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May 27, 2009

Hon. Joseph V. Doria, Jr.
Commissioner
Department of Community Affairs
South Broad & Front Streets
P.O. Box 800
Trenton, New Jersey 08625-0800

Attention: Exceptions

**Re: Dep't of Community Affairs, Bureau of Housing Inspection v. Rachamalla
OAL Dkt. No. CAF 00792-09 (on remand CAF 6747-07)
Agency Dkt. No. BHI-346-07
EXCEPTIONS TO THE INITIAL DECISION**

Dear Commissioner Doria:

The issue presented in this case is what factors the Department of Community Affairs ("DCA") should use to compute a penalty against the owner of a multifamily dwelling who violates the DCA's regulations on lead hazard controls. In his May 14, 2009, Initial Decision, Administrative Law Judge Douglas Hurd ("ALJ Hurd") held that Respondent Murali Rachamalla should be penalized \$9,750 for his violations, only slightly above the presumptive penalty of \$9,125 fixed by regulation. Participant¹ Department of the Public Advocate contends

¹ In a May 4, 2009, Order, ALJ Hurd granted the Department of the Public Advocate leave to participate in the above-referenced matter, including the right to file exceptions. See N.J.A.C. 1:1-16.6(c)(4).

that in assessing this amount, ALJ Hurd failed to recognize two of the three aggravating factors justifying an increased penalty, and erred in finding one mitigating factor. As a result, the Public Advocate urges that the penalty amount be recomputed, giving appropriate weight to the three aggravating factors supported in the record.

PROCEDURAL HISTORY

This matter is before the Commissioner after a remand from the Appellate Division. In a March 10, 2009, ruling, the Appellate Division affirmed the previous finding of the DCA that Mr. Rachamalla was in violation of the regulations requiring owners of multifamily dwellings to control lead hazards. The appeals court, however, ordered DCA to reassess the initial penalty of \$17,500 against Mr. Rachamalla “in light of N.J.A.C. 5:10-1.17,” which sets forth presumptive penalty amounts that can be increased or decreased based on the existence of aggravating or mitigating factors. Pursuant to the remand order, ALJ Hurd reassessed the penalties at \$9,750, and articulated the following factors in making his determination:

As explained in the Initial Decision, the respondent did act in good faith in attempting to address the Bureau’s Orders. He took the certification course, and then had to wait weeks to get the certificate to conduct the dust samplings. He then tried to remediate the violations. Respondent’s good faith is a mitigating circumstance. The aggravating circumstance in this matter is the fact that children resided in the apartments at the time the Orders were issued. This is significant because of the potential long term health issues and learning disabilities associated with children being exposed to lead paint deterioration.

Dep’t of Cmty. Affairs v. Rachamalla, OAL Docket No. CAF 792-09 (on remand CAF 6747-07) at 4 (DCA May 14, 2009) (the “Remand Initial Decision”).

Accordingly, ALJ Hurd assessed an initial penalty of \$350 for each of five life hazard violations, and \$1,600 for each of five continuing violations. These penalties are only slightly

greater than the presumptive penalties described in N.J.A.C. 5:10-1.17(c)(1) and (d)(1), which would be \$325 per initial violation and \$1,500 for each continuing violation.

LEGAL ARGUMENT

In assessing the penalties against Mr. Rachamalla, ALJ Hurd erred in two respects: First, he should have found that this record demonstrated three aggravating factors (instead of just one), supporting an increase in the presumptive penalty; and second, he erred in identifying one mitigating factor used to compute the ultimate amount of the penalty.

A. THE PENALTIES SHOULD BE REASSESSED TO REFLECT THE THREE AGGRAVATING FACTORS THAT ARE PRESENT IN THIS CASE.

As examined more fully in our May 13, 2009, letter brief to ALJ Hurd, the lead poisoning problem in New Jersey is significant. Consequently, the Department of Community Affairs' Bureau of Housing Inspection's ("BHI") aggressive enforcement of the Hotel and Multiple Dwelling Law is a critical component of addressing lead hazards, and it is in the public interest to deter noncompliance by increasing the presumptive penalties under the law when, as in this case, certain aggravating factors are present.

ALJ Hurd correctly recognized that "the fact that children resided in the apartments at the time the Orders were issued" is an aggravating factor, and his determination on this point should be expressly affirmed.

Nevertheless, the penalties should be reassessed to reflect two other aggravating factors that are also present in this case, specifically that Mr. Rachamalla delayed executing the repairs beyond a reasonable timeframe; and that Mr. Rachamalla used improper and unauthorized methods to remove a lead paint hazard. Collectively, these factors – including the presence of children – support an increase in the presumptive penalty for the life safety violations.

First, Mr. Rachamalla's delay in correcting the life safety violations beyond a reasonable time frame is an aggravating factor. On May 3, 2007, Mr. Rachamalla was given initial notice of the five violations found in the "three unit apartment building . . . constructed prior to 1978, located at 419 Lawrence Street, Burlington City." Dep't of Cmty. Affairs v. Rachamalla, OAL Docket No. CAF 6747-07 at 2 (DCA Nov. 30, 2007) (the "First Initial Dec."). After receiving actual notice, and in requesting extensions for compliance, Mr. Rachamalla knew that he had to remediate these life safety hazards in a timely fashion and with the utmost diligence. Nevertheless, he failed to remediate the violations on both occasions. Id. at 2-3. In fact, all five of the violations remained open until August 31, 2007, when the Inspection Report indicated that three of the five violations had been removed. Id. at 3. Meanwhile, people continued to live in the building, thereby potentially exposing Mr. Rachamalla's tenants, including children, to lead poisoning.

Mr. Rachamalla claims that part of the delay in controlling the lead hazards at his apartments should be attributed to several weeks of delay in getting the certificate evidencing his completion of a training course in lead safety. See Transcript of November 7, 2007 ALJ Hearing at 48; see also Initial Remand Decision at 4. Even assuming this is true, however, this only delayed the time within which Mr. Rachamalla might have personally completed the work; it did not delay the time within which some qualified person other than him might have completed it. Mr. Rachamalla's own inability to complete the necessary work does not excuse his inaction in getting some other qualified person to perform the lead control work so as to avoid prolonging the exposure of children in residence to the risk of lead poisoning while his own certification paperwork was pending. Mr. Rachamalla's significant delay in addressing the life-safety lead

hazard violation operates as an aggravating factor, which is sufficient to permit a heightened penalty.

Additionally, the use of improper and unauthorized methods is another aggravating factor to consider when issuing a penalty order for violations of the Hotel and Multiple Dwelling Law. Here, Mr. Rachamalla attempted to encapsulate an area of paint that was listed as a continuing violation, without the proper certifications and permits. Id. at 4. In addition, the work was not carried out competently; according to the inspector, “the work [was] just not acceptable” and there was “continued deteriorating paint and flaking” even after the work was completed. Transcript of November 7, 2007 ALJ Hearing at 38-39; see also First Initial Dec. at 3.

Given the dangers of lead-based paint, the hazards associated with improper removal, and the unfortunate ease by which a child can become lead poisoned, it is crucial that lead removal efforts scrupulously follow the law’s requirements. See David E. Jacobs et al., The Prevalence of Lead-Based Paint Hazards in U.S. Housing, 110 Envtl. Health Perspectives A599 (2002) (finding 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”); 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-based paint hazards in their homes), available at <http://www.cdc.gov/nceh/lead/Publications/Primary%20Prevention%20Document.pdf> (last visited May 27, 2009).

Here, Mr. Rachamalla simply did not follow the requirements for safely removing the lead paint hazard. He did not follow the steps that were taught to him during the Lead Safe

Work Practices and Lead Sampling Technician Training, and instead improperly performed work that he was not certified to perform. See First Initial Decision at 4 (citing N.J.A.C. 5:17 et seq.). Therefore, Mr. Rachamalla's use of improper, unauthorized, and dangerous methods is another aggravating factor in this case.

B. THE ADMINISTRATIVE LAW JUDGE ERRED IN IDENTIFYING MITIGATING FACTORS IN THE CASE.

ALJ Hurd found a "mitigating circumstance" in "Respondent's good faith" efforts in completing a lead certification course and in making an unsuccessful effort to abate lead hazards. Remand Initial Decision at 4. The Public Advocate respectfully suggests that these efforts should not be regarded as a mitigating circumstance.

As noted above, it may very well be laudable that Mr. Rachamalla obtained training in lead-safe work practices. However, Mr. Rachamalla's certification did nothing for the benefit of the tenants in his buildings whose health is safeguarded by the State's lead control regulations. In particular, his certification did not mitigate the potential harm and lead exposure that continued for months at the property. Moreover, Mr. Rachamalla did not use the skills taught during the training to properly perform the work to remedy the violations on his property. The first and only lead remediation project he performed was done improperly and not within the standards and guidelines taught during the certification course. Accordingly, completion of a training course, in and of itself, is not a mitigating factor. Nor is it a mitigating factor to attempt to execute work in a manner contrary to what is taught at a training course. Indeed, because the purpose of New Jersey's lead regulations is to protect occupants from lead hazards, a landlord's subjective good faith efforts that do not actually minimize the harm from lead hazards should not be viewed as a mitigating factor. Since Mr. Rachamalla's efforts did not yield any actual

protection from lead hazards for his tenants, he is not entitled to any reduction in penalty based on his completion of a lead-safe training course or his unsuccessful efforts to abate hazards.

CONCLUSION

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

Respectfully submitted,

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