance away."

rent was income-based, knowingly and intentionally concealed her income from NYCHA for seven years, defrauding the agency of $27,144. We hold that termination of petitioner's tenancy was not "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness" (id. at 233). Moreover, termination in this case is "compelled by a supervening public interest" (id. at 241).

A vital public interest underlies the need to enforce income rules pertaining to public housing. Despite petitioner's alleged difficulties if her tenancy is terminated, public housing is of limited availability and there are waiting lists of other families in need of homes, whose situations may be equally sympathetic. If income reporting violations were to be ignored by the NYCHA, there would be -- as noted by the dissenting Justice -- no meaningful deterrent to residents of income-based public housing who misstate their earnings. If residents believe that the misrepresentation of income carries little to no chance of eviction, the possibility of restitution after criminal conviction may not serve adequately to discourage this illegal practice. The deterrent value of eviction, however, is clearly significant and supports the purposes of the limited supply of publicly-supported housing. It follows, then, that NYCHA's decision to terminate petitioner's tenancy is not so disproportionate to her misconduct as to shock the judicial conscience.

The remaining contentions in the petition are either unpreserved or without merit.

Accordingly, the order of the Appellate Division should be reversed, without costs, and the judgment of Supreme Court reinstated.

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Order reversed, without costs, and judgment of Supreme Court, New York County, reinstated. Opinion by Judge Pigott. Chief Judge Lippman and Judges Graffeo, Read and Smith concur.
Judge Rivera took no part.

Decided February 14, 2013