

Index No. 25173/00

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To be argued by
Lia Pascale

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

In the Matter of the Application of
ADELINE PADILLA,

Petitioner-Appellant,

-against-

JOHN G. MARTINEZ, as Chairman of the
NEW YORK HOUSNG AUTHORITY and
Hearing Officer Judith Payne of the New York
City Housing Authority,

Respondent-Respondent,

For a Jud-ment Pursuant to Article 75
Of the Civil Practice law and Rules.

PETITION-NEIi-~~PEiL*~NT.S BRIEF

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

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In the Matter of the Application of

ADELINE PADILLA,

Petitioner-Appellant.

-against-

John G. Martinez, as Chairman of the
NEW YORK CITY HOUSING AUTHORITY,

Respondent-Respondent.

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

PRELIMINARY STATEMENT

This proceeding, commenced by petitioner Adeline Padilla, challenges the administrative determination of respondent John G. Martinez, as chair, New York City Housing Authority ("Housing Authority") terminating petitioner's tenancy based upon non-desirability. The matter was transferred to the Appellate Division on the issue of substantial evidence. In seeking a judgment annulling the administrative determination, Ms. Padilla alleges that the decision to terminate her tenancy is not supported by substantial evidence. She also alleges that respondent acted arbitrarily and capriciously and in error of law, and abused its discretion by imposing the ultimate sanction of termination of tenancy.

Petitioner Adeline Padilla is a recipient of Supplemental

Security Income (SSI) due to a learning disability. She is illiterate and she appeared at the termination hearing alone, without representation. Her tenancy was terminated based on one incident which occurred nearly three years prior to the hearing. The incident involved an altercation between the petitioner and the assistant housing manager. Petitioner admits the altercation however she disputes that she initiated the confrontation.

Petitioner Padilla has a long history of psychiatric treatment. At the time of the hearing, however, she was not under treatment because of the death of her treating psychiatrist. She subsequently sought and is now receiving treatment and medication for her psychiatric condition. She has resided in the Forest Houses Project for ten years, and the Housing Authority was aware that she received SSI for a mental disability.

The hearing to terminate the tenancy was adjourned no less than three times by the Housing Authority, never at petitioner's request, and was not held until nearly three years after the alleged incident. Yet, petitioner's request for an adjournment during the course of the hearing in order to retain an attorney was ignored.

At the hearing, the Housing Authority failed to produce the only witness to the altercation. Additionally, the petitioner was asked about incidents not specified in the charges, which

occurred prior to the specified incident.

The Hearing Officer's decision recommending termination was based on petitioner's demeanor at the hearing as well as her admission that she had assaulted the assistant manager. The decision does not consider petitioner's mental impairment as a mitigating factor for her actions, nor does it take into account the possibility of treatment and cure in order to prevent eviction. Now, petitioner is at risk of losing her Housing Authority apartment where she resides with three children. She is also the mother of a severely retarded, paraplegic, twelve year old son, who is presently in an occupational home, but is permitted to visit with his mother and family on weekends and holidays. Eviction would likely result in the termination of her son's home visits.

Petitioner has been involved in no incidents whatsoever since the alleged misconduct nearly four years ago. She has a good relationship with the current management of the project. She is receiving psychiatric treatment and is taking medication to prevent depression and psychosis. She presents no threat to the Housing Authority, its employees and tenants. Any offensive conduct has been cured and she is being unduly punished for one incident which occurred over four years ago.

QUESTIONS PRESENTED

Did the Housing Authority fail to follow federally mandated

procedures which require that a tenant with a mental disability be referred to social services to ensure representation at a termination hearing?

Did the Housing Authority violate petitioner's due process rights at the hearing?

Was the Housing Officer's determination supported by substantial evidence?

Is the sanction of termination of tenancy a sanction so disproportionate as to "shock one's sense of fairness".

STATEMENT OF FACTS

Ms. Padilla has lived in the subject Housing Authority Forest House Project for ten years.(R. 9 para. 1, R.253)¹ She is illiterate in English and Spanish (R. 11 para. 13), collects SSI for a learning disability (R. 9 para.2) and resides with her three children (R. 9 para.3). The family receives public assistance. Her fourth child Angel Padilla, suffers from cerebral palsy, is profoundly mentally retarded, non-verbal and wheelchair-bound. (R. 9 para 3). He is totally dependent on others for all daily living skills including eating, toileting and bathing. He is cared for in an occupational home. However he is permitted to go home over holidays, weekends, and during the

¹ "R. ^U refers to the page number of the record on appeal where the supporting testimcnv. nleadings and exhibits can be found.

summer months. The visits are vital to the family and are a source of cohesion for the family. Ms. Padilla is an involved parent who is always willing to care for her son during visits and due to the extensive involvement, love and care provided during his visits. It was urged by Angel's treating therapist that Ms. Padilla should be afforded every opportunity to remain in her current apartment. (R.23)

On Oct. 28, 1997, Ms. Padilla went to the Management Office of her Housing Authority Project because she believed that rent checks issued directly to the Housing Authority for her family by Department of Social Services were being stolen. She believed that the problem was part of a widespread Housing Authority problem which had been reported in the media and involved the ~~la~~^{theft} of millions of dollars. She felt that the stolen checks resulted in her being served with numerous non-payment petitions, or "dispossesses" which she was required to defend against in housing court.(R. 233-236) When she went to the management office she was speaking loudly and was very upset. She went into Housing Assistant Ms. Brenda William's office. The assistant manager, Ms. Marlene Larrier, then came out of her office and went to Ms. Williams' office.(CR.237)

According to Ms. Padilla, Ms. Larrier told Ms. Williams "to get up from the room, that she's gcinc tc fix this" and then Ms. Larrier smacked Ms. Padilla at which point Ms. Padilla hit

Ms. Larrier back.(R. 238) According to Ms. Larrier, Ms. Larrier asked Ms. Williams to come out because she feared for Ms. Williams' safety (R. 124). She further stated, "Brenda came out. She left the room. After Brenda left the room, Ms. Padilla continued to shout and scream, and I started to back out of the room. As I got in line with the door, my secretary Kathy Brown, she passed behind me, she said something to me, and I looked back to ask her what she had said. When I turn around again, that's when Ms. Padilla punched me in my face."(R. 136-1373

Ms. Larrier retreated to her office, and Ms. Padilla tore a wall clock off of the wall and threw the clock through the glass window on Ms. Larrier's door. The clock did not hit Ms. Larrier. Soon after, the police arrived, and Ms. Padilla was arrested. (R.240-241, 146) She pled guilty to disorderly conduct and served 60 days of community service.(R.230-232)

On or about Sept. 10, 1998, nearly one year after the incident, the Housing Authority commenced termination of tenancy proceedings based on the incident of Oct. 28, 1997.(R.33-35) The Specification of Charges alleged non-desirability and breach of rules and regulations in that Petitioner Padilla physically and verbally assaulted Marlene Larrer [sic] on or about Oct. 28, 1997. It further alleged that by virtue of the alleged incident, Ms. Padilla's continued occupancy constituted a danger to the health and safety of her neighbors, as well as a danger to the

employees, premises or property of the Housing Authority. (R. 35). No other incidents were alleged. A hearing was scheduled for Oct. 28, 1998. The hearing was subsequently adjourned no less than three times, and never at Ms. Padilla's request. (R.30-32) Each of these times, Ms. Padilla went from her home in the Bronx to Manhattan for the hearing, only to be told that it was being adjourned (R.10 para. 6). The hearing was finally commenced on Aug. 29, 2000, nearly three years after the incident of Sept. 27, 1997.(R. 98) Injuring Ms. Larrier's testimony, Ms. Padilia was agitated and upset, because she believed Ms. Larrier was lying. (R. 122). Following Ms. Larrier's testimony, but prior to her own, Ms. Padilla stated that she would like to retain an attorney.(R. 179) The Hearing Officer stated that there had to be an adjournment for the day anyway because Ms. Padilla's children were downstairs and told Ms. Padilla she would have to start looking immediately to find an attorney because it might take some time. (R. 181-182). The Housing Attorney suggested September 13, and Ms. Padilla said that she could not come on September 13. The Housing Attorney asked, 'You can't come back Sept. 13?' to which Ms. Padilla replied, "No, Ma'am. September 13 is a school day. If you want to do it tomorrow, then we do it tomorrow... I want to finish with this already." (R. 182) The Hearing Officer then suggested that the following day would be a long, busy day. The following discussion ensued:

MS. PAYNE: Well, she wants it tomorrow, she wants--
MS. PADILLA: If you want to do it in October, I cannot in
September, ma'am. My son is a handicap. They
give him -
MS. PADILLA: Yes, please, because I can't, not with him a
handicap
MS. PAYNE: Yeah.
MS. PADILLA: -the vacation, that's-
HEARING OFFICER: We could do -
MS. PADILLA: -they don't stay-
HEARING OFFICER: -it tomorrow afternoon, or we can do it
in October.
MS. PAYNE: We can do it tomorrow afternoon. Do you want
to make it 1:00 o'clock?
HEARING OFFICER: 2:00 o'clock?
MS. PAYNE: 2:00 o'clock?
MS. PADILLA: 2:00 o'clock, yeah, because his lunch is
2:00 o'clock.

(~~85-186)

At adjourned hearing, Ms. Padilla admitted that she hit Ms. Larrier. She stated however that Ms. Larrier hit her first. (R. 241). She testified that she was angry and upset because of "the problem of the check, getting all the dispossess, going through that, they saying I'm going to lose my apartment, you know, that handicap he got CP. I have to get up at 4:00 in the morning everyday. He's 11 years old. I have to change his pampers, I have to feed him. Everything -" (R. 242). She further testified that she told Ms. Williams, in the housing office, "Ms. Williams, I'm tired of this. I have to - my son come, I have to go at 5:00 in the morning, I have to be in Court, in Court at 9:00 in the morning, and we always there till 5 o'clock. I have to pick my son up, you understand?" (R. 243). She was also upset that her tenant record was being marred by numerous twenty-

five dollar charges for the numerous non-payment court proceedings in spite of the fact that her rent **was** supposed to be sent directly to the landlord by Department of Social Services (R. 235). During the hearing, Ms. Padilla was agitated and confused. She constantly interrupted Ms. Larrier (R.119-124), at one point crying (R. 124) only to be admonished by the Hearing Officer to control herself (R. 125). At the hearing, Ms. Padilla testified that she was upset that the case had been going on for so long. She also testified that she had problems with the Bloods street gang who had assaulted her six year old son.(R. 176)

Regarding the incident of Oct. 28, 1997, Ms. Padilla testified that she had lived in the premises for nine years, "and since that happened, I never had problem after that."(R. 253)
The following line of questioning by the hearing officer ensued:

HEARING OFFICER: So you never-never had a problem with the Project Management before--

MS. PADILLA: No.

HEARING OFFICER: -- or after?

MS. PADILLA: Ms. Martinez, the Manager, the -- she's -- she's nice, and all of them now is nice there, because everybody's new there.

HEARING OFFICER: Well, but I'm reminding you that my question was-: tthink you said you never had a problem before or after, except this particular incident--

MS. PADILLA: With the lady, yeah.

HEARING OFFICER: -in October of '98.

MS. PADILLA: '97.

HEARING OFFICER: Right. ,

MS. PADILLA: Yeah.

ZGZZiNG OFFiCE : TIiZAY< YLU .

MS. PADILLA: Yes Ma'am.
HEARING OFFICER: Is that right--
MS. PADILLA: YES.
HEARING OFFICER: -you never had any problem?
MS. PADILLA: Yes, I never.
HEARING OFFICER: Okay.
MS. PADILLA: No, I never have problems--
HEARING OFFICER: Anything--
MS. PADILLA: -there.
HEARING OFFICER: -else you want to tell me?
MS. PADILLA: No, that's it.

(R.253-254)

The housing attorney, Judith Payne, then asked Ms. Padilla about another incident wherein Ms. Padilla allegedly hit another tenant. She then asked Ms. Padilla, "In fact, we get a lot of complaints about you hitting other people. Do they all hit you first; How many people have you hit first?" She then asked "Isn't it a fact that you've come into the Management Office and been very loud and disorderly in the past?" (Ii. 255-256)

The Housing Attorney and the Hearing Officer then questioned her about the reason she received SSI. Ms. Padilla testified that she received SSI for "mentally - I don't know how to read and write". (R. 258) The NYCHA attorney cross-examined "Isn't it because you can't control your temper (R. 258)" The Housing Attorney asked her if she'd ever gone to an anger management psychotherapist, if she'd ever gone to Dr. Horace Batser, and if she ever went to the Occupational Hygiene Center in Manhattan.(R 259) When the Hearing Officer asked if Ms. Padilla saw a psychiatrist or some other professional, Ms. Padilla testified

"No, not no more ma'amu... "She died".(R. 258-259) The hearing officer then told Ms. Padilla, "I'm thinking that you have a problem controlling your temper, and if you were seeking help, and have been trying to do something, like take medication for it - that could make a difference". (R. 260) The Hearing Officer did not explore whether Ms. Padilla had been under treatment at the time of the incident with Ms. Larrier.

After Ms. Larrier's testimony, the Housing Attorney stated that the Housing Assistant, Brenda Williams would not be testifying, but that the secretary Kathy Brown, would testify. CR. 208) When Ms. Padilla stated that she expected Ms. Williams to be at the hearing and asked why she was not present, the hearing officer stated that she had the same question-CR. 209) Ms. Padilla stated, "I was expecting Ms. Williams was here, because the secretary was inside the - her office when that happened, her secretary."(R.209)

'You understand, Ms. Williams was there while everything that happened, the fighting and everything, Ms. Williams was there.

"Why Ms. Williams was not here?" CR. 209)

A conversation was then held off the record, at Ms. Payne's request. Back on the record, the hearing officer stated that Ms. Payne had explained why Ms. Williams would not be called as a witness, "and essentially, Brenda Williams, according to Ms. Payne, didn't witness anything because she was asked to leave by

Ms. Larrier, and then did, in fact, not return, but go downstairs..." (R. 210).

Ms. Kathy Brown, the secretary, later testified that on October 28, 1997, Ms. Padilla came in to see Ms. Williams, and that Ms. Padilla was upset and there was a lot of yelling. Ms. Brown testified that she, Ms. Brown, was in Ms. Larrier's office at the time. Ms. Larrier then got up from her desk and went to Ms. William's office to see what was wrong. Ms. Brown testified that she (Ms. Brown) then got up from her desk, and ran straight down the hallway to call the police.(R. 215-217) She stated that she did so because "...when incidents like that occur, when tenants come in the office upset like that, that's the natural thing for me to do is go - cause you never know what's going to happen."(R. 217) When she came back, she saw petitioner pulling the clock off of the wall and throwing it.(R. 218) She did not testify that she heard Ms. Larrier ask Ms. Williams to leave the room, nor did the Hearing Officer ask her any questions about whether Ms. Williams was present to witness the altercation.

On September 20, 2000, the hearing officer issued a decision recommending termination of the tenancy. (R.27) She cited the fact that Ms. Padilla admitted to striking Ms. Larrier . The decision observed that Ms. Padilla "fairly trembled with hostility throughout the hearing. Her generalized intense antagonism seemed sometimes to obstruct her ability to tell the

truth. Ms. Larrier, on the hand [sic], was mild-mannered, gracious and open." The decision also cited Ms. Padilla's testimony on cross-examination wherein she did not deny hitting other tenants. The decision also indicated that Ms. Williams was undergoing a problematic pregnancy and therefore unable to testify. The decision concluded that the Housing Authority "is obligated to protect its tenants and employees, and that nothing in the record could serve to mitigate the requested disposition."

Ms. Padilla subsequently sought, and is now receiving psychiatric treatment and medication for psychosis and depression (R.287 para. 7, R. 289, 290, 291)

ARGUMENT

Point I

THE HOUSING AUTHORITY FAILED TO FOLLOW FEDERALLY MANDATED PROCEDURES WHICH REQUIRED THAT MS.PADILLA BE REFERRED TO SOCIAL SERVICES FOR EVALUATION PRIOR TO COMMENCEMENT OF EVICTION PROCEEDINGS.

The New York City Housing Authority is a federally funded entity which must comply with requirements of federal law. When the Housing Authority seeks to administratively terminate the tenancy of, or initiate eviction proceedings against, a tenant with mental disabilities, it must follow special policies and procedures designed to afford them adequate procedural safeguards and reasonable accommodation of their mental disabilities. Blatch v. Franco, 1998 WL 265132 (S.D.N.Y. May 26, 1998).

Thus, when the Housing Authority is aware that a tenant is mentally disabled, it must seek an evaluation prior to commencement of termination of tenancy proceedings. If during the course of the hearing, it becomes evident that the tenant is mentally disabled or incapable of representing him or herself, then the Hearing Officer must terminate the proceeding and adjourn the hearing pending an evaluation.

The procedural safeguards designed to prevent a person with a mental disability from appearing at a termination proceeding unrepresented are explained in Blatch v. France.

"When the Housing Authority seeks to administratively terminate the tenancy of a tenant whom it suspects is mentally disabled, it must first refer the tenant to the Housing Authority Social Services Division for evaluation. If the tenant is evaluated as possibly mentally incapacitated, the Housing Authority is then required to refer the tenant to the Protective Services for Adults ("PSA") of the Human Resources Administration of the City of New York ("HRA"). Pursuant to a Memorandum of Understanding entered into between the Housing Authority and HRA in January of 1995, when seeking to terminate the tenancy of a tenant with a known mental disability, the Housing Authority's Department of Resident Review and Counselling automatically refers the tenant to PSA prior to the institution of administrative proceedings against the tenant. The tenant's administrative hearing will not commence until PSA indicates either that the tenant is not eligible for protective services under its guidelines, or that appropriate arrangements have been made for appointment of a guardian and/or representative for the tenant."...

"If, however, during the course of a hearing, a tenant appears to be incapable of adequately defending his or her rights, and is unrepresented, the hearing officer should terminate the proceeding, adjourn the hearing, and refer the matter to the Hearing Officer for a hearing on the appointment of a guardian and/or representative for the tenant."...

Operation Services Tenancy Administration Division ("OSTA") for a prompt evaluation of the tenant. OSTA then determines whether the tenant requires referral to PSA. The termination hearing is not to recommence until PSA determines either that the tenant is not eligible for protective services, or arrangements have been made for the appointment of a guardian or representative for the tenant."

Blatch, 1998 WL 265132, at *2.

The Housing Authority was aware during the hearing that Ms. Padilla suffered from a mental disability. At the hearing, Ms. Padilla testified that she received SSI for "mentally - I don't know how to read and write." She also testified that she had been under previous psychiatric treatment, but that she was not currently being treated because her psychiatrist had died. (R. 258-259) These facts gave ample notice to the Hearing Officer that Ms. Padilla suffered from a mental disability. The fact that Ms. Padilla was receiving SSI conclusively established that she was disabled; and the fact that she was under treatment by a psychiatrist, together with her own testimony that the SSI was for a mental condition, clearly indicated that her condition involved a mental disability. That Ms. Padilla was unable to read or write further corroborated that fact. Thus, under the Blatch procedure, the Housing Authority was required to refer the tenant to PSA prior to the institution of termination of tenancy proceedings.

The Housing Authority attorney's line of questioning

underscores the Housing Authority's knowledge that Ms. Padilla suffered from a mental disability. Her questions about whether Ms. Padilla had gone to an anger management psychotherapist, whether she had seen a Dr. Horace Baxter, and whether she had been to the Occupational Hygiene Center on Mc Graw Hill Place in Manhattan (R.259), indicate that the Housing Authority had knowledge and information that Ms. Padilla suffered from a mental problem even if she was not under treatment at the time of the hearing.

The Hearing Officer's decision rests in large part on the tenant's demeanor at the hearing. However, even a casual observer would have noted that her agitated behavior at the hearing might be attributed to a lapse in psychiatric care.

It is clear from its line of questioning that the Housing Authority was aware, prior to commencement of the hearing, that Ms. Padilla received SSI for a mental disability. Accordingly, she should have been referred to PSA prior to commencement of eviction proceedings. Even if the Housing Authority was unaware, prior to commencement of the hearing, of Ms. Padilla's mental disability it was evident from Ms. Padilla's testimony, from her demeanor, and from the Housing Authority's interrogation, that Ms. Padilla suffered from a mental disability. Once these aspects of the hearing unfolded the Hearing Officer was obligated to terminate the proceeding and adjourn it in order for Ms. Padilla

to be evaluated. See Blatch, 1998 WL 265132, at *2,

"If, however, during the course of a hearing, a tenant appears to be incapable of adequately defending his or her rights, and is unrepresented, the hearing officer should terminate the proceeding, adjourn the hearing, and refer the matter to the Housing Authority's Operation Services Tenancy Administration Division ("OSTA") for a prompt evaluation of the tenant".

The fact that Ms. Padilla asked for an attorney during the course of the hearing (R. 179) only compounds the hearing officer's error in failing to terminate the hearing in order to evaluate the tenant and determine if representation was required.

Had the Housing Authority complied with the mandated guidelines, the hearing would not have been held without an evaluation; at the very least, the hearing should have been terminated in order to conduct an evaluation. The Housing Authority entirely failed to follow its own federally mandated procedures which are intended to protect mentally disabled tenants - yet still seeks to evict this tenant. This was a material failure that would have affected the outcome of the hearing.

The Hearing Officer clearly stated that if she were being treated, it might make a difference. (R. 260) Ironically, because Ms. Padilla was not being treated at the time of the hearing - due to the death of her psychiatrist - the Housing Authority seeks to evict. The Housing Authority's determination is arbitrary and capricious, and incorrect as a matter of law.

POINT II

PETITIONER WAS DEPRIVED OF DUE PROCESS AT THE HEARING.

1. The Hearing Officer and the Housing Attorney improperly interrogated Ms. Padilla about prior incidents not contained in the Specification of Charges.

The specification of charges against Ms. Padilla specify one, and only one incident - the assault on Ms. Larrier on October 28, 1997. Yet during the course of the hearing the Hearing Officer improperly elicited and mischaracterized Ms. Padilla's testimony, and permitted the Housing Authority Attorney to cross-examine Ms. Padilla on prior incidents, not specified in the charges.

(R. 253-255) Her improperly elicited testimony was then cited in the Hearing Officer's decision, "On cross-examination tenant did not deny that on several occasions she has physically attacked other tenants".(R.27-29)

Ms. Padilla testified \\ I live there for nine years, and since that happened, I never had problem after that." The Hearing Officer then mischaracterized her testimony and stated, 'Well, but I'm reminding you that my question was - I think that you said you never had a problem before or after, except this particular incident-" to which Ms. Padilla replied "With the lady, yeah." (R. 253).

The Hearing Officer's questions and subsequent line of questioning by the Housing Attorney were improper since they

concerned previous incidents not contained in the specification of charges. Any attorney would have objected to this line of questioning, and had she been represented, her attorney would have instructed her not to answer. However, Ms. Padilla, an illiterate tenant with a learning disability - who had even requested time to retain an attorney ⁷ and most likely would have been represented if the Housing Authority had properly evaluated her - did not have the cognitive means of defending herself against this line of questioning.

At a Housing Authority hearing, due process requires that the tenant be given sufficient notice prior to the hearing to insure that the tenant is adequately informed of the nature of the evidence against him so that he can effectively rebut that evidence. Escalera v. New York City Housins Authority, 425 F.2d 853, 863 (2d Cir.), cert. denied, 400 U.S. 853 (1970). Ms. Padilla had no notice that the Housing Authority intended to interrogate her about previous incidents which were not specified in the charges against her. She was therefore not given the opportunity to adequately prepare and bring witnesses as to any other incidents. The Hearing Officer's decision is based on evidence obtained through a violation of the tenant's due process rights and should not be considered. Such testimony should not have been permitted, and to the extent that the Decision is based on that testimony, it is unsupported by the evidence.

2. The Housing Authority failed to produce Brenda Williams as a witness at the hearing.

Though the termination proceeding was adjourned by the Housing Authority for nearly two years, on the day the case finally went forward, the Housing Authority failed to produce Ms. Brenda Williams, a key witness to the altercation. The incident had indeed taken place in Ms. Williams' office.

Even the Hearing Officer was surprised that Ms. Williams did not appear to testify.(R. 209j) When she asked the Housing Attorney why Ms. Williams was not present, a conversation was had off the record. Back on the record, the Hearing Officer stated that according to the Housing Attorney, Ms. Williams did not witness anything because she went downstairs after she left the room.(R. 210) Ms. Larrier's testimony, however, only indicated that she called Ms. Williams out of the room, not that she went downstairs. (R.124, 136) The Hearing Officer accepted the explanation, and proceeded with the hearing. Her decision indicates that Ms. Williams did not appear due to a problematic pregnancy. There is no indication from the transcript that Ms. Williams was pregnant.

Under Escalera v. New York City Housina Authority a tenant is entitled to a hearing before an impartial helring officer prior to eviction. Furthermore, due process requires an opportunity to confront and cross-examine adverse witnesses. Escalera, 425 F.2d

at 862.

The Housing Authority's failure to produce Ms. Williams on the day of the hearing, and to permit Ms. Padilla to cross-examine her, deprived Ms. Padilla of due process requirements. The fact that the Hearing Officer had a conversation off the record, at the request of the Housing Attorney in order to discuss Ms. Williams's absence renders her absence suspect.

The Housing Authority had already adjourned the hearing for nearly two years. Despite Ms. Padilla's insistence that Ms. Williams was present at the altercation (R. 209) the Hearing Officer failed to provide Ms. Padilla with any means to confront and examine Ms. Williams. Pregnancy would cause a finite period of unavailability. Presumably, if in fact Ms. Williams was pregnant, she should have been able to testify shortly thereafter, and the hearing officer should have explored Ms. Williams's imminent availability. The Housing Authority's two year delay in proceeding with the hearing resulted in severe prejudice to the petitioner - the absence of a critical witness whom Ms. Padilla should have been permitted to cross-examine.

Furthermore, Ms. Kathy Brown's testimony did not indicate that Ms. Williams was not present to witness the altercation, and in that respect, contradicts Ms. Larrier's testimony that Ms. Williams did not witness anything.

The Housing Authority's delay as well as its failure to hold

the hearing at a time when a crucial witness was able to testify deprived Ms. Padilla of due process.

POINT III

THE DECISION TO TERMINATE THE TENANCY IS ARBITRARY AND CAPRICIOUS AND UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

At the outset, the Housing Authority's failure to afford petitioner due process, as set forth above, renders the Hearing Officer's decision unsupported by the evidence. Additionally, the decision to terminate is further unsupported by the evidence as set forth below.

1. The Hearing Officer failed to consider that Ms. Padilla was involved in no subsequent incidents.

The Housing Authority's specification of charges against Ms. Padilla alleges that Ms. Padilla's continued occupancy constitutes a danger to the health and safety of tenants and employees of the premises. (R. 35) This charge undermines the Hearing Officer's suggestion that if Ms. Padilla were under treatment it would make a difference in the determination.

Furthermore, the charges alleged no other incident, apart from the altercation of October 28, 1997. There was no testimony at the hearing of August 29, 2000 - nearly three years after the alleged incident - that Ms. Padilla had been involved in any subsequent misconduct or engaged in any undesirable behavior. In fact she now receives treatment, (R. 287, para. 7, R. 289-191) and the absence of subsequent incidents indicates that any offensi-"-e

behavior has been cured. In fact, a number of her neighbors have petitioned the Housing Authority to stop her eviction CR. 24, R. 21-22) The Hearing Officer's decision fails to acknowledge that there was no testimony of subsequent undesirable behavior.

Paragraph 9 of the Housing Authority Grievance Procedures (R. 63) requires that the Hearing Officer's decision include findings as to whether the charges have been proven. The Housing Authority failed to show that petitioner was a continued threat to the safety of others. Proof of this element of the charges was necessary in order to support a decision to terminate.

Accordingly, the decision to terminate for the continued safety of the Housing Authority tenants and employees is unsupported by the evidence.

2. The Housing Authority failed to recognize Ms. Padilla's mental disability as a Mitigating Factor.

Despite Ms. Padilla's testimony that she received SSI for a mental disability (R.258) and that she had been under psychiatric care up until the death of her psychiatrist (R.258), the Hearing Officer failed to recognize that Ms. Padilla's mental state should serve to mitigate her behavior. The Hearing Officer ignored that Ms. Padilla was suffering from a lapse in treatment and that her behavior most likely was a result of her untreated mental impairment. Ms. Padilla's lapse in care was not of her own doing, but was due to circumstances beyond her control - the

death of her physician.

The Hearing Officer fully ignored that Ms. Padilla was previously treated. She failed to explore the nature of her condition, or obtain a more precise explanation of her disability. It would have been reasonable for her to recognize that based on Ms. Padilla's description of her disability ("...mentally - I don't know how to read and write".(R.258)), that the disability may have been the underlying reason for her behavior. She should have also recognized that the disability rendered her incapable to proceed without an attorney. She concluded, in effect, that if Ms. Padilla were under treatment her actions might be excused, but, because she was not being treated, there was no excuse for her actions. The Housing Authority thus cites Ms. Padilla's mental disturbance as a reason to terminate her tenancy without first ensuring that she was afforded the due process her mental disability legally required.

Paragraph 5 of the Housing Authority Grievance Procedures - Grounds for Termination of Tenancy state that the Hearing Officer shall be liberal in granting reasonable adjournments. (R.63, ppg.5) In Brown v. Poolizio, 166 A.D.2d 44, 569 N.Y.S.2d 615 (1st Dept. 1991) the court found that the Hearing Officer's refusal to grant the tenant an adjournment to retain counsel, coupled with the Housing Authority's counsel's misrepresentation regarding the tenant's ability to secure counsel, were tantamount

to arbitrary and capricious behavior which effectively eviscerated the tenant's due process right to confront and cross-examine the opposing witnesses and to present evidence in support of her case. The court stated:

"Petitioner's intimidation by, and capitulation to, the proceedings are readily apparent from the record and rendered the hearing completely one-sided." The minimum procedural requirements of Due Process under the Fourteenth Amendment must reflect the balance between the government's interest in efficient administration and the nature of the individual's interest being affected by governmental action" (Citing Escalera at 867.)

Similarly, Ms. Padilla capitulated to a perceived pressure to go forward, even without counsel. On the one hand, she expressly states that she wished to retain an attorney; on the other hand, she agrees to continue the hearing the following day (when there clearly would not have been time to secure counsel). Her sense of intimidation and confusion at the process, as well as her sense of being overwhelmed by her necessity to reconcile her family obligations with her desire to protect her own interests at the hearing, are clear from her statements on the record. (R. 180-186). (R. 180-186)

POINT IV

THE ULTIMATE SANCTION OF TERMINATION OF TENANCY
CONSTITUTES AN ERROR OF LAW IS ARBITRARY AND CAPRICIOUS
AND IS AN ABUSE OF DISCRETION.

In a non-desirability proceeding where the Housing Authority

has proven its case, the Hearing Officer may make any of the following dispositions:

- 1) Termination of Tenancy;
- 2) Probation;
- 3) Continued eligibility to reside in Project subject to exclusion of one or more persons in the household;
- 4) Continued eligibility to reside in Project; or
- 5) Continued eligibility to reside in Project with a referral to the New York City Department of Social Services.

Brown v. Poolizio, 569 N.Y.S. 2d at 622.

It is well settled that an administrative termination of a Housing Authority tenancy should not be punitive or disproportionate to the wrong committed. *Id.* Thus, even if this court were to find that the decision to terminate Ms. Padilla's tenancy was based on substantial evidence, termination of Ms. Padilla's tenancy under the circumstances would be so disproportionate a penalty as to shock one's sense of fairness.

Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 356 N.Y.S.2d 833 (1974). James v. New York City Housing Authority, 186 A.D.2d, 589 N.Y.S.2d 331 (1st Dept. 1992); Winn v. Brown, 226 A.D.2d 191, 640 N.Y.S.2d 527 (1st Dept. 1996) Soand v. France, 242 A.D.2d 210, 663 N.Y.S.2d 813 (1st Dept. 1997), Varsas v. France, 238 A.D.2d 274, 656 N.Y.S.2d (1st Dept. 1997); Peooles v. New York City Housins Authority, 281 A.D.2d 259, 723 N.Y.S.2d 6 (1st Dept.

2001).

In Milton v. Christian, 99 A.D.2d 984, 473 N.Y.S.2d 194 (1st Dept. 1984), the tenant was involved in three separate altercations with Housing Authority employees over an eight month period and his tenancy was terminated. The court held that the penalty of terminating a 16 year tenancy was disproportionate, considering that the tenant was "undergoing an extremely stressful period in his life including a work-related accident causing him to lose his employment, severe indebtedness, and the abandonment by his wife, who took his daughter." Id. at 473 N.Y.S. 2d at 196.

In James v. New York City Housing Authority, supra, the tenant had resided in a Housing Authority apartment for approximately one and one-half years when she was arrested for setting a fire in her apartment. Approximately two years later the Housing Authority commenced proceedings to terminate the tenancy based on the fire incident, and the tenancy was terminated on the ground of non-desirability. The court found that although the tenant may have been a danger to other tenants at the time of the fire, any concern should have dissipated by the time the hearing officer rendered his decision nearly four years after the incident. Additionally, there had been no other reported incidents involving the tenant since the time of the fire and although questions about the tenant's mental state

remained, the tenant was participating in counseling sessions and was taking medication. Accordingly, the court held that the severe sanction of eviction was not warranted and the matter was remitted for consideration of a more appropriate penalty.

In Winn v. Brown, suora, the tenancy was terminated for non-desirability based on two incidents where the tenant made threats to Housing Authority employees, and screamed profanities and racial epithets. The court found that although the determination of non-desirability was supported by substantial evidence, the penalty of termination "shocks our sense of fairnessu, given that the two incidents occurred during a time of much stress for the tenant. Id. at 640 N.Y.S. 2d at 528.

In Stand v. Franco , suora, the court found that although the tenant engaged in serious behavior and was appropriately condemned by the Housing Authority, the penalty of eviction of a four year resident and mother of three small children was a disproportionate sanction.

Recently, in Peoples v. New York City Housing Authority, supra, this court found that although substantial evidence supported the Housing Authority's finding that the tenant physically confronted and accosted the Housing Authority's representative during an inspection of the tenant's apartment for repairs, the penalty of termination was inappropriate and the matter was remanded for imposition of a lesser penalty. The

court noted that the tenant "experienced considerable frustration" because of the inspector's refusal to acknowledge that the apartment was in almost constant need of repair.

The facts of Ms. Padilla's case present all of the elements of the above-cited cases. Ms. Padilla has resided in the premises for ten years. Her apartment not only houses three of her children, but also enables her handicapped child to visit with his family. (R. 23) Eviction of Ms. Padilla's family will severely compromise this family unit.

At the time of the altercation, Ms. Padilla's mental disability caused news reports of stolen welfare checks to generate the delusion that she was being victimized and put her in an acutely stressful state. At the same time that she was trying to contend with her rent problem and court appearances, she was also caring for her severely retarded and entirely dependent child. All the while, she was suffering from a lapse in psychiatric treatment due to the death of her psychiatrist.

Additionally, at the time of the hearing, she testified that she was also having a problem with the Bloods street gang who were victimizing one of her children. (R. 176) The nature of this woman's problems, whether real or imagined placed her under an extremely stressful state. These factors should have been considered when determining the disposition of her case.

Nearly three years had passed from the alleged incident to

the time of the hearing. The Housing Authority does not dispute that Ms. Padilla has not been involved in any objectionable behavior since 1997. She now has a good relationship with the project management (R. 253) is now under psychiatric care (R. 287 para.7, R. 289, R. 290) and is supported by her neighbors in her attempt to retain her apartment (R. 22-24) Any objectionable behavior has been cured. Ms. Padilla is being punished for one isolated incident which occurred over four years ago.

If she is evicted, she will likely be placed in a shelter. As a recipient of SSI and public assistance she is unlikely to find affordable housing. This will impact on all of her children, but especially on her handicapped son whose home visits depend on a secure home which will accommodate his visits to his mother and siblings (R. 23).

Under these circumstances, continued eligibility, or at most, a probationary period, is warranted.

CONCLUSION

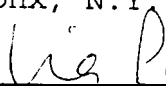
For the reasons set forth above, it is respectfully submitted that this Court enter judgment on behalf of petitioner

annulling respondent's determination to terminate petitioner's tenancy, and award such other and further relief as is just and appropriate.

Dated: Bronx, NY
March 15, 2002

Respectfully submitted,

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ADDENDUM

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

----- X
In the Matter of the Application of

ADELNE PADILLA,

Petitioner-Appellant.

-against-

STATEMENT PURSUANT
TO CPLR 5531

John G. Martinez, as Chairman of the
NEW YORK CITY HOUSING AUTHORITY and
Hearing Officer Judith Payne of the New York
City Housing Authority,

Respondent-Respondent.

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

----- X

1. The index number in the court below is 25 173/00.
2. The full names of the original parties are as they appear in the caption.
3. The proceeding was commenced in Supreme Court, Bronx County.
4. The proceeding was commenced on November 8,2000.
5. The pleadings were served as follows:

The Petition on November 8,2000; the Answer and Supporting Memorandum of Law on or about December 12, 2000; the Supporting Affirmation in Reply on or about January 22, 2001; the Supporting Affidavit in Reply on or about February 22,2001.

6 . Petitioner-appellant initiated this proceeding to obtain an order reversing respondent's decision to terminate her tenancy, and to obtaiq'an order restoring her tenancy.

7. The proceeding was transferred from Supreme Court pursuant to CPLR 7804(g) on the

issue of substantial evidence. The case was transferred pursuant to an order of the Supreme Court,
County of Bronx, Justice Saks entered on March 27, 2001.

8. The appeal is on a full reproduced record.

Dated: Bronx, New York
March 13 ,2002

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