2015 WL 7688775 (N.Y.A.D. 1 Dept.) (Appellate Brief)
Supreme Court, Appellate Division, First Department, New York.

In the Matter of the Application of Aharon LIEDER, Petitioner-Appellant.,
v.
NEW YORK CITY HOUSING AUTHORITY., Respondent-Respondent.

No. 15570.
March 9, 2015.

To Be Argued By:
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Brief for Petitioner-Appellant

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*1 PRELIMINARY STATEMENT

This is a CPLR Article 78 proceeding seeking a determination annulling and vacating the final administrative determination of the New York City Housing Authority. Said determination denied the Appellant-Petitioner's claim to remaining family member status on the sole ground that the NYCHA did not grant Petitioner permanent permission in writing to reside in the subject premises. The determination was made despite the unrefuted testimony and evidence which established the NYCHA's knowledge of and acquiescence to. Appellant-Petitioner's residency as a part of his grandmother's household.

Since 1997. the tenant of record added four individual grandchildren to her household, first listing them on her annual affidavits of income and only later requesting permission for the permanent addition to her household. Petitioner was the last of these four grandchildren to be added, and the tenant of record died prior to the submission of the eventual permanent permission request form. The hearing officer refused to consider this evidence submitted by Petitioner, and held that because Respondent never formally approved the permanent permission request form. Petitioner's claims to remaining family member status must be denied. The Court below, by the Hon. Shlomo Hagler, by Order dated June 9. 2014. transferred the within Article 78 petition to the Appellate Division, pursuant to CPLR § 7804(g).

*2 QUESTION PRESENTED

Q. Was the administrative determination below contrary to law, arbitrary and capricious, or unsupport by substantial evidence where the unrefuted evidence demonstrated that the former tenant of record, with the approval of Respondent-Appellee, for more than a decade made additions to her household first through the affidavit of income, and only later sought formal permission?

A. The Court below did not reach this question and transferred this proceeding to the Appellate Division pursuant to CPLR § 7804(g).

*3 STATEMENT OF FACTS

Aharon Lieder is the Petitioner-Appellant herein (“Petitioner”), resides in the subject premises (325 Roebling Street, Apt. 4E, Brooklyn. NY) and has been living at said premises since 2006, (R. at 315, lines 1-7). Like many of his siblings before him, Petitioner moved into the subject premises to support and help care for his maternal grandmother, Malvina Bleier, who invited Petitioner to reside with her. (R. at 317, lines 7-25). Ms. Bleier, born in 1914 in Hungary, suffered from “hypertension” Crohn's disease, osteoporosis, and memory impairment as a result of a stroke.” (R. at 69, 100). Petitioner lived with Ms. Bleier until her death at the age of 95 on November 13, 2009, after appearing together on at least one affidavit of income. (R. 87-100). As more fully demonstrated below, since 1997. Ms. Bleier would invite various grandchildren to reside with her, indicating their presence on her annual affidavits of income, and only later seek retroactive written approval from Respondent-Respondent (“Respondent” or “NYCHA”) to permanently add them to her household.

I. ABRAHAM LIEDER'S OCCUPANCY

On Ms. Bleier's annual affidavit of income for 1997. she listed her grandson, Abraham Lieder, Petitioner's brother, as residing with her in the subject apartment without first seeking permission for him to permanently reside with her. (R. at 58). By Letter dated May 22, 1997, NYCHA wrote to Petitioner, requesting that Ms. *4 Bleier contact management. (R. at 59).

Apparently Ms. Bleier did not seek permission to permanently add Abraham Lieder to her household before the 1998 Affidavit of Income was submitted on or before January 29, 1998, which listed Abraham as an occupant. (R. at 60).

Although Abraham Lieder technically did not have permission to reside with his grandmother without first obtaining permission from Respondent to do so, permission was apparently granted after Abraham Lieder moved in. Permission was retroactively granted on or about March 27, 1998. (R. at 61).

II. CHANA LIEDER'S OCCUPANCY

By February 6, 2001, Abraham Lieder moved out of the subject premises, and Chana Lieder, her grandchild and sister of Petitioner, moved in. Again, Ms. Bleier added Chana Lieder to her household and annual affidavit of income without first seeking permission from Respondent to do so. (R. at 62-63).

Through various letters dated from February 15, 2001 through March 23, 2001, Respondent sought proof that Abraham Lieder married and vacated the subject premises. (R. at 64-67). Respondent's internal notes indicated that Ms. Bleier had submitted school verification letters, a birth certificate, and social security card for Chana Lieder, but had not yet submitted a "notorized [[sic] letter re: support of Chana", a permanent permission request form, or a doctor's letter. (R. at 68).

***5** As indicated above, Ms. Bleier, 86 years old in 2001, suffered from "hypertension, Crohn's disease, osteoporosis, and memory impairment as a result of a stroke." (R. at 69-70). Notably, on the April 9, 2002 letter, her treating physician states that Ms. Bleier "requires constant supervision due to her risk of confusion and falls. It is medically unsafe for her to sleep in her apartment unaccompanied." (R. at 70). It is for this reason that her grandchildren lived with her, as she had no one else to care for her.

On April 17, 2001, Ms. Bleier submitted a request for permission to permanently add Chana Lieder to her household, even though Chana had already moved into the subject premises. (R. at 71-72). Ms. Bleier also submitted a statement from Chana Lieder's school, as well as a letter of financial support from her parents. (R. at 74).

Incredibly, two weeks after Ms. Bleier submitted the permanent permission request for, NYCHA responded with a letter that "this office has not received the necessary Nycha permanent permission request form." (R. at 73-74).

In any event, by letter dated June 26, 2001. the Project Manager submitted Ms. Bleier's request to add her granddaughter to her household to Respondent's Borough Director. (R. at 75).

By letter dated August 15. 2001. Respondent denied Ms. Bleier's request ***6** to add Chana Lieder. not because the addition would have caused overcrowding, but because at the time of the request Chana Lieder was under 18 and Ms. Bleier did not have custody of her, notwithstanding the fact that Chana turned 18 prior to Respondent denying her request to be added to the household. (R. at 76).

Nevertheless, Chana continued to reside with Ms. Bleier, and continued to appear on the annual affidavit of income. (R. at 77-78). Respondent invited Ms. Bleier to submit another permanent permission request form to add Chana to her household (R. at 79).

Chana continued to reside with Ms. Bleier. and Ms. Bleier again listed Chana on the 2003 Affidavit of Income. (R. at 80-81).

III. NICHA LIEDER'S OCCUPANCY

In late 2003 or early 2004, Chana moved out of the subject premises, and Nicha Lieder, Petitioner's sister and another granddaughter of Ms. Bleier. moved in with Ms. Bleier. Ms. Bleier made sure to include Nicha Lieder in the Annual Affidavit of Income. (R. at 82-83).

Nicha Lieder also appears on the 2005 Affidavit of Income, and she also signed the Third Party Verification that is apart of the annual income review process. (R. at 84-86).

***7 IV. AHARON LIEDER'S OCCUPANCY**

In 2006, Petitioner moved into the subject premises to live with, and care for, his **elderly** maternal grandmother. (R. at 317, lines 6-25). Petitioner appears, as so many other grandchildren through the years, on the Annual Income Affidavit. (R. at 87-97).

Even though Ms. Bleier put Petitioner on the annual affidavit of income. she also filled out a permanent permission request form to formally add Petitioner to her household. Unfortunately the form was not submitted to Respondent before Ms. Bleier died on November 13. 2009. (R. at 98-100).

In 2010, Petitioner asserted his claim of entitlement to a lease for the subject premises as a remaining family member of Ms. Bleier. That claim eventually proceeded to a Project Grievance on June 6, 2011, when Respondent denied Petitioner's claim. The Project Grievance denied Petitioner's claims because he did not have official permission to join the household, and in dicta, asserts that permission, even if timely requested. would have been denied in any event due to alleged overcrowding. (R. at 101) Petitioner's claims then proceeded to a District Grievance, which was denied on December 6, 2011. (R. at 102).

The Grievance ultimately advanced to a hearing, which was held on March 12 and April 30. 2013. (R. at 270-350). On May 21. 2013, Counsel for ***8** Petitioner submitted a post-hearin memorandum of law in support of its arguments. (R. at 103-136). On May 21, 2013. counsel for Respondent submitted its memorandum in support of its arguments. (R. at 137-139).

On June 14, 2013, the hearing officer issued a decision denying Petitioner a lease as a remaining family member. (R. at 53-57). On July 31, 2013, the Respondent's Board approved the hearing officer's decision, denying Petitioner a lease. (R. at 46-52).

V. THE ADMINISTRATIVE HEARING

The issues for the hearing officer involved the application of the Respondent's Remaining Family Member policy, which determines whether an occupant of an apartment will be granted a lease upon the vacatur or death of the tenant of record. The Respondent's Remaining Family Member policy. at N.Y.C.H.A. Management Manual, Chapter IV, Subd. IV, § J.1, and Chapter VII, § 4.E.I.a, provides:

Remaining family member status applies to occupants of all projects and is defined as

● persons who were member(s) of the original tenant family, or

• who became permanent member(s) of the tenant family subsequent to move-in with the written approval of the project management, or

● who subsequent to move-in were born or legally adopted into the tenant family and thereafter, remained in continuous ***9** occupancy up to and including the time the tenant of record moves or dies.

Any occupant who meets any of these standards shall be deemed a “remaining family member.” “Remaining family members” shall be offered an Authority lease if they are otherwise eligible for public housing in accordance with the admission standards for applicants contained in the Housing Applications Manual

At the hearing of this matter, the Petitioner established through unrebutted testimony and documents that beginning in 1997 the former tenant of record would ultimately have four different grandchildren move in with her at one time or another in the one-bedroom apartment and would notify the NYCHA by including them in the affidavits of income. (R. at 58, 60, 62-63, 77-78, 80-86). Petitioner moved into the subject apartment in 2006, and appeared on the 2008 Affidavit of Income. (R. at 87-96, 315, lines 1-6).

According to the Management Manual, the NYCHA's response, after being alerted that Mrs. Bleier improperly added people to her household without first receiving permission from the NYCHA, would be to send a notice that unless she removed the unauthorized occupants, her tenancy would be terminated. Instead, the NYCHA's pattern and practice was to merely invite Mrs. Bleier to request permission after the fact, and retroactively grant approval or would simply ignore the infraction. (R. at 58, 61, 73-74). Here, the former tenant of record sought retroactive permission ***10** for Grievant to join the household as she had so frequently done before. (R. at 98-99). The only difference this time was that death intervened prior to the submission of the request. (R. at 100).

Thus, Petitioner urged that NYCHA had acquiesced to the addition of the various grandchildren, and in particular, Petitioner. (R. at 103-136). As recently held by the First Department, Appellate Division, NYCHA's demonstrated acquiescence to additions can stand in place of its formal written approval in remaining family member grievances, in certain circumstances.

Petitioner also argued that NYCHA's claim of overcrowding was nothing but a pretext for denial, as it had previously approved one grandchild, and invited several others to submit permanent permission requests to be added to this one bedroom apartment. (R. at 61, 68, 71-74, 79, 101-136). Further, the only permanent permission request that was previously denied by NYCHA was not based on the blanket rule Respondent attempted to assert at the hearing, overcrowding. (R. at 75). Rather, Respondent made a factually specific determination - a pointless exercise if the tenant of record was indeed precluded from ever adding another person to her household. (R. at 75). In any event, NYCHA's assertion that permission would have been denied because of alleged overcrowding is contrary to both the letter and spirit of Federal and State law.

***11 VI. THE ADMINISTRATIVE DECISION**

The hearing officer erroneously found the lack of a permanent permission request form dispositive, notwithstanding evidence that Respondent actually knew Petitioner was residing in the subject premises during the last years of Ms. Bleier's tenancy.

The hearing officer erroneously determined that Respondents prior actions or inactions with respect to the occupancy of Ms. Bleier's grandchildren were irrelevant, and wrongly held that Respondents actions or inactions would not be considered in reaching a final determination on Petitioner's grievance. (R. at 56).

Finally, the hearing officer's dicta also seemed to suggest that Respondent's occupancy policy is reasonable and could have formed a basis to deny a request by Ms. Bleier to add Petitioner to her household, had it been otherwise proper and timely. (R. at 57).

Respondent's Board adopted the hearing officer's decision in its Determination of Status dated July 31, 2013. (R. at 46-52).

Petitioner challenged Respondent's final determination by way of the within CPLR Article 78 proceeding. (R. at 6-139). By Order dated June 9, 2014, the Court transferred this matter to the Appellate Division. First Department pursuant to CPLR § 7804(g), as the proceeding commenced below involved ed an issue of substantial ***12** evidence. (R. at 2)

This appeal ensued,

***13 ARGUMENT**

POINT I

STANDARD OF REVIEW

The standard under state law that a court must use when determining whether to annul an administrative law decision is whether the decision is contrary to law, arbitrary and capricious or an abuse of discretion, including as to the measure or mode of penalty imposed, (C.P.L.R. § 7803(3), or is not on the entire record supported by substantial evidence (C.P.L.R. § 7803(4)). The Court of Appeals, in *Matter of Pell v. Bd of Education,* 34 N.Y.2d 222 (1974), further defined "arbitrary and capricious" action as action that is "without sound basis in reason and is generally taken without regard to the facts." *Id.* at 231. *See also, Marburg v. Cole,* 286 N.Y. 202 (1941).

The C.P.L.R. § 7803(3) test of "arbitrary and capricious and abuse of discretion" is obverse to that of "rationality" which is to be judged solely on the grounds stated by the officer in the determination. If the *stated grounds* are arbitrary and capricious, the court may not uphold the determination even if the agency proffers a proper or a different and appropriate reason in response to the Article 78. *Scherbyn v. Wayne-Finger Lakes Board of Co-op Educational Services,* 77 N.Y.2d 753 (1991).

Normally, "[a]n administrative agency's interpretation of the statute it is ***14** charged with implementing is entitled to varying degrees of judicial deference depending upon the extent to which the interpretation relies upon the special competence the agency is presumed to have developed in its administration of the statute." *Matter of Rosen v. Public Empl. Relations Bd.,* 72 N.Y.2d 42. 47 (1988).

Here however, as demonstrated below, the rule is not an agency rule, or a rule promulgated pursuant to Federal law, rather its an exception carved out of Respondent's rules and regulations pursuant to *McFarlane v. NYCHA*, as recently restated by *Gutierrez v. Rhea.* 105 A.D.3d 481 (1st Dept., 2013). As such, no specialized knowledge or understanding is required, and no deference is owed to NYCHA in its interpretation of *McFarlane* and *Gutierrez,* and it therefore should not be accorded any deference. *Roberts v. Tishman Speyer Properties.* 13 N.Y.3d 270, 890 N.Y.S.2d 388 (2009). Instead, the standard is whether the Respondent's decision is affected by an error of law. CPLR § 7803.

Further, even the agency's interpretation of its own rules must still be reasonable and rational. As recently reiterated by the Court of Appeals: "While agency interpretations of their own regulations are generally afforded considerable deference courts must scrutinize administrative rules for genuine reasonableness and rationality in the specific context presented by a case." *Murphy v. New York State Div. of Housing and Community Renewal,* 21 N.Y.3d 649.644-655 (2013) (internal citations ***15** and quotations omitted).

The within matter fails to meet these standards and suffers from a lack of rationality, as well as a complete disregard for the law, thus rendering the decision an abuse of discretion, and without a rational basis to support its finding.

Because Respondent refused to analyze Petitioner's claims through the *McFarlane*, *Guiterrez* and *Murphy* framework, and hence failed to give any weight at all to the evidence submitted in support of Petitioner's claims, it is also not supported by substantial evidence.

POINT II

THE RESPONDENT'S DETERMINATION OF STATUS IS UNLAWFUL, ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION BECAUSE RESPONDENT KNEW OF AND ACQUIESCED TO PETITIONER'S HOUSEHOLD STATUS

I. A LACK OF WRITTEN PERMISSION IS NOT DISPOSITIVE

The Respondent's Remaining Family Member policy, at N.Y.C.H.A. Management Manual, Chapter IV, Subd. IV, J.1, and Chapter VII, § 4.E.I.a, requires that, in order for Petitioner to be entitled to a lease, he show that he occupied the apartment with the approval of Respondent, that he remained there until the departure of the tenant of record, and that he is otherwise eligible for a lease under the requirements of the Respondent's Housing Applications Manual.

***16** NYCHA's Management Manual, chapter IV, Sub. IV, F. 4., pp. 7-10, sets forth the requirements for obtaining permanent permission for an additional person to join a tenant's household. The requirements are that the tenant of record be in current occupancy and in good standing, and the proposed additional person must fall within the NYCHA definition of "family" (defined below), and must be otherwise eligible for public housing under the requirements of the NYCHA Applications Manual. Furthermore, the addition of the person must not cause the total family income to exceed NYCHA limits or cause the family to exceed NYCHA occupancy standards for the tenant's apartment. See NYCHA Management Manual, chapter IV, Sub. IV, F. 4. pp. 7-10.

Prior to the administrative hearing, Respondent failed to object that Petitioner was otherwise eligible for occupancy. (R. at 264-267). Thus, the only remaining issue to be resolved by the hearing officer was whether the Petitioner received written permission to join the household, or in the alternative, whether the Respondent knew of Petitioner's existence in the household and failed to take any adverse action against her or the tenant of record, thereby implicitly approving of Petitioner's addition to the household. Secondly, the hearing officer had to determine if the occupancy standards could preclude the Petitioner's addition to the household. The hearing officer incorrectly answered "no" to the first, and her decision was silent ***17** as to the second. (R. 53-57),

a. The McFarlane Doctrine

In *Via v. Franco,* this Court set forth the doctrine that a remaining family member claimant can rely on a *de facto* claim of 'permanent permission' to join a household in the context of her succession claim. *Via v. Franco,* 223 A.D.2d 479 (lst Dept. 1996). Finding the claimant therein to be within the "'zone of interests' intended to be protected by the regulations granting succession rights to remaining family members," this Court declared that such a claimant "has standing" to maintain the challenge as to a prior permission denial, or, said another way, to what should have been a grant of permanent permission.

The *Via* Court's holding is consistent with the Code of Federal Regulations, 24 C.F.R. § 966.53, that defines a Housing Authority "tenant" as:

> (f) Tenant shall mean the adult person (or persons) (other than a live-in aide): (1) Who resides in the unit, and who executed the lease with the PHA as lessee of the dwelling unit, or, if no such person now resides in the unit. (2) Who resides in the unit, and who is the remaining head of household of the tenant family residing in the dwelling unit.

Via was amplified by the Appellate Division where it held that the knowledge and acquiescence of the Housing Authority to the allegedly "unauthorized" occupancy are more relevant factors to a remaining family member claim than the lack ***18** of written permission, and that lack of permanent permission is not dispositive. *McFarlane v. NYCHA,* 9 A.D.3d 289 (1st Dept. 2004). More specifically, where a claimant can make "a showing that the Authority knew of, and took no preventive action against, the occupancy by the tenant's relative, could be an acceptable alternative for compliance with the notice and consent requirements." *McFarlane v. NYCHA,* 9 A.D.3d 289, 291 (Ist Dept. 2004); *Miller v. NYCHA.* 279 A.D.2d 349 (1st Dept., 2001); see also *NYCHA v. Galan,* Jr., NYLJ 12/22/93, p.22, c.2, 21 HCR 656B (App.Term, 1st Dept.); NYCHA v. Mangual, NYLJ 3/21/94, p.29, c.6, 22 HCR 181B (App.Term, 1st Dept.).

The rationale underpinning McFarlane is that if NYCHA is to be accorded wide latitude to decide who resides in its apartments, its inaction when faced with knowledge of unauthorized occupants should be viewed as its implicit approval of such occupants to permanently reside in the apartment. As stated:

> Moreover, after McFarlane, the NYCHA clearly cannot hide its head in the sand regarding who resides in the Apartment when it has the authority onito and approve who resides in the Apartment. Accordingly, it would seem that McFarlane requires the NYCHA to demonstrate the steps it took to monitor who resided in the Apartment.

Barnes v. Hernandez, 2006 WL 4937413 (N.Y.Sup.) (Trial Order), 2006 N.Y. Slip Op. 30208(U).

***19** Here, as demonstrated above, the rule is not an agency rule, or a rule promulgated pursuant to Federal law, but rather is an exception carved out of the rules and regulations pursuant *to McFarlane v. NYCHA.* As such, no specialized knowledge or understanding is required, and no deference is owed to *NYCHA in* its interpretation of McFarlane, and its refusal to analyze Petitioner's claims through the prism of McFarlane should not be accorded any weight. *Roberts v. Tishman Speyer Properties,* 13 N.Y.3d 270, 890 N.Y.S.2d 388 (2009).

In subsequent cases interpreting *McFarlane,* remaining family member status has been denied where: there was no "reference to Petitioner in the tenant's file" [1] ; the tenant of record never made verbal mention of the occupant to the NYCHA [2] : "there is no indication that respondent was actually aware of her residency..." [3] ; and where "[tjhere was no evidence that respondent knew petitioner might also have taken up residency there" [4]

***20** Therefore, where an occupant can demonstrate that NYCHA was aware of Petitioner's occupancy, and the NYCHA failed to take any further steps to monitor and approve or disapprove the apparent addition, the occupant should be able to meet the *McFarlane* rule.

In *Schorr,* the Court of Appeals held that once the landlord properly decided that the claimant was not entitled to a successor lease, HPD (through the landlord) could not be estopped from carrying out its charge to remove the claimant. *Schorr v. New York City Dept. of Housing Preservation and Development.* 10 N.Y.3d 776 (2008). Interestingly, the Court of Appeals took notice of the fact that "[tjhere is no evidence in the record that HPD knew of petitioner's purported "tenancy" during the time period in question." *Schorr v. New York City Dept. of Housing Preservation and Development,* 10 N.Y.3d 776, at FN 2, (2008). Thus, the Schorr Court, in declining to estop HPD, specifically noted that the claimant did not otherwise qualify for succession, and cites the basic rationale in McFarlane in support of its finding.

Therefore, the *Schorr* claimant, in a back door attempt to remain in the apartment to which he was not otherwise entitled, claimed that the inordinate delay by the landlord after the departure of the tenant of record should estop the landlord from carrying out its statutory duty of eviction. The Court of Appeals disagreed.

As such, it is clear that the Schorr decision was not intended to foreclose ***21** the McFarlane doctrine. To begin with Schorr addresses the application of equitable estoppel as it applies to facts and conduct occurring after the tenant of record dies or vacates, where a succession claim is not otherwise supported and a lease is being claimed on pure estoppel after-the-fact grounds. McFarlane interprets facts and conduct occurring prior to the vacature or death of the tenant of record to provide support for a legitimate succession claim and an alternative. de facto, method of regulatory notice to NYCHA.

Secondly, unlike *Schorr. McFarlane* does not deal in equity. *McFarlane* simply provides "an acceptable alternative for compliance with [NYCHA's] notice and consent requirements." *Barnes v. Hernandez,* 2006 WL 4937413 (N.Y.Sup.) (Trial Order), 2006 N.Y. Slip Op. 30208(U). There is no mention of equity in McFarlane, while the central holding of *Schorr* is that "estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties." *Schorr*

v. New York City Dept. of Housing Preservation and Development, 10 N.Y.3d 776, 779, (2008). Further, the application of the *McFarlane* does not prevent or inhibit the NYCHA from discharging its statutory duties, as prohibited by Schorr. Rather, McFarlane provides analysis to determine whether or not NYCHA has been provided the notice it wants in order to discharge its duties.

In essence. *McFarlane* presents a shield for the protection of a legitimate ***22** claim of *de facto* notice, and thus, a right to succeed the tenant of record. The claimant in *Schorr* attempted to use estoppel as a sword to gain rights where he legitimately had none and the Court of Appeals denied that claimant's attempt.

Finally, and most tellingly, the *Schorr* Court, if it intended to completely eviscerate *McFarlane,* would have and should have done so explicitly. However, the *Schorr* Court, in support of its finding that the claimant did not meet the requirements for succession, specifically states that HPD was not otherwise on notice of his occupancy, and hence could not implicitly approve Schorr's occupancy through the prism of *McFarlane.*

In recognition of *Schorr's* limited application, this Court has adhered to *McFarlane*, even after *Schorr*. In fact, in a decision from April 2013. this Court again reiterated its approval of the *McFarlane* reasoning. *Gutierrez v. Rhea.* 105 A.D.3d 481 (Ist Dept., 2013), lv. denied 21 N.Y.3d 861 (2013).

In *Gutierrez v. Rhea*, the Appellate Division remanded a remaining family member claim for a hearing on the narrow issue of whether the claimant's prior criminal conviction was substantial enough to render him "otherwise ineligible" to succeed to his mother apartment. The *Gutierrez* Court noted the claimant's status "is jeopardized by the fact that [claimant] never received written permission to be added to his mother's lease while she was alive..." *Gutierrez v.* ***23** *Rhea.* 105 A.D.3d 481, 485 (1st Dept., 2013). However, in overcoming that hurdle, the *Gutierrez* Court also noted that "while estoppel is not available against a government agency engaging in the exercise of its governmental functions, we have held that NYCHA's knowledge that a tenant was living in an apartment for a substantial period of time can be an important component of the determination of a subsequent RFM application." *Gutierrez v. Rhea,* 105 A.D.3d 481, 485 Dept., 2013) (internal citations omitted). The Gutierez Court also noted that the claimant and tenant of record "were consistently open and honest with NYCHA, and they followed its rules (even though the tenant of record failed to seek permission prior to the claimant moving into the apartment)." *Gutierez v Rhea,* at 486.

Guiterrez is in accord with a line of cases decided by this Court all issued after Schorr. "Pursuant to Supreme Court's directive, petitioner submitted evidence that she had co-resided in the apartment with her mother for more than the requisite year and that NYCHA implicitly approved of the co-residency." *Detres v. New York City Housing Authority,* 65 A.D.3d 442, 443 (1st Dept., 2009); citing *McFarlane v. New York City Hous. Auth.* 9 A.D.3d 289, 291 (1st Dept., 2004); *see also Fermin v. New York City Housing Authority.* 67 A.D.3d 433 (1st Dept., 2009); *McNeal v. Hernandez.* 58 A.D.3d 417 (1st Dept., 2009); Detres v. New York City Housing Authority, 65 A.D.3d 442 (1st Dept. 2009); *Rivera v. New York City Housing* ***24** *Authority,* 60 A.D.3d 509 (1st Dept., 2009); *Abreu v. New York City Housing Authority East River Houses,* 52 A.D.3d 432 (1s Dept., 2008); *Rodriguez v. Hernandez,* 51 A.D.3d 532 (1st Dept., 2008); *Johnson v. New York City Housing Authority,* 50 A.D.3d 438 (1st Dept., 2008).

The hearing officer refused to apply the doctrine laid out in *McFarlane.* Although the hearing officer failed to state why she would not so utilize *McFarlane,* presumably she relied upon *Schorr v. DHPD,* for the proposition that DHCR, a state agency, cannot be estopped from invoking the regulations that are promulgated pursuant to enabling legislation. Here, Respondent is not a state agency implementing enabling legislation, but is rather a city agency implementing rules that were self-drafted.

Shortly after the Respondent's decision was issued, the Court of Appeals revisited its rationale in *Schorr,* and held that "technical non-compliance" with the regulatory rules would not be fatal to a claim of succession because "courts must scrutinize administrative rules for genuine reasonableness and rationality in the specific context presented by a case." *Murphy v. New York State Div. of Housing and Community Renewal,* 21 N.Y.3d 649, 644-655 (2013) (internalcitations and quotations omitted).

Thus, it was error for Respondent to categorically preclude Petitioner ***25** from evidencing Respondent's de facto approval of his occupancy, which, as demonstrated more fully below. Petitioner in fact established. Further, Respondent's error was compounded by its refusal to consider any evidence of Respondent's prior conduct involving its informal addition of several other grandchildren since 1997.

b. Petitioner satisfies *McFarlane, Gutierrez* and *Murphy*

Here, Petitioner and Ms. Bleier sought permanent permission for Petitioner to reside with Ms. Bleier as Ms. Bleier had routinely done with various grandchildren, beginning in 1997.

Petitioner and Ms. Bleier, like the claimants in *Gutierrez v. Rhea,* were "open and honest" with the NYCHA about Petitioner's occupancy, and actually sought to "officially" add Petitioner. Similarly, like the claimant in Murphy v. DHCR. Petitioner is in technical non-compliance with the written permission rule, yet there is no serious claim that Petitioner did not co-reside with Ms. Blier beginning in 2006 and continuing until Ms. Bleier died in 2009. As in *Gutierrez v. Rhea,* the Respondent violated a number of its own internal rules, and failed to institute proceedings to have Petitioner added or removed from the household, or to terminate Ms. Bleier's tenancy if she failed to remove Petitioner.

Here, there can be no doubt that Respondent was put on notice of Petitioner's occupancy. (R. at 87-97). Further, Respondent never requested proof ***26** that Petitioner vacated the subject premises after it was put on notice that Petitioner was residing in the subject premises. Instead. Respondent directed Ms. Bleier to resubmit the affidavit of income without Petitioner's name, a fact that Respondent now seeks to capitalize on, even though it is the author of this fiction. (R. at 242). Respondent should have treated Petitioner's addition on the affidavit of income as a clumsy attempt by a 91 year old immigrant to add a grandchild to her household, something which she had been doing with the knowledge and acquiescence of Respondent since 1997. (R. at 58-60, 62-63, 77-78, 80-97). Notably, each and everyone of those documents were received and stamped contemporaneously by Respondent, and maintained with Respondent's own files.

Respondent could not have been under the impression that Petitioner had vacated the apartment because it did not require proof that Petitioner vacated, even though Respondent previously requested proof that prior additions to the household had vacated. (R. at 64). Instead, Respondent insisted that Ms. Bleier resubmit the affidavit of income without Petitioner's information, even though Respondent knew Petitioner was still residing in the subject premises. (R. at 242). Respondent should have begun termination proceedings for addition of an unauthorized occupant, or should have treated Petitioner's inclusion on the affidavit of income as a request to official permission to add Petitioner to her househc 1.

***27** Petitioner herein established that Respondent was aware of his presence in the apartment for years before Ms. Bleier's death, and that Respondent "took no preventive action" against the Petitioner's occupancy. That Respondent failed to offer a larger, more comfortable apartment to meet its own "occupancy standards" is irrelevant. The federal rules require that Respondent was bound either to take action to terminate the tenancy for unauthorized occupancy, or approve the addition. 24 CFR 960.257(a); 24 CFR 960.257(c); NYCHA Management Manual, Chapter VI., Income Review and Verification, section 5; Management Manual, Chapter IV, Occupancy, subdivision IV., Changes in family composition, subsections F.4.b. (3); F.4.b. (5); F.4.b.(9); Ch. IV. Occupancy, subdivision IV., Changes in family composition, subsection G. 3.; Ch. IV. Occupancy, subdivision IV., Changes in family composition, subsection H.

Respondent cannot merely sit on its proverbial hands when it knows that the letter of the management manual is not being followed, and then use the same manual as a cudgel when it suits them. *McFarlane, Guiterrez, Murphy, supra.* Or to put it another way, Respondent may not "hide its head in the sand regarding who resides in the Apartment when it has the authority to monitor and approve who resides in the Apartment. Accordingly, it would seem that McFarlane requires the NYCHA to demonstrate the steps it took to monitor who resided in the Apartment." *Barnes v.* ***28** *Hernandez,* 2006 WL 4937413 (N.Y.Sup.) (Trial Order), 2006 N.Y. Slip Op. 30208(U).

NYCHA's Management Manual, Chapter VI. Income Review and Verification, provides:
5. Review of Forms

Forms submitted by tenants are reviewed by Housing Assistants for completeness and accuracy. All insertions and corrections in the Tenant's Certificate shall be made by the tenant and dated and initialed by him.

No change shall be made in the Occupant's Affidavit of Income by any employee of the Housing Authority.

In some cases, the Housing employee may find it expedient to use the telephone in order to clarify entries on the Summary of Earnings Statement. Any clarifications or additional information thus obtained shall be entered on an Interview Record. If the Housing employee finds it necessary to record this information on the Summary of Earnings Statement, his entries shall be clearly identified as such by his initialing in red.

Tenants should be contacted concerning any additional information required and given a date prior to which such information shall be submitted. This contact should be recorded in the interview record.

Information regarding employment and family composition are compared with information previously reported in the tenant's folder. The tenant's explanation of any discrepancies are recorded and any discrepancies which cannot be satisfactorily explained must be called to the attention of the Housing Manager.

***29** NYCHA Management Manual, Chapter VI. Income Review and Verification, section 5 (emphasis added),

While Respondent contacted a relative of Ms. Bleier, instead of inviting Ms. Bleier to request permanent permission and providing the relevant form to do so, Respondent simply insisted that Ms. Bleier resubmit a new affidavit of income omitting Petitioner's name, effectively hiding Petitioner's paper presence in the household. Respondent took no further action against Petitioner's occupancy in the apartment. (R. at 242).

The Management Manual also provides for consequences for tenants who persist in allowing unauthorized occupants to reside in their households. Chapter VI. Income Review and Verification, section VII. Declaration of Income, Income Review and Associated Forms, warns that "failure to accurately report family composition, income or employment as required by Authority Rules and Regulations, may result in termination of tenancy (see Chapter VII, Termination of Tenancy)." Where an unauthorized occupant is known to be residing in an apartment without permission, the manager must commence Termination of Tenancy proceedings. (R. at 173-175 at Ch. IV, Occupancy, subdivision IV., Changes in family composition, subsections F.4.b.(3); F.4.b.(5); F.4.b.(9); Ch. IV. Occupancy, subdivision IV. Changes in family ***30** composition, subsection G. 3.; Ch. IV. Occupancy, subdivision IV,, Changes in family composition, subsection H.)

The NYCHA's policies relating to family composition and annual income affidavits clearly require the manager of a development to call the tenant into the office to investigate and take proper measures when there is a change in family composition on the annual affidavit of income. This policy creates a mechanism by which unauthorized additions to households can be made authorized if the circumstances warrant such a result. Such a policy has a justifiable purpose.

Where NYCHA Management failed to follow its own rules and policies in processing permission requests, the permission request is deemed granted. Here, the NYCHA Management failed to follow the prescribed procedures in that it failed to approve the implicit permission request (the affidavit of income), despite the fact that the tenant and the Petitioner met the requirements for the approval of the permission request. The Management's failure to adhere to the Management Manual in processing the request results in the permission request being deemed granted.

Moreover, in the instant matter, NYCHA Management failed to follow the prescribed procedures for processing the tenant's affidavit of income on which she reported the Petitioner's occupancy of the apartment, by failing to follow through with the investigation to verify occupancy of the apartment and by failing to take action to ***31** prevent unauthorized occupancy or to formally approve the addition. Had the required procedures been followed, the tenant would have obtained approval for the Petitioner's occupancy in writing, or the tenant would have been offered an opportunity to file a grievance on any denial of permission for Petitioner to reside with her, or the tenant would have been given a transfer to an appropriately sized apartment. Instead, the NYCHA was content with the status quo, yet now seeks to rigidly enforce the rules that it clearly ignored for years.

Thus, Respondent's written permission requirement may be deemed satisfied where a tenant has reported the additional occupant's residency to the Management. *MacFarlane v. NYCHA, Gutierez v Rhea, and Murphy v. New York State Div. of Housing and Community Renewal; supra.*

c. Respondent's prior approval of Abraham Lieder for the subject apartment shows that the occupancy standard is discretionary

Although the hearing officer did not base her determination on the alternate argument that even if permanent permission was requested by Ms. Bleier to add Petitioner, it would have been denied in any event by Respondent's occupancy standards that prohibit additions which would result in "overcrowding." (R. at 101). Respondent, in the proceeding below, did not address Petitioner's arguments on this issue. (R. 427. at note 4.) However, in as much as this basis was asserted for the ***32** initial denial, it is addressed here. (R. at 101).

NYCHA has a custom and practice, despite its written policy, of permitting two adult individuals to reside in one bedroom apartments even where they are not spouses or domestic partners. This custom and practice is tantamount to a policy, and creates an exception to the written policy. In 2001, NYCHA approved a prior permission request by Ms. Bleier to add her grandson, and brother of Petitioner here, Abraham Lieder, in the same apartment at issue herein. (R. at 61). In fact both Ms. Bleier and her grandson occupied the one bedroom apartment together because according to Ms. Bleier's treating physician, "it is medically unsafe for her to sleep in her apartment unaccompanied." (R. at 69-70). The prior approval demonstrates that the one bedroom occupancy standard is discretionary at best, and at worst is merely a pretext for denial for some other, nefarious reason. The prior approval for Abraham Lieder to reside in this one-bedroom apartment demonstrates that there was no reason for the project grievance to be denied because of "overcrowding." (R. at 101).

A recent decision on this issue is directly on point. In *Ortiz v. New York City Housing Authority*, the supreme court held that the "determination must be annulled because NYCHA violated its own rules. Overcrowding standards are to be considered after permanent permission is granted. By failing to do so, NYCHA has impermissibly conflated its RFM rules with its overcrowding procedures." *Ortiz v.* ***33** *New York City Housing Authority*, 2014 WL 1921284, 2014 N.Y. Slip Op. 31213(U) (Trial Order) (N.Y.Sup.), 4. The Ortiz court held that "NYCHA must follow its own rules: step 1 consider RFM; Step 2 invite request for transfer. As there is no explanation on the record as to why this procedure was not followed, the decision lacks a rational basis and is arbitrary and capricious as a matter of law." *Ortiz v. New York City Housing Authority*, at 4.

Because Respondent failed to first consider Petitioner's remaining family member claim, and if approved, permit Petitioner to retain the subject apartment, or if appropriate, transfer Petitioner to a larger apartment, Respondent's determination should be annulled.

d. Respondent's one bedroom occupancy standard is unreasonable and violates public policy

In the denial of Petitioner's project grievance, Respondent asserted that Petitioner's occupancy would violate NYCHA's occupancy standard for one bedroom apartments, despite the fact that the NYCHA previously granted permission for Abarahm Lieder to permanently join the household of Ms. Bleier in this same apartment. It is the Petitioner's position that the occupancy

standard is unenforceable because it is unreasonable and conflicts with Federal HUD guidelines. The occupancy standard in question does not limit occupancy to immediate family members; rather. ***34** it requires that if there are two adults, they either be married or "considered" domestic partners. This rule, which makes untenable distinctions on the basis of "age, sex marital status, or familial status", is thus discriminatory per se. The occupancy standard is also inconsistent with local real property law and zoning. Lastly, the occupancy standard appears to conflict with the Housing Authority's mandate to provide housing to persons of low income and inconsistent with other of the Housing Authority's internal policies.

i. The HUD Handbook

The HUD Handbook ("Handbook") contains guidelines for occupancy standards for federally assisted housing. See HUD Handbook 4350.3 CHG-24 General Occupancy Guidelines, Paragraph 2-18c. The Handbook states:

> The Fair Housing Act prohibits occupancy standards that operate to deny units to families with children unless the units have been specifically designed for the **elderly**. However, it does not prohibit restrictions that are otherwise reasonable (such as where the unit size is too small for the family).

HUD Handbook 4350.3 CHG-24 General Occupancy Guidelines, Paragraph 2-18c(1). With respect to the unit size in relation to a family HUD allows the owners operators of federally assisted housing to impose their own restrictions, so long as those restrictions are reasonable and in compliance with Federal and local laws. The ***35** Handbook states: "There are no HUD program requirements concerning how many persons can share a bedroom or concerning whether persons of the opposite sex can share a bedroom." HUD Handbook 4350.3 CHG-24 General Occupancy Guidelines, Paragraph 2-18c(3). The Handbook further requires that "The owner's occupancy standards and any tenant selection plan must be in compliance with Federal, State or local fair housing and civil rights laws, tenant-landlord laws and zoning restrictions, and with all Equal Opportunity and nondiscrimination requirements in HUD's administrative procedures." HUD Handbook 4350.3 CHG-24 General Occupancy Guidelines, Paragraph 2-18c(4).

While the above requirements appear very general, the Handbook does offer specific guidance with regard to the reasonableness of occupancy standards. It is clear that the size of the unit and the number and size of the bedrooms should be considered when determining how many persons a unit may accommodate. See HUD Handbook 4350.3 CHG-24 General Occupancy Guidelines, Paragraph 2-18c(5). HUD has taken the position that an occupancy standard permitting two persons per bedroom is presumptively reasonable. The Handbook states:
Owners may consider the following guidelines in developing occupancy standards:

a) children of the same sex may share a bedroom

b) no more than two persons would be required to occupy a bedroom. HUD's position is generally that occupancy ***36** policies which exclude more than 2 persons per bedroom will generally be reasonable while *occupan policies which require fewer than 2 person per bedroom will generally be unreasonable,* depending of all facts and circumstances.

c) Unrelated adults and person of the opposite sex (other than spouses) would not be required to share a bedroom (other than spouses).

d) A child may share a bedroom with a parent if the parent so wishes, often depending on the child's age. This is, however, a decision to be made by the parent.

HUD Handbook 4350.3 CHG-24 General Occupancy Guidelines Paragraph 2-18c(6) (emphasis added). Thus, under the HUD guidelines what Ms. Bleier did here (adding her grandson to a one bedroom apartment) would "generally be reasonable while

the occupancy standards, as enforced here, requiring fewer than 2 person per bedroom. “will generally be unreasonable.” HUD Handbook 4350.3 CHG-24 General Occupancy Guidelines, Paragraph 2-18c(6). Nothing in the HUD guidelines prohibits two adults who wish to share a one bedroom apartment from doing so. In any event. all of the proscriptions above prohibit the local Authority from forcing an overcrowding situation upon tenants, not using it as an excuse to preclude two adults from sharing a bedroom.

The local housing authority cannot promulgate regulations that frustrate the purpose of Section 8 legislation. *Matter of Bajana v. Rhea,* 2010 WL 3536823 (Sup Ct. N.Y. County 2010); *citing* ***37** *Lopez v. White Plains Hous. Auth.* 355 F.Supp. 1016 (S.D.N.Y.1972); *In re Evans v. Franco,* 93 N.Y.2d 823, 687 N.Y.S.2d 615, 710 N.E.2d 261 (1999).

ii. Fair Housing Act

Federal courts have determined the issue of whether occupancy standards promulgated by an owner/operator of federally assisted housing are reasonable and whether the occupancy standards violate the Fair Housing Act (“FHA”). 42 U.S.C. § 3601 et seq. The United States Fair Housing Act provides that
42 USC § 3604. Discrimination in the sale or rental of housing and other prohibited practices.

“As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title. it shall be unlawful--

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.”

***38** *See also*, New York State Executive Law § 296(2-a).

In addressing the issue, courts have considered the HUD occupancy guidelines as well as state and local laws. A one-person / one-bedroom occupancy standard violates the FHA by discriminating on the basis of familial status. *See United States of America v. Badgett,* 976 F.2d 1176 (8th Cir. 1992). A numerical occupancy restriction of no more than two persons per two bedroom unit violates FHA by discriminating on the basis of familial status. The Housing Authority fails to offer any legitimate business reason for the restrictiveness of the occupancy standard. A Landlord must show a legitimate business reason for its occupancy standard if that standard would otherwise violate Title VIII. For example, something such as limited parking is not a legitimate reason for an occupancy standard, especially with regard to children, because they don't have cars. United States of America v. Badgett, 976 F.2d 1176 (8th Cir. 1992). However, lack of ability to provide adequate hot water without replacing the water heaters to accommodate a larger volume of residents could be a legitimate business reason for imposing an occupancy restriction. *United States of America v. Weiss, 847 F.Supp.* 819 (Dist. Nev. 1994). No business reason, however, has been proffered by Respondent to justify its occupancy standard as none exists.

***39 iii. State and local laws**

Courts have also considered state law and local zoning codes to determine whether a landlord's occupancy standard is reasonable. Zoning laws often impose requirements for square footage per occupant of a dwelling, which may be considered by a court when determining whether a landlord's occupancy standard is reasonable. Where a City Building Department requirement determined a unit could accommodate a family of three, a court held that the landlord's occupancy standard of two persons for studio and one bedroom apartments discriminated on the basis of familial status and violated the FHA. See *United States of America v. Tropic Seas. Inc.*, 887 F.Supp. 1347 (Dist. Ha. 1995). *See also United States Of America v. Lepore*, 816 F.Supp. 1011 (M.D. Pa. 1991) (two-person occupancy limitation violated FHA prohibition against familial status discrimination).

In New York City, the local occupancy standards laws, under the Housing Maintenance Code, require that an apartment not be occupied by more than one person per 80 square feet. N.Y.C. Administrative Code § 27-2075. The code allows, however, for the inclusion of the living room and kitchen in the 80 Sq. Ft. per person calculation. Thus, the average NYCHA one bedroom apartment, which has approximately 250-300 square feet of livable space, not including the bathroom and closets, would actually accommodate 3 persons, 2 more than that proposed to be ***40** allowed by the Authority in the context of this hearing.

Additionally, New York's "Roommate Law", Real Property Law § 235-f, sets forth state landlord-tenant law with regard to unlawful restrictions on occupancy. The section provides:

> Any lease or rental agreement for residential premises entered into by one tenant shall be construed to permit occupancy by the tenant, immediate family of the tenant, one additional occupant, and dependent children of the occupant provided that the tenant or the tenant's spouse occupies the premises as his primary residence.

R.P.L. § 235-f. This section also renders lease provisions which limit occupancy to immediate family unenforceable. *Id.* Courts interpreting R.P.L. § 235-f have found that the section allows an additional permanent member of the household to enter into occupancy, and that the substantive landlord-tenant law is not inconsistent with federal programs such as the Section 8 program. Therefore, tenants receiving federal assistance may avail themselves of the benefits of state and local law and still enjoy and retain all the rights, privileges and immunities of the federal programs. *See Greene Avenue Associates v. Cardwell*, 743 N.Y.S.2d 842, 191 Misc.2d 775, (N.Y. City Civ. Ct. Jun 7, 2002); *Morrisania 11 Associates v. Harvey*, 527 N.Y.S.2d 954, 139 Misc.2d 651 (N.Y. City Civ. Ct. 1988); *Marine Terrace Assoc. v. Zeimbekis*, 122 Misc.2d 921, 472 N.Y.S.2d 287 (Civ. Ct., Queens County 1984).

***41 iv. NYCHA mandates and policies**

NYCHA is charged with the mission to provide safe and sanitary dwelling accommodations for persons of low income in order to support and encourage the health, safety, morals, welfare, and comfort of the citizens of the state and to the end of eliminating the spread of disease and crime. See N.Y. Pub. Hous. Law § § 2 and 401. The purported occupancy standard at issue herein does nothing to further such mission, and indeed, would serve to increase homelessness within New York City. The occupancy standard as applied in this case works at cross-purposes with the Housing Authority's mission and duty to its tenants to promulgate and follow sound occupancy policies which are consistent with public policy and federal, state and local laws.

Even if the addition of Petitioner resulted in overcrowding, that would provide a basis for a transfer, not a basis for denial of permission to be added to the household. It bears noting that the policy upon which Respondent has relied to deny Petitioner's claim has more than one category of "overcrowding"; that of "extremely overcrowded". The distinction is significant in that households designated as "extremely overcrowded" enjoy a higher priority of transfer, indicating that the level of overcrowding is not in fact, a basis for denial of occupancy, but rather a basis for transfer to a larger apartment. In fact, "the owner is required to offer the family a ***42** different unit as promptly as possible." *Morrisania II Associates v. Harvey*, 527 N.Y.S.2d 954, 958 (N.Y.City Civ.Ct.,1988); citing *24 C.F.R. 880.605, 881.605. Here, the addition of Petitioner would have led only to "overcrowding" not the "extreme overcrowding," placing Petitioner within* reasonable levels of occupancy.

Finally, using the "overcrowded" rule as a basis for Respondent to escape its duty to provide safe, adequate housing, is, aside from turning reason on its head, a violation of public policy. As one court has recognized,

> the overcrowding provisions of both Section 8 and the New York City Administrative Code share a similar underlying purpose: the protection of tenants from substandard, frequently hazardous living conditions. They should thus be interpreted, where possible, to prevent an automatic forfeiture of the leasehold. It would be far worse for families to be made homeless, and for the **elderly** and infirm to be **neglected**, than for them to temporarily share cramped quarters until an alternative can be secured.

Morrisania II Associates v. Harvey, at 961 (internal citations omitted).

HUD has recognized that there may be situations in which deviation from an established occupancy standard must be permitted, in order to remain consistent with overall goals and policies. "Owners may approve a unit that is smaller than the occupancy guidelines in Paragraph 2-18c suggest if doing so is consistent with the owner's tenant selection standards and will not cause serious overcrowding." See HUD Handbook 4350.3 CHG-24 General Occupancy Guideli. Paragraph 2-18d ***43** Smaller Units. In the instant case, the Petitioner, the proposed additional occupant, was and is "otherwise eligible" under NYCHA's tenant selection standards and his inclusion on the family composition would not have been inconsistent with those standards. Nor would permitting him to join the household have caused "overcrowding" under NYCHA's standards. See NYCHA T.S.A.P. transfer priorities, definition of term "overcrowded". The occupancy standards, as proposed to be applied, conflict with the Housing Authority's mandate to provide housing to persons of low income and are inconsistent with HUD guidelines and other of the Housing Authority's internal policies.

POINT III

ALLEGATIONS OF UNCLEAN HANDS DOES NOT PRECLUDE THE RELIEF SOUGHT

In the responsive papers to Petitioner's Article 78, Respondent asserted that Petitioner's alleged "unclean hands" precludes the legal remedy sought herein: vacature of the Respondent's unlawful and erroneous administrative decision below. To begin with, this argument was raised improperly for the first time in the Article 78. Putting this issue aside, Courts will deny equitable relief where the beseeching party comes into court with "unclean hands." Here, Petitioner does not seek equitable relief and in any event, Petitioner's alleged conduct does not rise to level deemed to be ***44** "unclean." As such, Respondent's claim, raised for the first time on appeal no less, of Petitioner's "unclean hands" is inapplicable to the instant matter.

I. UNCLEAN HANDS WAS IMPROPERLY RAISED FOR THE FIRST TIME IN THE ARTICLE 78 PROCEEDING

It has long been held that in an article 78 proceeding, that a reviewing court "must judge the propriety of such action solely by the grounds invoked by the agency." *Matter of Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991), *quoting Matter of Montauk Improvement v. Proccacino*, 41 N.Y.2d 913, 913 (1977).

Here, in the administrative determination below, there is no mention of "unclean hands" in either the determination, or even as a position advocated by Respondent's attorneys at the hearing. (R. 46-52, 137-139). Thus, Respondent improperly raised such an argument for the first time in its answer to the instant article 78 proceeding. (R. 432-433). *Matter of Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs. see also Depamphilis v. Kelly*, 107 A.D.3d 611 (1st Dept., 2013) (holding that "[w]e do not reach respondents' argument that petitioner violated New York City Charter § 116(a) and (b), as it was improperly raised for the first time in their answer in the article 78 proceeding.").

***45 II. PETITIONER'S CLAIM SOUNDS IN LAW, NOT EQUITY, AND THE "UNCLEAN HANDS" DEFENSE IS THEREFORE UNAVAILABLE TO RESPONDENT**

The defense of "unclean hands" is only available in equitable actions or where a party is seeking equitable relief. "The clean hands doctrine applies only to equity actions and proceedings. Since the plaintiffs cause of action is not equitable in nature, the clean hands doctrine cannot be applied to this case." *County of Nassau on Behalf of Nassau County Planning Com'n v. Eagle Chase,* 144 Misc.2d 641, 646, 544 N.Y.S.2d 904 (N.Y.Sup. 1989); citing 55 NY Jur 2d. Equity, § 124; *Dry Dock Sav. Inst. v Harriman Realty Corp.,* 150 Misc 860, 861, aff'd 244 App Div 793.

Petitioner's claim was commenced pursuant to CPLR § 7803. and is therefore an action at law. Further, Petitioner does not seek an equitable remedy such as an accounting, an injunction, a constructive trust, an equitable lien, a partition, contract recession or reformation, a declaratory judgment, or specific performance. Rather, Petitioner seeks judicial review of an administrative decision, his only remedy at law. As such, Respondent's defense of "unclean hands" is clearly inapplicable to the instant matter.

Here, as Petitioner has commenced the proceeding pursuant to CPLR § 7803, his claim is one sounding in law, not in equity. As such, the defense of "unclean hands" is not available to Respondent, and therefore, the alleged conduct is ***46** not a bar to the relief sought here.

III. PETITIONER'S ALLEGED CONDUCT WAS NOT AN INTENTIONAL FRAUD OR WILLFUL MISCONDUCT

Even if Respondent may properly interpose an equitable defense of "unclean hands" in this action at law, Respondent fails to make a showing of wrongful intent or willful misconduct, as Petitioner was reliant upon his **elderly** grandmother to handle the affairs of her apartment. In any event, when Petitioner's name does appear on an affidavit of income, Respondent's response was not to legitimize his occupancy or to insist and confirm that he in fact vacated, rather Respondent's response was to sweep the document under the proverbial rug. (R. at 242). Thus. Respondent can hardly claim any prejudice for the failure of Petitioner to appear on multiple affidavits of income when its response would likely be the same - to ignore his appearance.

"In order to establish unclean hands, there must be a showing of wrongful intent or willful misconduct." 55 N.Y.Jur.2d, Equity, § 107; cting *Ansul Co. v. Uniroyal, Inc.,* 306 F.Supp. 541 (S.D.N.Y. 1969). "Proof of material misstatements or nondisclosures, standing alone and without establishment of an intent to deceive or recklessness, do not amount to unclean hands." 55 N.Y.Jur.2d, Equity. § 107; citing *Xerox Corp. v. Dennison Mfg. Co.,* 322 F.Supp. 963 (S.D.N.Y. 1971).

Here, the conduct alleged by Respondent, that Petitioner's grandmother ***47** who was 92 years old at the time, failed to report his presence in an earlier affidavit of income somehow perpetrates a fraud upon Respondent is a gross overstatement of the facts.

To begin with, Petitioner never realized a gain from his conduct. Indeed, Respondent is now on the verge of losing succession rights if he is not successful here. Secondly, Petitioner did not intend to deceive Respondent. Petitioner was not the individual responsible for reporting his presence, that fell to his grandmother, the former tenant of record. Thirdly, when his grandmother did list his presence in an affidavit of income, Respondent did not seek to verify his income to accurately calculate the rent, Respondent's response was to ignore his presence altogether by having Ms. Bleier fill out a new affidavit of income without Petitioner's name on it and without obtaining any verification that Petitioner in fact vacated. (R. at 242). Therefore, at most, Petitioner's conduct could only be described as a "material misstatement or nondisclosure" which does not rise to the level of "unclean hands."

CONCLUSION

The Respondent's practice of ignoring observed additional family members (who would be otherwise eligible for permanent permission to join the household) until the tenant of record moves out or dies and then evicting the remaining family members is draconian and should not be sanctioned by this court's especially ***48** where, as here, it is undisputed that NYCHA was actually aware of Petitioner's occupancy prior to the death of the tenant of record.

For all the foregoing reasons, it is respectfully urged that this Court set aside NYCHA's administrative ruling that Petitioner is not entitled to remaining family member status, and direct NYCHA to offer Petitioner a lease in hIS own name, together with a grant of such other, further and different relief as may be just, proper and equitable.

Footnotes

1 *Jamison v. New York City Housing Authority*, 25 A.D.3d 501, 809 N.Y.S.2d 14 (1st Dept., 2006).

2 *Rivera v. New York City Housing Authority*, 60 A.D.3d 509. 876 N.Y.S.2d 3 (1st Dept. 2009).

3 *Pelaez v. New York City Housing Authority*, 56 A.D.3d 325, 867 N.Y.S.2d 413. 414 (1st Dept. 2008) (emphasis added).

4 *Johnson v. New York City Housing Authority*, 50 A.D.3d 438, 855 N.Y.S.2d 489.490 (1st Dept., 2008) (emphasis added).

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