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VIA FACSIMILE AND OVERNIGHT MAIL

Hon. Douglas Hurd, A.L.J.
Office of Administrative Law
9 Quakerbridge Plaza
Mercerville, NJ 08619

Re: Dep't of Community Affairs, Bureau of Housing Inspection v. Rachamalla
OAL Dkt. No. CAF 00792-09
Agency Dkt. No. BHI-346-07

Dear Judge Hurd:

Consistent with the Office of Administrative Law's Order of May 4, 2009, granting the Department of the Public Advocate leave to participate in the above-referenced matter, please accept this letter brief concerning the penalties assessed by the Commissioner of the Department of Community Affairs (the "Commissioner") against Respondent Murali Rachamalla ("Respondent" or "Rachamalla"). The prevalence and severity of lead poisoning of New Jersey's children continues to be a significant concern of the State, and in this case, there are several aggravating factors to consider in determining the appropriate penalty for Rachamalla's violations of the Hotel and Multiple Dwelling Law, including (a) whether children live in the home; (b) whether abatement delays extend beyond a reasonable timeframe; and (c) whether

improper and unauthorized methods were used to remove a lead paint hazard. Because all three of these factors are present here, the Court should impose penalties in excess of the presumptive amounts fixed by regulation.

PROCEDURAL HISTORY

Respondent Rachamallu is the owner “of a three unit apartment building constructed prior to 1978, located at 419 Lawrence Street, Burlington City.” Dep’t of Cmty. Affairs v. Rachamallu, OAL Docket No. CAF 6747-07 (DCA Nov. 30, 2007) (“Initial Decision”) 2. Following inspections by the Department of Community Affairs’ Bureau of Housing Inspection (“BHI”), BHI issued three separate notices on May 22, July 31, and September 4, 2007, to Respondent, ordering him to abate lead paint hazard violations and imposing penalties for violating the Hotel and Multiple Dwelling Law, N.J.S.A. 55:13A-1, et seq. Rachamallu v. Bureau of Housing Inspection, A-3134-07T2, slip op. at 2 (App. Div. March 10, 2009). BHI subsequently withdrew the penalty order of September 4, 2007. Id. at 4.

The Hotel and Multiple Dwelling Law is “remedial legislation necessary for the protection of the health and welfare of the residents of this State” and sets the safety standards for units of dwelling space in New Jersey. N.J.S.A. 55:13A-2. Under the powers conferred by the law, the Commissioner promulgated regulations that prescribe the standards for determining the appropriate penalty for violations of that law. N.J.A.C. 5:10-1.17; see also N.J.S.A. 55:13A-7.

These regulations establish the “presumptive penalties for each type of violation specified therein, subject to increase or decrease based upon findings of ‘aggravating or mitigating

circumstances.”” Rachamalla v. Bureau of Housing Inspection, A-3134-07T2, slip op. at 7 (App. Div. March 10, 2009).

The precise issue on remand from the Appellate Division is the determination of the appropriate penalty under N.J.A.C. 5:10-1.17. In its decision, the Appellate Division affirmed the finding that Respondent violated the lead-based paint regulations, but reversed the penalties imposed by the Commissioner, remanding the matter “to determine the type of violations [Rachamalla] had committed and to make appropriate findings of fact based on the record developed at the administrative hearing as to any aggravating or mitigating circumstances that would warrant an increase or decrease in the presumptive penalties for those violations.”

Rachamalla v. Bureau of Housing Inspection, A-3134-07T2, slip op. at 7 (App. Div. 2009). The only penalties still in dispute are the initial \$2,500 penalty imposed by the May 22, 2007, notice and the additional \$15,000 imposed by the July 31, 2007, notice. Id. at 4-5. The Commissioner referred the remand to the Office of Administrative Law for review.

OVERVIEW OF THE SIGNIFICANT LEAD PROBLEM IN NEW JERSEY

While the Hotel and Multiple Dwelling Law does not expressly list the specific aggravating and mitigating factors to be considered in determining whether the presumptive penalties should be increased or decreased, it is clear the magnitude of lead-paint hazards in New Jersey’s residential housing is so significant, especially in older housing occupied by children, that certain aggravating factors should be used to increase the presumptive penalties on a case-by-case basis.

The lead poisoning problem in New Jersey is significant. As a result, Governor Jon S. Corzine has made the reduction of lead poisoning a top priority of his administration. In issuing

Executive Order 100 on April 29, 2008, the Governor found that lead can cause developmental disabilities, neurological and behavioral problems, decreased I.Q., and, in extreme cases, coma and death to children; and that some two million houses in New Jersey were constructed prior to the prohibition of the sale of lead paint, and many children are therefore potentially exposed to dangerous levels of environmental lead. Executive Order No. 100 (2008).

The Governor's findings are overwhelmingly supported by administrative, legislative, and scientific authorities at both the federal and state level. For example, the United States Centers for Disease Control has explained the widespread nature of the lead poisoning problem:

The major source of lead exposure among U.S. children is lead-based paint and lead-contaminated dust found in deteriorating buildings. Lead-based paints were banned for use in housing in 1978. However, approximately 24 million housing units in the United States have deteriorated leaded paint and elevated levels of lead-contaminated house dust. More than 4 million of these dwellings are homes to one or more young children.

Center for Disease Control, Nat'l Ctr. for Env'tl. Health, Childhood Lead Poisoning Prevention Program, General Information Page, <http://www.cdc.gov/nceh/lead/faq/about.htm> (last visited May 13, 2009).

As further explained by the Environmental Protection Agency ("EPA"), people can ingest or inhale lead in a variety of ways, including putting their hands or other objects covered with lead dust in their mouths, eating paint chips or soil that contains lead, or breathing in lead dust, especially during renovations that disturb painted surfaces. United States Env'tl. Prot. Agency, Lead: Basic Information, <http://epa.gov/lead/pubs/leadinfo.htm> (last visited May 13, 2009).

Lead is a life safety hazard to both adults and children. "Exposure to lead dust and paint chips by inhalation and/or ingestion can result in high blood pressure, digestive problems, muscle and

joint pain, nerve disorders, memory and concentration problems, increased chance of illness during pregnancy and harm to a fetus, including brain damage or death.” Press Release, Env’tl. Prot. Agency, Failure to notify residents of potential hazards may cause lead poisoning/ U.S. EPA fines Fine Custom Painting \$10,000 for failing to disclose lead-based paint hazard (May 5, 2009) (available at <http://yosemite.epa.gov/opa/admpress.nsf/0/222d117e0d297b7d852575ad00630c1b?OpenDocument>). Lead is even more dangerous to children, however, and can result in such issues as damage to the brain and nervous system, behavior and learning problems such as hyperactivity, slowed growth, hearing problems, and headaches. United States Env’tl. Prot. Agency, Lead: Basic Information, available at <http://epa.gov/lead/pubs/leadinfo.htm> (last visited May 13, 2009).

A home should be a place of safety, but for thousands of New Jersey children, tragically their home is the most dangerous environment they will encounter. It is widely recognized that lead-based paint in housing is the principal cause of lead poisoning and lead exposure among the State’s children. See, e.g., New Jersey Department of Health and Senior Services, Lead Poisoning Elimination Plan at 6 (2005), available at <http://www.cdc.gov/nceh/lead/StrategicElimPlans/New%20Jersey%20Lead%20Poisoning%20Elimination%20Plan%20Final.pdf> (last visited May 13, 2009); Centers for Disease Control and Prevention, Preventing Lead Poisoning in Young Children, at 1 (2005), available at www.cdc.gov/nceh/lead/publications/PrevLeadPoisoning.pdf (last visited May 13, 2009).

Data compiled by the U.S. Census shows that New Jersey has some of the oldest housing stock in the country, with nearly one million homes (28.7%) built before 1950 when the lead content of

paint was at its highest,¹ and approximately 2.4 million homes (69%) built prior to 1978 when the federal government banned the sale of lead-based paint for residential use. U.S. Census Bureau, American Cmty. Survey, New Jersey Selected Housing Characteristics: 2005-2007, available at http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=04000US34&-qr_name=ACS_2007_3YR_G00_DP3YR4&-ds_name=ACS_2007_3YR_G00_&-lang=en&-sse=on (last visited May 13, 2009). As the Legislature expressly found in enacting the 2003 Lead Hazard Control Assistance Act, P.L. 2003, c.311, §2(d):

Because of the age of New Jersey's housing stock, our State is among the states with the most serious risk of exposure from previous residential use of lead-based paint. It is estimated that there are about two million homes which were constructed in New Jersey prior to 1978, the year in which the sale of lead in paint for residential use was banned.

N.J.S.A. 52:27D-437.2(d).

In addition to the individual health effects from lead exposure, there are economic and societal costs to New Jersey children and the State itself. The damage from lead poisoning can lead to lower educational achievement, higher school dropout rates and increased behavioral problems. Committee on Env'tl. Health, American Acad. of Pediatrics, Lead Exposure in Children: Prevention, Detection, and Management, 116 Pediatrics 1036, 1038 (2005). Through no fault of their own, children who are lead poisoned may be less likely to become positive contributors to the State's communities and economy. Thus failure to prevent lead poisoning has

¹ Housing built before 1950 is almost certain to contain lead-based paint because paint made before 1950 had very high (up to 50%) levels of lead pigments. See, e.g., New Jersey Dep't of Health & Senior Serv., Childhood Lead Poisoning in New Jersey, Annual Report Fiscal Year 2003 (2004), available at <http://www.state.nj.us/health/fhs/documents/childhoodlead2003.pdf> (last visited May 13, 2009).

an economic, health and societal impact not only on the affected children but also on the State as a whole.

Consequently, the BHI's aggressive enforcement of the Hotel and Multiple Dwelling Law is a critical component of addressing lead hazards, and it is in the public interest for the Commissioner to increase the presumptive penalties under the law if certain aggravating factors are present, as in the instant case.

LEGAL ARGUMENT

In the face of the foregoing evidence of the lead paint hazard in New Jersey, and its devastating and irreversible effects on children, the Court should consider several aggravating factors in determining the appropriate penalty for violating the Hotel and Multiple Dwelling Law. Specifically, among the aggravating factors that the Court should consider are: (a) whether children live in the home; (b) whether abatement delays extend beyond a reasonable timeframe; and (c) whether improper and unauthorized methods were used to remove a lead paint hazard.²

a. A CHILD LIVING IN THE HOME IS AN AGGRAVATING FACTOR WHEN DETERMINING A PENALTY UNDER THE HOTEL AND MULTIPLE DWELLING LAW

Lead is an extremely dangerous neurotoxin that particularly debilitates the still-developing systems of children under six years old. Children can become lead poisoned very easily and quickly. For instance, a child who accidentally eats a lead-based paint chip the size of a postage stamp can become severely lead poisoned. See Testimony of the Department of the Public Advocate Before the Senate Health and Human Services Committee on the Nature and

² Factors such as these are consistent with the factors that other state agencies use to determine the precise monetary penalty to assess on a violator when a regulation prescribes a range of monetary penalties. See N.J.A.C. 7:14-8.5(i) (authorizing DEP to use compliance history, severity of violations, a mitigation or remedy of a violation, and unusual or extraordinary costs imposed on the public, in considering the amount of monetary penalty to assess).

Extent of Lead Poisoning in New Jersey and Possible Solutions to the Problem, April 29, 1992, at 41X. Additionally, children absorb up to 50 percent of the lead that they ingest or inhale, compared to adults, who absorb only 10 percent. See, e.g., Ekhard E. Ziegler et al., Absorption and Retention of Lead by Infants, 12 Pediatric Research 29 (1978). Furthermore, because their nervous systems are still developing, children aged six and under are inherently more susceptible to toxins than adults, whose mature systems are better able to metabolize, detoxify and excrete lead. See, e.g., Theodore I. Lidsky and Jay S. Schneider, 126 Brain 5, 10 (2003). For these reasons, it is imperative that significant attention be paid to homes where children reside, and especially older homes, the lead hazard can be especially acute.

The Hotel and Multiple Dwelling Law requires that property owners comply with the requirements of the law and maintain their property in a safe condition to ensure the health, welfare and safety of the dwelling's occupants. See N.J.S.A. 55:13A-7. Given the unique threats to children caused by lead paint hazards, evidence that a child lives in a building with lead paint hazard violations should be recognized as an aggravating factor in assessing a penalty.

As this Court specifically found, “[c]hildren reside in the apartment building” owned by Rachamallu. Initial Decision 2. The presence of children residing in the building where the lead hazard violation was found is itself an aggravating factor.

b. SIGNIFICANT DELAYS IN REMEDIATING A PROPERTY WITH LEAD HAZARDS ARE ALSO AN AGGRAVATING FACTOR WHEN DETERMINING PENALTIES UNDER THE HOTEL AND MULTIPLE DWELLING LAW

A continuing or long-standing delay in failing to correct a life-safety lead hazard violation is another aggravating factor. The longer a lead hazard remains in a home, the more opportunity for lead to be ingested to poison residents, especially children. Therefore, the

increased risk that is created by continual delays is an aggravating factor when assessing a penalty under the Hotel and Multiple Dwelling Law.

Mr. Rachamalla testified that he was unaware of any of the violations because he purchased the house in 2006. However, Mr. Rachamalla also testified that the building was constructed during the 1920s or 1930s. Transcript of November 7, 2007 ALJ Hearing at 58-59. His alleged lack of awareness of violations is of no moment: New Jersey's multifamily dwelling regulations presume that there is lead paint in houses of that era, unless there is affirmative proof that the house is free of lead paint. See N.J.A.C. 5:10-6.6(a)(1)(i) and (iii); see also 42 U.S.C. § 4851(3) (articulating Congress' 1992 finding that "pre-1980 American housing stock contains more than 3,000,000 tons of lead in the form of lead-based paint, with the vast majority of homes built before 1950 containing substantial amounts of lead-based paint"). Given the age of the home, and given the absence of proof that the house is free of lead paint, Mr. Rachamalla should be charged with having knowledge of the dangers of lead paint, and of his concomitant obligation to continuously maintain the property in a safe condition to ensure the health, welfare and safety of the dwelling's occupants.

Indeed, Mr. Rachamalla had actual notice of the violations from the Bureau, and in requesting extensions for compliance, he knew that he had to remediate these life safety hazards with the utmost diligence. Nevertheless, he failed to remediate the violations on both occasions. Initial Decision 4, 5.

Mr. Rachamalla contends that he put forth his "best efforts" to correct the violations. Nevertheless, all five of the violations remained open until August 31, 2007, when the Inspection Report indicated that three of the five violations had been abated. Id. at 3. In fact, Mr.

Rachamallu requested, and was granted, two extensions for compliance: the first extension was to June 19, 2007, and the second extension, to August 21, 2007. App. to Respondent's App. Div. Brief. Ra20, Ra26 (filed Oct. 14, 2008). Both reinspections, however, revealed that several violations earlier cited had still not been abated. During all these months, people continued to live in the building, thereby potentially exposing Mr. Rachamallu's tenants, including children, to lead poisoning.

Therefore, Mr. Rachamallu's significant delay in addressing the life-safety lead hazard violation operates as an aggravating factor, which is sufficient to permit a heightened penalty.

c. USING IMPROPER AND UNAUTHORIZED METHODS OF LEAD ABATEMENT IS ANOTHER AGGRAVATING FACTOR TO BE CONSIDERED WHEN ORDERING PENALTIES

Using improper and unauthorized methods is another aggravating factor for the Court to consider when issuing a penalty order for violations of the Hotel and Multiple Dwelling Law. In the present matter, Mr. Rachamallu attempted to encapsulate an area of paint that was listed as a continuing violation, without the proper certifications and permits. Initial Decision 4. However, research has found that "[u]nless proper precautions are implemented, lead-based paint can contaminate dust or soil when it deteriorates or is disturbed during maintenance, repainting, remodeling, demolition, or paint removal." Thus, executing an abatement correctly is a crucial component of ensuring that children are protected from lead hazards. See David E. Jacobs et al., The Prevalence of Lead-Based Paint Hazards in U.S. Housing, 110 *Env'tl. Health Perspectives* A599 (2002) (noting that children are then exposed to lead from paint "either directly by eating paint chips or indirectly by ingesting lead-contaminated house dust or soil through normal . . . contact"); see also Centers for Disease Control and Prevention, Preventing Lead Exposure in

Young Children: A Housing-Based Approach to Primary Prevention of Lead Poisoning at 18

(2004) (describing multiple ways in which children can be exposed to lead-base paint hazards in their homes), available at

<http://www.cdc.gov/nceh/lead/Publications/Primary%20Prevention%20Document.pdf> (last

visited May 13, 2009). Given the unfortunate ease by which a child can become lead poisoned, it is crucial that lead removal efforts scrupulously follow the law's requirements.

Here, these requirements were not followed. Although Mr. Rachamalla successfully completed the Lead Safe Work Practices and Lead Sampling Technician Training Requirement on June 5, 2007, he did not use the skills taught there to properly perform the work to remedy the violations on his property. The first and only lead remediation project he performed was on the building that is the subject of the current dispute, and that job was done improperly and not within the standards and guidelines taught during the certification course. For example, James Grogan, Compliance Officer, testified during the Nov. 7, 2007, hearing that in one area, Mr. Rachamalla tried to "enclose the paint - - enclose the area, which is not covered under Lead Safe Work Practices. It's not the type of work that you are trained to do. To do that kind of work, you must be a certified lead abatement contractor. You must have a permit, you must obtain a permit in accordance to the UCC Regulations. It's a much, much more stringent set of training requirements, and the work is just not acceptable. And also, you can see the quality of the work wasn't really there, if you'll examine the pictures." (Transcript of November 7, 2007 ALJ Hearing at 38-39). The Bureau submitted pictures of the conditions after the August 2007 reinspection and the court opined, "Indeed, the pictures do show continued deteriorating paint and flaking, even though it appears [Rachamalla] did try and correct the problem." See Initial

Decision 4; see also Adetula v. Bureau of Housing Inspection, CAF 12676-05, 8 (Initial Decision Sept. 22, 2006) (assessing penalties for continuing open violations because “[t]he fact that the petitioner might have corrected some of these violations which were again present at the time of the re-inspection is [of] no importance. They were present at the time of the re-inspection”).

Mr. Rachamalla did not follow the steps that were taught to him during the certification training, and instead improperly performed work that he was not certified to perform. See Initial Decision 4 (citing N.J.A.C. 5:17 et seq.). Therefore, Mr. Rachamalla’s use of improper and unauthorized methods is an aggravating factor in this case.

CONCLUSION

For the foregoing reasons, the court should find that the aggravating factors support assessing an increased penalty above the presumptive minimum.

Respectfully submitted,

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