SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

In the Matter of the Application of
JUANITA MATOS,

Petitioner-Appellant,

-against-

TINO HERNANDEZ, as Chairman of the
New York City Housing Authority, and the
NEW YORK CITY HOUSING AUTHORITY,

Respondents-Respondents,

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules.

To be argued by:
Kathryn Neilson

Index No. 402704/2008

PETITIONER-APPELLANT'S BRIEF

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QUESTIONS PRESENTED

1. Does an administrative determination by an impartial hearing officer of the New York City Housing Authority that fails to include any findings of fact or articulate any reasoning for the final outcome comport with the requirement of due process, NYCHA's internal hearing policies and federal HUD regulations? The court below did not address this question. Petitioner-appellant contends that it does not, and that the decision is therefore arbitrary and capricious as a matter of law.

2. Is it disproportionate to condition a public housing tenancy on the permanent exclusion of an authorized household member, where the underlying allegations and findings against the household member would not otherwise support termination of tenancy? The court below did not address this question. Petitioner-appellant contends that where the underlying allegations and findings would not support termination of tenancy as against the head of household, they cannot support mandating the permanent exclusion of an authorized household member.

3. Do two isolated convictions by plea of non-violent, non-drug-related misdemeanors by the son of a public housing tenant, without more, justify conditioning the continued occupancy by the tenant and her minor grandchild on the permanent exclusion of her son from their public housing apartment, where the

son has lived as an authorized member of the household for twenty years otherwise without incident, and where the son acts as the primary caretaker for the elderly and disabled tenant and the minor child, both of whom suffer from severe and chronic medical conditions? While the court below found that exclusion was not disproportionate, it did not directly address this question, and instead based its determination on an erroneous assumption that the son was dangerous, when no such finding had ever been made. Petitioner-appellant contends that, under the circumstances, conditioning her continued occupancy in the apartment on her son's permanent exclusion from the apartment is not justified and constitutes disproportionate penalty and is an abuse of discretion as a matter of law.

4. Is it within the discretion of the hearing officer to condition the continued tenancy of a public housing tenant and her minor grandchild on the permanent exclusion of her son, an authorized household member, solely as a punitive measure, absent any finding that the son constitutes danger to NYCHA residents and employees? The court below did not address this question. Petitioner-appellant contends that the imposition of exclusion solely as a punitive measure, without any finding that the household member constitutes a danger, is an abuse of discretion as a matter of law.

STATEMENT OF THE CASE

Petitioner-appellant Juanita Matos is the 69-year-old head of household of a public housing apartment managed by respondent-respondent New York City Housing Authority ("NYCHA").[1] At the time of the administrative hearing at issue, Ms. Matos had lived in NYCHA public housing, together with her 39-year-old son, Edwin Hernandez, for approximately 20 years.[2] Mr. Hernandez has sole custody of his then five-year-old son, Chance Hernandez, who has lived with his father and grandmother since his birth.[3] Ms. Matos suffers from multiple chronic illnesses.[4] Chance is also chronically ill, suffering from severe asthma.[5] Mr. Hernandez is the primary caretaker of both his elderly mother and young son.[6]

In 2007, NYCHA initiated a termination of tenancy proceeding against Ms. Matos based on three charges of non-desirability and breach of lease regarding Mr. Hernandez.[7] An administrative hearing was held in front of Hearing Officer Stuart Laurence over the course of multiple appearances, finally concluding on May 21, 2008.[8]

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[1] Appendix at A5, A140
[2] A8, A140, A174-175
[3] A8, A142, A176-177
[4] A9, A143-148, A230-231
[5] A9, A177-179
[6] A9, A148, A177-180
[7] A8-9, A21
[8] A9, A90-209

At the hearing, Ms. Matos and her son testified that she suffers from numerous medical conditions, including thoracic and lumbar radiculopathy (a disorder of the nerves the spine and back), osteoarthritis, reflux disease and depression.[9] She testified that over the past 10 years she has had three surgeries on her knee and four surgeries on her shoulder, and that she is currently being treated for extreme stress. She testified that her son does the cooking, cleaning, and shopping – that he does "everything" – for the household.[10]

Mr. Hernandez testified that he has sole custody of his five-year-old son, whose mother has no involvement in his life.[11] He testified that he has not been able to work regularly for some time because he spends his days attending to the considerable needs of both his son, who suffers from severe asthma that requires treatment by application from a nebulizer every few hours, as well as heart problems.[12] He also testified that he is the primary caretaker of his elderly and disabled mother.[13] He tends to the household chores, cleaning, shopping and much of the cooking. He accompanies his mother to her medical appointments, and monitors her health and well-being.[14]

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[9] A143-148, A179-180, A230-231
[10] A148
[11] A176-177
[12] A177-179
[13] A179
[14] A179-180

NYCHA's first charge was related to a criminal charge stemming from a January 17, 2007, arrest, which was dismissed and sealed on June 12, 2007.

To support its second charge, NYCHA introduced the certificate of disposition of Mr. Hernandez's June 12, 2007, conviction by plea for a class "A" misdemeanor of "auto-stripping" in the 3rd degree, along with the police complaint and arrest report related to that plea.[15] No witness to the incident or member of the police force testified about the incident underlying the conviction. Mr. Hernandez testified that on May 29, 2007, the date in question, he was outside standing next to a friend on the sidewalk when the police did a sweep of the block and arrested everyone who was out on the street.[16] NYCHA did not introduce any testimony or other evidence to contradict Mr. Hernandez's version of the events. The police complaint introduced by NYCHA refers to two defendants, the first being Mr. Hernandez, with the second name blacked out.[17] The complaint indicates that the officer observed the second defendant removing speakers from a car. The only notation referring to Mr. Hernandez was that he "did make statement in regards."[18] There is no indication as to the content of those alleged statements in the police complaint or arrest report, nor did any witness appear to testify about Mr. Hernandez's statements or involvement.

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[15] A210-213
[16] A186-187
[17] A212
[18] Id.

To support its third charge, respondent NYCHA introduced the certificate of disposition of Mr. Hernandez's June 12, 2007, conviction by plea for an unclassified misdemeanor of unauthorized possession of ammunition, along with the police complaint and arrest record related to that plea.[19] No witness to the incident or member of the police force testified about the incident underlying the conviction. Mr. Hernandez testified that May 13, 2006, he was walking outside with a friend when they were approached by another man who began arguing with his friend.[20] He testified that the man pulled out a gun, and that, fearing for his safety, he struggled with the man and forced the gun out of his hands and onto the ground.[21] At that time, the police arrived and the other man fled.[22] Mr. Hernandez remained when the police arrived, and told them that he was carrying a small knife that he used for odd jobs, but that the gun on the ground was not his.[23] He was then arrested, arraigned and released, with the criminal case pending.[24]

NYCHA did not introduce any testimony or other evidence to contradict Mr. Hernandez's account of the events. Further, Mr. Hernandez's testimony that the incident and arrest took place off NYCHA grounds was confirmed by Sherril

[19] A214-217
[20] A183
[21] A183-184
[22] A184
[23] A184-185
[24] A185

Williams, a Housing Assistant for Pelham Parkway Houses, during NYCHA's presentation of its case.[25]

Mr. Hernandez testified that after the 5/29/07 arrest, he was held at Rikers Island and not released due to the prior pending charges against him.[26] Mr. Hernandez testified that the next two weeks he spent at Rikers were his first experience with incarceration, aside from the overnight stays related to the 5/13/06 and 1/17/07 arrests.[27] He testified that on or about June 11, 2007, he met with his attorney who advised him that if he chose to fight the remaining two charges, he could remain in jail for up to a year before the cases even went to trial.[28] On June 12, 2007, Mr. Hernandez pled guilty to the two misdemeanors at issue, and was released shortly thereafter.[29]

Mr. Hernandez testified that he spends most of his time at home or otherwise caring for his family.[30] Mr. Hernandez testified that he cannot maintain employment due to the demands of both his chronically ill young son and mother, who both depend on him.[31] Mr. Hernandez's exclusion from the apartment would be devastating to this family. Ms. Matos would be left unable to attend to her most basic needs; Mr. Hernandez would be forced to choose between leaving his

[25] A110-111
[26] A186-187
[27] A189
[28] A187-188
[29] A188-189, A210, A214, A43
[30] A189
[31] A177-178, A190-191

chronically ill young son with his elderly and disabled mother, who is clearly unable to properly care for him, or taking his son with away from the only home he has ever known.

In addition to his commitment to his family, Ms. Matos presented testimony and evidence regarding her son's positive involvement in his community. Mr. Hernandez testified that he attends church regularly and volunteers with the project's resident council.[32] Mr. Hernandez testified that at times when the project elevators are out of service, he volunteers to assist older residents by carrying groceries up to their apartments.[33]

This sentiment was supported by Herma Williams, the President of the Pelham Parkway Houses Resident Council, who submitted a letter on Mr. Hernandez's behalf, praising him as "a supportive father who is actively involved in the daily needs of his young children," and asking NYCHA to take into account the "devastating effects" that excluding him from the household would have.[34] She noted that both Ms. Matos and Mr. Hernandez are involved in the community service activities of the Council, that their service "has been an asset to the residents" and recognized them as "upstanding citizens in our public housing development." In addition, Ms. Matos submitted a petition signed by forty-three

[32] A180-181
[33] A181
[34] A236

residents and neighbors in support of Mr. Hernandez and his continued occupancy.[35]

In a written decision dated June 23, 2008, the hearing officer dismissed the first charge, but sustained the second and third charges.[36] In his decision, the hearing officer never made any finding that Mr. Hernandez's uncontested versions of the events leading to the convictions that formed the basis of the charges were not credible. He simply recounted the testimony offered, without offering any factual findings, credibility determinations, or analysis of the testimony. He did not even acknowledge the evidence offered in support of Mr. Hernandez.[37]

Nor did the hearing officer make *any* determination that Mr. Hernandez ever posed or now poses a threat to the residents and staff of the Pelham Parkway Houses. But even in the absence of such a finding, he issued a determination conditioning Ms. Matos's eligibility for continued tenancy on the permanent exclusion of Mr. Hernandez from the household.[38] The only justification offered by the hearing officer for his determination was that Mr. Hernandez's "recent convictions indicate serious sanction."[39] The determination was subsequently upheld by respondent NYCHA's board.[40]

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[35] A233-235
[36] A44-46
[37] Id.
[38] A46
[39] Id.
[40] A47

Ms. Matos appealed the hearing officer's determination in an Article 78 petition, arguing that requiring the exclusion of her son from the apartment was arbitrary and capricious and an abuse of discretion, in that it constituted a penalty disproportionate to the findings.[41] But on June 3, 2009, the Hon. Walter B. Tolub denied Ms. Matos's petition.[42]

ARGUMENT

I. THE LOWER COURT ERRED IN FAILING TO REVERSE THE HEARING OFFICER'S DETERMINATION BASED ON HIS FAILURE TO ARTICULATE THE UNDERLYING REASONING

NYCHA adopted its Termination of Tenancy Procedures pursuant to the consent decree in Escalera v. New York City Housing Authority.[43] These procedures provide that prior to terminating a tenancy, NYCHA must afford the tenant an administrative hearing before an "impartial disinterested attorney."[44] The Procedures, as well as federal HUD rules and regulations, require a hearing officer to issue a determination which states the reasons for the decision.[45] Due process further requires that "findings of fact be made in a manner wherein the parties are assured that the decision is based on evidence in the record, uninfluenced by

[41] A2-47
[42] A239-244
[43] 67 Civ. 4307 (S.D.N.Y. 1971); NYCHA Termination of Tenancy Procedures
[44] Id. at ¶ 5
[45] Id. at ¶ 9; see also 24 C.F.R. §§ 966.4(e)(8), 966.57

extralegal considerations, and that both an intelligent challenge by a party aggrieved by the determination and an adequate judicial review are possible."[46]

"It is precisely because of the severe limitations on the availability of judicial review" that hearing officers "are required to make '[a] careful and painstaking assessment of all the available evidence.'"[47] But in the decision at issue, the hearing officer completely failed to do so. Indeed, the hearing officer made no factual findings at all.[48] Instead, the decision merely recited the evidence in a narrative, and then jumps to a conclusion of conditional exclusion, stating only that "[t]he convictions at issue indicate serious sanction."[49] The hearing officer provided no reasoning as to how and why he came to this conclusion. He made no finding that Mr. Hernandez is a danger to his neighbors and community. He made no determination or even implication that he finds Mr. Hernandez's testimony of the circumstances underlying the convictions not to be credible. He provided no analysis of the mitigating factors, including the age and health of Ms. Matos and her minor grandchild, mentioning them only in the context of his recitation of the proceedings. He failed to consider Ms. Matos's clear inability to care for herself and her grandson without Mr. Hernandez's day-to-day assistance.

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[46] Goohya v. Walsh-Tozer, 292 A.D.2d 384, 384-85, 738 N.Y.S.2d 373 (2d Dept. 2002) app dism'd 99 N.Y.2d 551; see also Perfetto v. Erie Co. Water Auth., 298 A.D.2d 932, 933-34, 748 N.Y.S.2d 96 (4th Dept. 2002)

[47] Rosenkrantz v. McMickens, 131 A.D.2d 389, 391-392, 517 N.Y.S.2d 501 (1st Dept. 1987) citing Brady v. City of N.Y., 22 N.Y.2d 601, 241 N.E.2d 236, 294 N.Y.S.2d 215, 606 (1968)

[48] A44-45

[49] A46

In conditioning Ms. Matos's continued tenancy on her son's permanent exclusion, the hearing officer went on to hold that Mr. Hernandez could not be restored to the household "without presenting evidence of social rehabilitation. This usually requires continuous employment, some educational achievement, or significant community work."[50] But the decision failed to even mention, let alone analyze, the character and rehabilitation evidence that was already presented at the hearing, including Mr. Hernandez's testimony about his community involvement,[51] the Resident Council's letter on his behalf,[52] his participation in the project's community service activities,[53] and the petition from his neighbors in his support.[54]

By virtue of his failure to make findings of fact and make a full assessment of all evidence, testimony and mitigating factors, the hearing officer's decision fails to comply with the requirements of HUD regulations, NYCHA's appeal procedure and due process, and must be reversed.

[50] Id.
[51] A180-181
[52] A236
[53] A237
[54] A233-235

II. THE LOWER COURT ERRED IN FAILING TO FIND THAT THE PERMANENT EXCLUSION OF PETITIONER'S SON CONSTITUTES A DISPROPORATIONATE PENALTY UNDER THE CIRCUMSTANCES

A. The Court Must Reverse Penalties that "Shock the Conscience"

In an Article 78 proceeding contesting an agency's exercise of discretion, the court is to set aside the agency action if "the measure of punishment or discipline imposed is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness."[55] A result should shock one's sense of fairness when its impact on the affected individual is so grave as to outweigh the turpitude, need for deterrence, or risk of harm to the public implicated in the offense.[56] Though limited, this standard of review does not amount to a meaningless rubber-stamp on agency sanctions.

In reviewing agency-imposed sanctions in the context of public housing, courts give special consideration to mitigating circumstances such as the length of the tenancy, the hardship that would be occasioned by the penalty, and the tenants' prior record of compliance with applicable rules.[57] In this case, as discussed in

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[55] Pell v. Bd. of Ed., 34 N.Y.2d 222, 233, 313 N.E.2d 321, 356 N.Y.S.2d 833 (1974); see also Featherstone v. Franco, 95 N.Y.2d 550, 554, 742 N.E.2d 607, 720 N.Y.S.2d 93 (2000) (reaffirming same standard)

[56] See Pell, 34 N.Y.2d at 234-35.

[57] See Robinson v. Martinez, 308 A.D.2d 355, 764 N.Y.S.2d 94 (1st Dept. 2003) (reversing the termination of a 21-year public housing resident for violation of an agreement to exclude her son from her apartment, when she allowed her son to spend the night once when he was sick in order to bring him to a doctor's appointment the next morning); Spand v. Franco, 242 A.D.2d 210 (1st Dept. 1997) (reversing termination of tenancy where incident was isolated, and where no indication that she poses a present risk to other tenants)

more detail below, these factors weigh considerably in Ms. Matos and Mr. Hernandez's favor. This is the first termination proceeding on any charge – they both have an otherwise unblemished 20-year record of compliance with NYCHA rules and regulations.[58] Mr. Hernandez is an active and well-liked member of the community.[59] The charges on which termination was based were isolated incidents, and there is no reason to believe that there will be any recurrence. Finally, Ms. Matos and her minor grandson rely completely on Mr. Hernandez for their daily care, and his exclusion from the household would be devastating to them.[60]

The First Department's sense of fairness was shocked in Powell v. Franco, when the New York City Housing Authority conditioned the continued occupancy of two public housing residents on the permanent exclusion of their son due to charges related to drug sale on project grounds.[61] The son had been arrested on project grounds "after being observed in hand-to-hand exchanges with various individuals and found in possession of what the arresting officer believed was crack."[62] The son later pled guilty to a lesser charge of disorderly conduct. While the court found that the hearing officer's determination was supported by

[58] A9
[59] A180-181, A233-237
[60] A142-148, A167-170, A190-191
[61] 257 A.D.2d 509, 684 N.Y.S.2d 226 (1st Dept. 1999)
[62] Id. at 510.

substantial evidence, it found the sanction of mandated exclusion of the tenants' son to be disproportionately harsh. The court noted that the family had "a long and commendable record as Housing Authority tenants and that the subject incident . . . was an isolated and apparently aberrant episode in an otherwise stable and law-abiding family."[63] The court went on to say that "[u]nder these circumstances, we find the penalty of petitioners' conditional exclusion from public housing shocking to our sense of fairness and remand the matter for imposition of a lesser penalty."[64]

The cases on which the lower court relied in upholding NYCHA's determination of exclusion are easily distinguishable from this case. In Romero v. Martinez, the First Department upheld the termination of a public housing tenant where she had violated a prior stipulation in which she voluntarily agreed to permanently exclude her son from the premises.[65] As a result, the issue before the court was not whether exclusion was appropriate in that case, but only whether the tenant's prior agreement to exclude her son from even visiting was enforceable.[66] Thus, Romero provides no insight into the standard that should be applied in evaluating whether an administrative determination requiring permanent exclusion of an authorized household member is disproportionate.

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[63] Id.
[64] Id.
[65] 280 A.D.2d 58, 721 N.Y.S.2d 17 (1st Dept. 2001)
[66] Id. at 62 – 64

McLurkin v. Hernandez involved a challenge to a determination that, as here, conditioned the tenant's continued occupancy on the exclusion of her adult son.[67] But in that case, the administrative charges included possession of a handgun on NYCHA grounds and resisting arrest, and were supported by testimony of both arresting officers. In addition, the hearing officer in that case made credibility findings regarding the son's possession of the weapon, which were upheld by the court. As a result, the court found that the son's "possession of a handgun on NYCHA grounds posed a clear danger to NYCHA's residents and employees."[68]

Finally, in Stafford v. Hernandez, the First Department upheld the termination of tenancy of a public housing tenant after she was found to have physically assaulted a NYCHA employee during her annual review by "punch[ing] her in the face."[69] The assault was found to have "escalated from two previous incidents of verbal abuse" towards the employee.[70] The charges were supported by the testimony of two NYCHA employees, including the assault victim, and the hearing officer made credibility findings in support of his determination, which were upheld by the court.[71]

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[67] 44 A.D.3d 496, 843 N.Y.S.2d 305 (1st Dept. 2007)
[68] Id.
[69] 52 A.D.3d 304, 859 N.Y.S.2d 643 (1st Dept. 2008)
[70] Id.
[71] Id.

By contrast, the charges in this case are not of the same severity as in McLurkin or Stafford. The charges that were sustained against Mr. Hernandez are not violent in nature. Nor did NYCHA present any testimony from the arresting officers from either incident or NYCHA employees, or any other evidence, to contradict Mr. Hernandez's testimony regarding the circumstances underlying the arrests. Nor did the hearing officer make any finding that Mr. Hernandez's version of the events were not credible, or that Mr. Hernandez ever posed or continues to pose a danger to NYCHA's residents or employees.[72]

B. NYCHA Procedures Mandate Probation Where Objectionable Conduct is Curable or Nonrecurring

Pursuant to the NYCHA Termination of Tenancy Procedures, where the Hearing Officer finds a charge to be proven, he may make one of a number of dispositions, including termination of tenancy, probation, and eligible subject to permanent exclusion of one or more persons.[73] The Procedures, along with NYCHA's public housing Management Manual, provide for a finding of "Probation" where "[t]here is reason to believe that the conduct or condition which led to the charge of non-desirability may not recur or may have been cured, or that the tenant is taking or is prepared to take steps to correct or cure such conduct or

[72] A44-46
[73] NYCHA Termination of Tenancy Procedures at ¶ 10

condition."[74] The clear corollary to this provision is that a determination of termination or exclusion requires a finding that the conduct or condition *is* likely to recur or has not been cured.

While often considered a lesser sanction than termination, it must be recognized that mandated exclusion of a household member is a significant and harsh punishment for a public housing family. For the remaining members of the household, they are faced with the choice of losing their home completely, or watching their loved one be forced onto the street. For the household member at issue, the permanent exclusion amounts to the termination of their rights as a public housing occupant and eviction from their home, without regard to their ability to secure alternative housing. And in cases such as this, where Ms. Matos and her grandson are completely dependent on Mr. Hernandez for their day-to-day care, his exclusion threatens the very stability of the remaining family. A determination requiring the permanent exclusion of an authorized household member must therefore be given great consideration. Indeed, the idea that the public housing tenant encompasses the entire family, and not simply the head of household, is recognized throughout the federal regulations governing public

[74] Id. at ¶ 14(a); Management Manual Chapter VII § IV(C)(6)(b); see also Vazquez v. N.Y.C. Hous. Auth., 57 A.D.3d 360, 871 N.Y.S.2d 10 (1st Dept. 2008) (finding termination to be disproportionate where there is "reason to believe that the conduct or condition which led to the charge of non-desirability may not recur or may have been cured, or that the tenant is taking or is prepared to take steps to correct or cure such conduct or condition")

housing, particularly in regards to the family's obligation to certify its income and assets[75] and otherwise maintain eligibility.[76]

The First Department was keenly aware of this reality in its decision in Powell v. Franco.[77] In that case, the court upheld NYCHA's administrative determination that the tenants' son, Kenneth, had engaged in the sale of crack-cocaine on project grounds, as supported by substantial evidence.[78] But the court also recognized that conditioning the family's continued tenancy on Kenneth's permanent exclusion from the household was extremely harsh. The court found that Kenneth was a member of an "otherwise stable and law-abiding family," and that forcing his parents to choose between their home and their son was, under the circumstances, "shocking to our sense of fairness."[79]

While there are few published cases that deal directly with the issue of conditional exclusion of an authorized household member in a public housing tenancy, termination of tenancy cases in which the charges are focused on the behavior of the head of household provide a natural context for evaluating whether mandating exclusion of a household member is disproportionate. In James v. New York City Housing Authority, the Appellate Division, First Department,

[75] 24 C.F.R. §§ 5.240, 5.603(b)
[76] 24 C.F.R. §§ 5.504(b), 960.201
[77] 257 A.D.2d 509, 684 N.Y.S.2d 226 (1st Dept. 1999)
[78] Id. at 510
[79] Id.

overturned as disproportionate the public housing termination of a tenant who was found to have purposely set fire to her apartment less than two years after the commencement of her tenancy.[80] The tenant had been diagnosed as a paranoid schizophrenic and alcoholic, and also had a history of heroin addiction. The court noted that while "questions as to the petitioner's mental state remain," she was on medication and engaged in counseling, and no other incidents had been reported since the original offense. Given all of the circumstances, the court found that "the severe sanction of eviction was not warranted" and reversed the finding of termination.[81]

In Joseph v. Franco, the New York Supreme Court reversed the termination of a long-time public housing tenant after she admitted to physically assaulting a Housing Authority employee after a verbal dispute and in response to a racial slur.[82] While there was no dispute that the incident was inexcusable, the tenant had "apparently acknowledged the improprieties of her conduct by pleading guilty in Criminal Court to a violation, for which she was sentenced to six days' community

[80] N.Y.L.J., Nov. 2, 1992, p. 25, (col. 6) (App. Div. 1st Dept.); see also Means v. Franco, 248 A.D.2d 262 (1st Dept. 1998) (annulling termination of tenancy where son was found to have sold drugs on the premises); Spand v. Franco, 242 A.D.2d 210 (1st Dept. 1997) (reversing termination of tenancy where incident was isolated, and where no indication that she poses a present risk to other tenants); Dickerson v. Popolizio, 168 A.D.2d 336 (1st Dept. 1990) (reversing termination of long-term tenancy based on wrongdoing committed by tenants' mentally and physically handicapped son)

[81] Id.

[82] N.Y.L.J., Jan. 27, 1999, p. 27, (col. 6) (N.Y. Sup.)

service (which was performed), and a conditional discharge."[83] The court annulled the termination, finding that it was "entirely disproportionate to the offense charged."[84]

Similarly, in Peoples v. New York City Housing Authority, the Appellate Division, First Department, vacated a termination as disproportionate where the tenant was found to have "physically confronted" and "accosted" a NYCHA inspector in the tenant's apartment.[85] While the court upheld the finding as supported by substantial evidence, and acknowledged that the tenant's behavior was "certainly a very serious breach of [NYCHA]'s rules," it found that "[t]he drastically disproportionate remedy of expelling petitioner from her home for this incident, after her long and unblemished tenancy" was shocking to the conscience and therefore an abuse of discretion.[86]

More recently, in Vazquez v. New York City Housing Authority,[87] the Appellate Division, First Department, vacated a public housing termination where

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[83] Id.
[84] Id.
[85] 281 A.D.2d 259, 260, 723 N.Y.S.2d 6 (1st Dept. 2001)
[86] Id.; see also Winn v. Brown, 226 A.D.2d 191, 640 N.Y.S.2d 527 (1st Dept. 1996) (finding termination of 15-year tenancy disproportionate where tenant charged with two incidents of "screaming profanities, racial epithets and making threats to respondent's employees . . . when local drug dealers were making her fear for the life of her son and herself and her request for a transfer remained unfulfilled."); Milton v. Christian, 99 A.D.2d 984, 473 N.Y.S.2d 194 (1st Dept. 1984) (reversing termination where long-time public housing tenant was found to have engaged in three altercations with NYCHA personnel, where the incidents took place during a time of extreme stress in the tenant's life)
[87] 57 A.D.3d 360, 871 N.Y.S.2d 10 (1st Dept. 2008)

the tenant had pled guilty to felony grand larceny in the third degree. In reversing the finding of termination against her, the court noted that

> [t]he procedures for terminating a tenancy do not require termination on a finding of non-desirability, where there is "reason to believe that the conduct or condition which led to the charge of non-desirability may not recur or may have been cured, or that the tenant is taking or is prepared to take steps to correct or cure such conduct or condition."[88]

The mitigating factors considered by the court in reaching its determination included the fact that the tenant

> has no prior criminal record, and her criminal conduct appears to have been an isolated aberration. Both petitioner and her uncle, whom she lives with and cares for, suffer from disabilities. Petitioner is further afflicted with depression and stress, which may in part be caused by her son's current deployment to Iraq. Petitioner has a strong family support system as evidenced by her daughter quitting college to work in order to aid petitioner in paying restitution as part of her criminal case. Termination of petitioner's tenancy under these circumstances is shocking to the judicial conscience and to one's sense of fairness.[89]

The cases discussed above reflect a wide array of circumstances in which the courts, while acknowledging the serious and often criminal wrongdoing in which the public housing tenants engaged, also recognized that the sanction of terminating a public housing tenancy must not be lightly imposed. The same recognition and care must also be applied in evaluating the appropriateness of

[88] Id. at 361 quoting NYCHA Termination of Tenancy Procedures
[89] Vazquez, 57 A.D.3d at 361

permanent exclusion of an authorized household member, who will similarly be forced from his home.

Were Edwin Hernandez the head of this household, rather than a household member, the two isolated incidents that form the basis of the proceeding would surely not be sufficient to support a finding of termination against him. But as an authorized member of the household, mandating his exclusion nonetheless results in the "drastically disproportionate remedy of expelling [him] from [his] home."[90] When evaluated in this light, these incidents do not rise to a level to support his permanent exclusion from the household, particularly given the mitigating circumstances in this particular household. An alternative of a probationary period on the tenancy would sufficiently protect NYCHA by ensuring that Ms. Matos and Mr. Hernandez comply with all rules and regulations, and providing NYCHA with recourse should they not, but without forcing Mr. Hernandez from his home, and threatening the stability of the household by removing the primary caretaker of the remaining and vulnerable household members.

C. The Mitigating Factors in This Case Weigh Against Permanent Exclusion

As discussed above, there exist a multitude of factors that mitigate against mandating Mr. Hernandez's exclusion as a condition of Ms. Matos's continued tenancy. Ms. Matos and her son have lived together as public housing residents for

[90] See Peoples, 281 A.D.2d at 260

20 years. This is the first termination proceeding against the tenancy on any charge.[91]

Mr. Hernandez also testified about the circumstances surrounding both the arrests and his subsequent guilty pleas. Regarding the arrest related to the ammunition charge, Mr. Hernandez testified that he had knocked a firearm out of another man's hands to protect himself, and that he did not flee when the police arrived.[92] In addition, his testimony that the incident took place off project grounds was supported by the testimony of NYCHA's Housing Assistant for Pelham Parkway Houses.[93] Regarding the auto-stripping charge, Mr. Hernandez's testimony that he was not engaging in the behavior alleged at the time of his arrest is actually supported by the police complaint, which refers to two defendants but indicates that police observed only the second defendant, who was not Mr. Hernandez, removing speakers from a car.[94] Again, NYCHA presented no independent testimony or evidence to contradict Mr. Hernandez's accounts of the arrests, or of his testimony regarding his decision to plead guilty to the charges.

Nor did NYCHA present any testimony or evidence to contradict the testimony and evidence in support of Mr. Hernandez – he focuses his time and energy on caring for his family; that he is an active and engaged father and son,

[91] A9, A189
[92] A183-184
[93] A110-111
[94] A212

acting as the primary caretaker of his chronically ill young son and elderly, disabled mother; that he is an involved and valued member of his community. The testimony regarding his regular attendance at a local church and regular volunteer work with the residents' council,[95] was supported by the Resident Council letter and petition signed by his neighbors.[96] This testimony and evidence was not disputed by NYCHA at the hearing. Where evidence is uncontroverted, there is no room for choice as to how it should be weighed.[97]

As in Powell[98] and Vazquez,[99] the charges underlying this case were isolated and aberrant incidents in a family that is an otherwise stable and cohesive unit. As in Peoples,[100] Mr. Hernandez has an otherwise blemish-free occupancy in public housing of more than twenty years. But unlike that case and Joseph,[101] the charges at issue against Mr. Hernandez did not even allege the kind of threatening conduct that was found, in those cases, not to support terminating the tenancy.

The uncontroverted evidence and testimony offered by Ms. Matos and Mr. Hernandez support a finding that the behavior on which the charges were based will not recur, as well as show mitigating factors that clearly weigh against

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[95] A180-181
[96] A233-237
[97] See Bush v. Mulligan, 57 A.D.3d 772, 869 N.Y.S.2d 569 (2d Dept. 2008) (annulling Section 8 termination for unreported income, where hearing officer disregarded uncontradicted evidence bearing on whether tenant's failure to report was intentional).
[98] 257 A.D.2d 509
[99] 57 A.D.3d at 361
[100] 281 A.D.2d 259
[101] N.Y.L.J., Jan. 27, 1999, p. 27, (col. 6)

conditioning Ms. Matos's continued occupancy on Mr. Hernandez's permanent exclusion. The two isolated incidents at issue do not show any pattern of behavior, and at least one of the charges did not even occur on project grounds. Mr. Hernandez is the anchor of this small family, and his permanent exclusion would be devastating to his elderly mother and young son. Mr. Hernandez is a positive addition to the community at large, as evidenced by the support from the project's Residents Council and his neighbors.

Given the devastating effect that forcing Mr. Hernandez out of the household would have for his mother and son; given the support shown to Mr. Hernandez by his immediate community; given that there has never been a finding that Mr. Hernandez presents any risk to his neighbors, and the utter failure of NYCHA to present any testimony or evidence to support such a finding, NYCHA's decision to condition Ms. Matos's continued occupancy on Mr. Hernandez's permanent exclusion from the household is clearly disproportionate and must be reversed.

III. THE LOWER COURT ERRED IN FAILING TO FIND THAT PERMANENT EXCLUSION IS DISPROPORTIONATE WHEN IMPOSED PURELY AS A PUNITIVE MEASURE AND NOT TO PROTECT THE COMMUNITY FROM ANY DANGER

In denying Ms. Matos's petition, the lower court found that "sanctions that exclude and remove a dangerous member of the household while preserving the

tenancy for the tenant and the rest of the family do not shock the court's sense of fairness nor shock the conscious [sic]" and that "the Housing Authority's exclusion of those who pose a danger has a deterrent effect."[102] But the standard articulated by the lower court is misapplied here – in the underlying administrative determination, the hearing officer never made *any* finding that Mr. Hernandez poses a danger or otherwise threatens the safety of other Housing Authority residents.[103]

The hearing officer did not base his determination of permanent exclusion on any finding or evidence that Mr. Hernandez was dangerous, but instead on his belief that some sort of punishment was deserved – or, as articulated in the decision, that the convictions by plea "require serious sanction."[104] But these termination of tenancy proceedings are not intended to be, nor should they be allowed to function as, purely punitive mechanisms against Housing Authority residents and their household members. They are instead vehicles to ensure the Housing Authority's obligation to provide a safe environment for all public housing residents.

This principle is reflected in the NYCHA Termination of Tenancy Procedures, which provides for a finding of "probation" where the conduct is

[102] A242
[103] A44-46
[104] A46

found to have been cured and is not expected to recur.[105] By definition, where otherwise nondesirable behavior is not likely to recur, there is little concern for risk to other residents and employees. In that context, imposing sanction greater than probation can be nothing other than a purely punitive measure – one that the Procedures aim to avoid. This is also illustrated throughout the case law regarding termination of tenancy and permanent exclusion. In upholding termination in Featherstone v. Franco, the Court of Appeals focused on the tenant's refusal to exclude her son from the household, where the "administrative record contains substantial evidence establishing that petitioner's son was violent and represented a potential danger to the safety of other residents in the housing project."[106] By contrast, when the court found exclusion to be disproportionate in Powell, it focused on the aberrant nature of the son's behavior – the implication being that it was unlikely to recur, and therefore the son did not pose a continued risk to other residents.[107] Similarly, in Peoples,[108] the court reversed hearing officer's recommendation of termination of tenancy, even while acknowledging that the tenant had engaged in "a very serious breach" of NYCHA's rules. Again, inherent in the court's decision is a presumption that the behavior was not expected to recur,

[105] NYCHA Termination of Tenancy Procedures at ¶ 14(a)
[106] 95 N.Y.2d 550
[107] 257 A.D.2d 509
[108] 281 A.D.2d 259

and that therefore allowing the tenant to remain did not present an increased risk to her public housing community.

In this case, it is clear that permanent exclusion was imposed as a purely punitive measure – the hearing officer essentially says as much in his determination. NYCHA never provided any testimony or evidence, nor did the hearing officer ever make any finding, that Mr. Hernandez poses any risk to Housing Authority tenants or employees. By contrast, Ms. Matos presented testimony and evidence that Mr. Hernandez is not a threat and that he is a contributing member of the community. The hearing officer's determination to exclude Mr. Hernandez from the premises was therefore solely punitive, not preventative, and under the circumstances is disproportionate and an abuse of discretion as a matter of law.

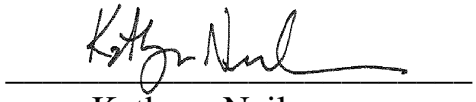
CONCLUSION

NYCHA's determination to condition Ms. Matos's continued occupancy on the permanent exclusion of her son, Edwin Hernandez, should be reversed as it is disproportionate under the circumstances. The mitigating factors, including the length of Mr. Hernandez's occupancy in the apartment, his elderly mother and minor son's reliance on him for daily care, the isolated nature of these aberrant incidents, and his support from the community, weigh against a finding that the

tenancy can be maintained only through the permanent exclusion of Mr. Hernandez from the apartment. NYCHA failed to offer anything to contradict the evidence and testimony presented in support of Mr. Hernandez. And finally, the hearing officer made no finding, and NYCHA presented no evidence or testimony, that Mr. Hernandez was or is now a risk to his community.

In addition, as a result of the hearing officer's failure to make findings of fact and make a full assessment of all evidence, testimony and mitigating factors, the decision violates HUD regulations, NYCHA's appeal procedures and due process, and must be reversed.

Dated: May 11, 2010



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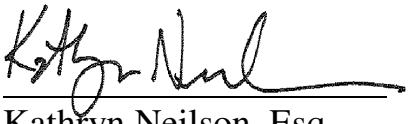

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STATEMENT PURSUANT TO CPLR 5531

1) The Index Number of the case below is 402704/2008

2) The full names of the parties below are Juanita Matos, Petitioner, and Tino Hernandez, as Chairman of the New York City Housing Authority, and The New York City Housing Authority, Respondents. The only change in the parties is that John B. Rhea has replaced Tino Hernandez as Chairman of the New York City Housing Authority.

3) The proceeding was commenced in the Supreme Court of the State of New York, New York County.

4) The proceeding was commenced on or about November 7, 2008, by service and filing of a Notice of Petition and Verified Petition. A Verified Answer was served on or about March 13, 2009.

5) The proceeding was brought pursuant to Article 78 of the New York Civil Practice Law and Rules, seeking reversal of an administrative determination conditioning petitioner-appellant's continued occupancy in her public housing apartment on the permanent exclusion of her son.

6) After assignment to the Hon. Walter B. Tolub, and upon consideration of all papers submitted, Justice Tolub issued a judgment denying the petition. The judgment was filed June 11, 2009.

7) This appeal is being made using the Appendix Method.

Dated: May 12, 2010
Bronx, New York

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