LEGISLATIVE UPDATE

New York State Legislature Adds New Section to the BCL/NPCL Regarding Conflicts of Interest for Coop and Condo Boards

By: Geoffrey Mazel, Esq., Co-Chairperson of the Cooperative & Condominium Law

On September 12, 2017, Governor Cuomo signed into law a new section to the New York Business Corporation Law (BCL) and the New York Not for Profit Corporation Law (NPCL). The vast majority of cooperative housing corporations in New York were created under the Business Corporation Law (the “BCL”), and subject to its’ terms and conditions. This new section provides guidance to the Board in the handling of certain conflict of interest situations and new disclosure requirements to the Board of Directors and Shareholders.

More specifically, the above has added a new section to the BCL, Section 727, which supplements the current Section 713 of the BCL. Section 713 currently provides that contracts and transactions between the Boards and a director, either individually or a business entity in which the director has an interest, for which a conflict may exist, may be permissible under certain circumstances. All conflicts are not automatically prohibited. Essentially, if all material facts in regard to the director’s interest were disclosed in good faith, and majority of Board members voted to approve such contract, then the contract is valid and binding and the transaction is permissible and is not not void or voidable due to the conflict. The interested director must recuse himself from the voting and deliberations on the conflicted contract.

On the flip side, Section 713 states that if the conflicted director fails to make proper statutory disclosures as stated above, the Board has the right to void the contract or transaction in question. Further, the Section 713 now requires that, at least once a year each director receive a copy of Section 713 of the BCL.

As stated above, in mid-September a new section of the BCL was added, which will become effective as of January 1, 2018, and is known as Section 727. This new section requires that at least once a year every effected Board must: 1) Provide a copy of Section 713 of the BCL to each Director; 2) Submit an annual report to the shareholders, signed by each Director, containing information on any contracts made, entered into, or otherwise approved by the Board where there was an interested director (as outlined in Section 713). This annual report must include: A list of all such contracts, as well as information and the identity of the other party, and the amount and purpose of the contract; a record of all meetings of the Board and when it voted on such contracts, including attendance, how each director voted on such contracts, and the actual result of voting for each such contract; finally it must include the date of each vote on each contract and the date the of

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The Docket

Being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th Street, Jamaica, NY. Due to unforeseen events, please note that dates listed in this schedule are subject to change. More information and changes will be made available to members via written notice and brochures. Questions? Please call 718-291-4500.

CLE Seminar & Event listings

November 2017
Thursday, November 23  
Thanksgiving Day - Office Closed

Friday, November 24  
Thanksgiving Holiday - Office Closed

Tuesday, November 28  
The Art of Arbitration: Best Practices & Tips from the Arbitrators

Wednesday, November 29  
Ethics Luncheon CLE 1:00 - 2:00 pm

December 2017
Thursday, December 7  
Holiday Party at Floral Terrace

Monday, December 25  
Christmas Day - Office Closed

January 2018
Monday, January 1  
New Year’s Day - Office Closed

Monday, January 15  
Martin Luther King, Jr. Day - Office Closed

February 2018
Monday, February 12  
Lincoln’s Birthday - Office Closed

Monday, February 19  
President’s Day - Office Closed

March 2018
Friday, March 30  
Good Friday - Office Closed

April 2018
Wednesday, April 18  
Equitable Distribution Update

May 2018
Thursday, May 3  
Annual Dinner & Installation of Officers

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President's Message

I mentioned in my last message that we have entered the busy season following the slower pace of the summer. The Bar Association has been extremely busy this Fall with many CLE events in October and November.

Just last week we had our highly attended Court of Appeals update. I was to extend a personal thanks to Spiros Tsimbinos who has moderated and presented this successful program for about twenty years. Spiros comes up from Florida each year specifically to share with us his knowledge of the past year’s decisions in the US Supreme Court. He also assembles an excellent panel to give us updates on both the Civil and Criminal cases of interest from the NY Court of Appeals. This year we were honored to have Court of Appeals Judge Michael A. Garcia attend and speak to our association regarding his view from the bench. We also got to say farewell to a longtime friend of our Association, Hon. Randall T. Eng, the Presiding Justice of the Appellate Division, Second Department, who previously announced that he will be retiring at the end of the year. I was fortunate to be able to present the Judge with an award honoring his many years of service to the entire Queens community.

The Board of Managers has been hard at work handling the day to day needs of the Association as well as the requests of the members and other Associations. I recently had the opportunity to meet with the bar presidents from the NYS Bar Association, NYC Bar, Brooklyn Bar, NY County Bar and Richmond County Bar. While each organization has some individual and unique needs, we all share some common issues and we hope to meet throughout the year to work together to address them. I am a firm believer that the more we share ideas, the better off we will be as an organization. Please feel free to contact me directly at newlaw@aol.com if you have any questions, concerns or recommendations. I hope that you will also visit our page on Facebook. We have increased our social media presence by putting more information and photographs of our events on the page in a timely manner. Please also check out our web site at qcba.org to see our calendar of events, including many CLE presentations and our annual Holiday Party, which will take place this year on December 7, 2017.

I look forward to seeing you at our events. If you would like to talk in person please call or email to set up a mutually convenient time. Of course, the best way to find me is to look on the second floor in the Supreme Courthouse on Sutphin Boulevard where I have spent nearly every workday for the past 25 years.

Best regards,
Gregory J. Newman

“IAm a firm believer that the more we share ideas, the better off we will be as an organization.”
CASENAME
In the Matter of Amanda Chambers Johnson, Petitioner v. Margaret Palumbo, administrator of the City of Poughkeepsie Office of Section 8 Housing, et al., Respondents 2014-09233

Justice Valerie Brathwaite Nelson


ADDITIONAL INDEX NUMBER
3458/14

ATTORNEYS

PROCEEDING pursuant to CPLR article 78 to review a determination of a hearing officer dated March 25, 2014, which, after a hearing, confirmed the determination of the City of Poughkeepsie Office of Section 8 Housing to terminate the petitioner’s participation in the Section 8 Housing Choice Voucher Program (see 42 USC §1437f[b][1]), which proceeding was transferred to this Court pursuant to CPLR 7804(g) by order of the Supreme Court (Denise M. Watson, J.), entered in Dutchess County on October 1, 2014.

The petitioner, Amanda Chambers Johnson, lived in an apartment in Poughkeepsie with her five children with the assistance of rent subsidy benefits under the Section 8 Housing Choice Voucher Program (see 42 USC §1437f[b][1]). On February 11, 2014, she was notified that her benefits under the program were being terminated due to alleged violations of the program rules. After an administrative hearing, the determination to terminate her benefits was confirmed based upon the finding that she was obligated, but failed, to request permission to add Antwone Jordan-McGill (hereinafter McGill) as an occupant to her subsidized apartment. We consider whether, under these circumstances, the petitioner was entitled to the housing protections of the Violence Against Women Act (hereinafter the VAWA; now 34 USC 12291 et seq.) based upon uncontested hearing evidence establishing that she was subjected to an escalating pattern of stalking and abusive behavior and domestic violence by McGill, a former intimate partner, whose course of abusive and violent conduct against her included his unwanted presence in her apartment. For the reasons that follow, we conclude that she was entitled to the housing protections of the VAWA, which prohibited her termination from the program on this ground (see 42 USC §14043e-11[b][2]).

1. Factual and Procedural

Background
The respondent City of Poughkeepsie Office of Section 8 Housing (hereinafter the Agency) administers the federally funded Section 8 Housing Choice Voucher Program, which provides rent subsidies to low-income tenants (see 42 USC §1437f). The petitioner had been a participant in the program for approximately 10 years and had resided with her children in Poughkeepsie at a particular apartment (hereinafter the contract unit) with the assistance of the program for approximately 7 years. Through a “Notice of Termination” letter dated February 11, 2014, the Agency notified the petitioner that it had decided to terminate her program assistance on the ground that she had violated the Housing and Urban Development (hereinafter HUD) Rules and Regulations. Specifically, the notice alleged that during the Section 8 recertification process on November 12, 2013, the petitioner had failed to fully disclose her household composition and all of the income attributable to her household, and had failed to request the Agency’s approval to add another family member as an occupant to the contract unit. It further alleged that the Agency had learned that McGill had lived with the petitioner at the contract unit from June 2012 until December 2013, at which time he was arrested. It is undisputed that McGill remained incarcerated from the date of that arrest throughout these proceedings. The notice further advised the petitioner that if she did not agree with the decision to

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Matter of Johnson v. Palumbo, 2014-09233 | continued from p.6...

'informal hearing' in accordance with 24 CFR 982.555 of the HUD Rules and Regulations. Federal regulations governing the Housing Choice Voucher Program require that, prior to the termination of housing assistance payments under an outstanding housing assistance payments contract, the participant be given the opportunity for an informal hearing to determine whether the agency's decision to terminate assistance is in accordance with the law (see 24 CFR 982.555(e)).

The petitioner requested such a hearing, which was held on March 19, 2014. In accordance with the governing rules and regulations, the Agency and the petitioner were each given the opportunity to present evidence (see 24 CFR 982.555[e][5]), and the hearing officer allowed each to submit a written summation to assist with his determination. The Agency presented the testimony of one of its housing program assistants and the testimony of a private investigator hired by the Agency, as well as documentary evidence. The program assistant testified that his boss had received an anonymous phone call from a person reporting that someone was living at the contract unit with the petitioner. Although the program assistant did not know when that anonymous phone call was received, the investigator testified that McGill was already incarcerated on charges stemming from his December 2013 arrest when she received the matter to investigate. The investigator further testified that because McGill was incarcerated, she did not conduct any "investigation or personal surveillance" of the contract unit. Her investigation consisted solely of gathering documents by submitting Freedom of Information Law (FOIL) requests to various governmental agencies. Through this investigation, she obtained copies of, among other things, McGill's pay stubs, his driver's permit application, and records of his parole home visits by New York State Department of Corrections and Community Supervision parole officers, all of which listed the contract unit as McGill's address. The parole records also indicated that McGill's parole officer had some form of contact with McGill at the contract unit during some visits made between June 2012 and December 2013. In addition to these documents, the Agency submitted a Domestic Incident Report dated December 19, 2013, completed by a police officer, which reported an incident, described more fully by the petitioner in her testimony at the hearing, in which McGill pursued the petitioner to a police station parking lot, where he punched her twice in the face before being arrested. The Domestic Incident Report indicated that the parties did not live together, but it also listed the contract unit as the address for both the petitioner and McGill. Based on this documentary evidence establishing that McGill had used the contract unit as his address, the Agency asserted that McGill was residing at the contract unit and the petitioner's housing assistance benefits were properly terminated because she failed to request Agency approval to add him as an additional occupant to the unit and disclose his income during the recertification process, despite signing documents on November 12, 2013, which contained the relevant rules obligating her to do so.

The petitioner testified at the hearing and submitted a number of documents. She took the position that McGill did not live with her at the contract unit and that the evidence submitted by the Agency indicating that McGill was residing there existed as a result of domestic violence and stalking. In her testimony, the petitioner described an escalating pattern of stalking and abusive behavior and domestic violence by McGill that culminated in the December 2013 incident leading to his arrest. The petitioner testified as follows. In June 2012, she permitted McGill, who was then a friend, to use the contract unit address for purposes of registering for parole; however, this was meant to be temporary and at no point did he actually live in the contract unit. In about July 2012, she and McGill entered into an intimate relationship, she "immediately" became pregnant, and McGill began to act controlling and domineering, eventually starting to threaten, intimidate and harass her. He wanted the petitioner to have

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EMPLOYMENT LAW PRACTICE

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In any particular year, even if the Board did not vote on any contracts which would require the above disclosures, the Board still must submit a report every year to its' Shareholders stating that the Board did not vote on any such contracts. In addition, the Board is then required to submit to the Shareholders a document, signed by each director, indicating “No actions taken by the Board were subject to the annual report required pursuant to Section 727 of the Business Corporation Law.”

The law does leave some gaping holes in terms of which Boards are covered under its' terms. The language of the new law applies only to those condominiums and cooperative corporations for under the BCL and NPCL. Most condominiums are unincorporated associations formed under the Condominium Act (Article 9-B of the New York Real Property Law). At this early point in time, it is unclear how these changes in the law will affect unincorporated associations. Only time will tell in the form of statutory amendments or judicial interpretation of these disclosure requirements.

As for condos and coops clearly under the auspices of Section 727, it is imperative that these Boards be aware and carefully follow its' guidelines. However, it should be noted that the law does not contain any provision for enforcement, nor any penalties for violations of this provision. Again, time will sort out these omissions whether in the form of statutory amendments or judicial interpretation of this new provision of the BCL and NPCL.
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an abortion and threatened to "give [her] an abortion, if [she] wouldn't go and get one." McGill "just went from one person to a totally different person." At first, the petitioner told him to leave her alone, that she did not "believe in abortion," and he would not need to be part of the baby's life. After that, McGill "became terrifying." He started asking the petitioner for keys to her apartment. She told him "no," but, against her wishes, McGill took a spare set of keys, which the petitioner had kept for her children. McGill would disappear for periods of time and then suddenly reappear. He began entering the petitioner's home at will, "whenever he felt like it," and told her that he would never give her back her keys.

McGill began to call the petitioner "over, and over, and over," 30 to 40 times in succession, until she would answer the phone, including times when she was at work. If the petitioner did not answer when McGill called, he would either find her or wait for her at her home and smash her cell phone. He smashed her cell phone on four occasions between October 2012 and June 2013. The petitioner became "truly terrified" of McGill, who often would "go at [her]." spit in her face, scream at her, and threaten her.

The petitioner testified that beyond the day he asked to use her address, McGill did not ask her permission for anything. The petitioner was not aware that McGill had used the contract unit address with his employer. His pay stubs did not come to her apartment. Nor was she aware that he had used the contract unit address when he applied for a driver's permit. She became aware of this fact when the permit was delivered to her apartment. She gave the permit to McGill and did not question him about it because she was scared of him. The petitioner maintained that from the time period of June 2012 through December 2013, although McGill used the keys he took to enter her apartment 48 to 100 times, he stayed overnight in her apartment at most 20 times. At the time, he told her that he was living with his brother, but since his incarceration in December 2013, the petitioner heard that he had been living with other women. The petitioner explained how she would contact McGill when his parole officer came to her apartment to conduct a home visit. If the visit was unannounced, she would rush to call McGill before the parole officer did because if McGill did not hear from the petitioner first, he would say that she was "trying to set him up." He would threaten, "You're gonna dig yourself a hole, and nobody's gonna find you." According to the petitioner, McGill would "just go off" if he heard something he did not like. As a result, she tried to "play nice," and did not confront him regarding his continued use of her address with his parole officer, his unauthorized access to her home, or his unauthorized use of her address on his driver's permit. The petitioner testified that McGill was "just a very wicked individual and [she] truly could not have done anything different than what [she] did to survive."

When pressed on cross-examination to explain why she did not seek an order of protection prior to December 2013 or try to stop McGill from accessing her apartment sooner, the petitioner replied, "I know it's hard to understand. You never think that someone will control you... But when you are in that situation, it's a totally different world... When you are scared of somebody and you have five kids to take care of, to get ready for school, got to work, to put on a smile every single day, it changes the dynamic of things that become important." The petitioner felt that McGill's use of her address and the taking of her keys was a means for him to control, abuse, and manipulate her.

McGill's threats escalated into physical violence on December 19, 2013, when the incident resulting in his arrest occurred. The petitioner testified that she decided to get her keys back from McGill that day because her son was turning 15, and she realized that she "just could not do it anymore, being scared all the time" and having her children witness McGill's "abusive and domineering behavior toward her. The petitioner and her cousin drove, in the petitioner's vehicle, to McGill's workplace at the time of his lunch break. The petitioner falsely told McGill that she could not find her keys, that representatives from the Agency were at the contract unit, and that she needed to get the spare set of keys from him so that she could let them into the apartment to conduct an inspection. McGill handed her the keys, but she was shaking. The petitioner turned to walk away, and McGill said, "Wait a minute... What are you doing?" The petitioner got into her vehicle and her cousin started to drive away. McGill got into his vehicle and pursued. He called the petitioner on her cell phone and told her to pull over. The petitioner refused and said, "I just can't take it anymore, I can't live like this anymore. Just leave me alone," McGill sped up and repeatedly told the petitioner to "pull over. I've got something for you." He tried to cut off the petitioner's vehicle, but the petitioner's cousin was able to drive to a police station. At the police station, the petitioner exited her vehicle. McGill exited his vehicle, approached the petitioner, and accused her of having "tricked him." Before the petitioner could respond, McGill punched her in the face, chipping her tooth. He punched her again in the face before police officers intervened and arrested McGill. In addition to the above testimony, the petitioner submitted into evidence police department Domestic Incident Reports, criminal complaints, a Criminal Court order of protection, a family offense petition, and a Family Court order of protection. These documents pertained to the December 19, 2013, incident, as well as subsequent violations of the orders of protection. Asked why the Domestic Incident Report listed McGill's address as being at the contract unit, the petitioner testified that the police used the address listed on McGill's driver's permit.

After the hearing, both the Agency and petitioner submitted written summations to the hearing officer. In its summation, the Agency affirmatively argued that it had not terminated the petitioner's housing benefits in violation of the VAWA because at the time the petitioner's benefits were terminated, it was aware only of the December 2013 incident of domestic violence, and its allegation of unauthorized occupancy stemmed from McGill's occupancy from June 2012 to December 2012. The Agency also cited the petitioner's failure to report, prior to the hearing, that she was a victim of domestic violence as a basis for rejecting her testimony, and denying her the protection of the statute. In her written summation, the petitioner contended that she was entitled to the protection of the VAWA because, to the extent that McGill lived in the contract unit, he did so because she feared him and was "scared of what would happen if she changed the status quo."

In a decision dated March 25, 2014, the hearing officer confirmed the Agency's termination of the petitioner's participation in the Section 8 Housing Choice Voucher Program. The hearing officer found undisputed the facts that McGill had used the contract address for the purposes of satisfying a condition of his parole, to obtain a driver's permit, and for employment purposes, and that McGill assaulted the petitioner on December 19, 2013, and had since been incarcerated. Based on the parole records, which indicated that a parole officer had contact with McGill at the contract unit during certain early morning and late evening visits, the hearing officer rejected the petitioner's testimony that McGill did not reside at the contract unit, and found that McGill had resided with the petitioner "at least for some period." He therefore found, by a preponderance of the evidence, that the petitioner had failed to request permission to add a family member as required by the HUD Rules and Regulations. The hearing officer stated that the petitioner bore the burden of proving "first, that she was a victim of domestic violence and second, that her actions were as a result of or related to that violence." Although he did not discredit the petitioner's testimony of the nature of her relationship with McGill and how McGill came to possess keys to the contract unit and use it as his address, the hearing officer nonetheless concluded that there
was no evidence of violence or fear in June of 2012, and even were there evidence of violence that early, he "failed to see how that fear would excuse the [petitioner from] requesting to add another family member." Consequently, the hearing officer found no basis to apply the VAWA in this case.

The petitioner thereafter commenced this CPLR article 78 proceeding in the Supreme Court seeking review of the determination, arguing, among other things, that the hearing officer erred as a matter of law in concluding that the VAWA did not prevent her tenancy from being terminated. In an order entered October 1, 2014, the Supreme Court transferred the proceeding to this Court upon finding that one of the issues raised in the petition was whether the determination was supported by substantial evidence (see CPLR 7804[9]).

2. Discussion

Originally enacted in 1994, one of the VAWA’s purposes was to provide greater protections to victims of domestic violence (see Violent Crime Control and Law Enforcement Act of 1994, Pub L 103-322, Tit IV, 108 stat 1796 [42 USC §13701 Note]). In 2005, it was reauthorized and expanded to include, among other things, protection for victims of domestic violence who receive publicly assisted housing benefits, including participants of the Section 8 Housing Choice Voucher Program (see Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub L 109-162, Tit VI, 119 stat 2960 [42 USC §13701 Note]; 42 USC §14043e et seq.). In expanding the VAWA to encompass certain public housing programs, Congress acknowledged that "[t]here is a strong link between domestic violence and homelessness," and "[w]omen and families across the country are being discriminated against, denied access to, and even evicted from public and subsidized housing because of their status as victims of domestic violence" (42 USC §14043e[1], [3]). Domestic violence has caused shelter populations to increase because of the scarcity of housing (see Mireya Navarro, Homeless, Because They Are Abused at Home, NY Times, Nov. 11, 2014, §A at 1, col 0). The purpose of the VAWA, as applied to public housing, is to reduce domestic violence and stalking, among other things, and to prevent homelessness (see 42 USC §14043e-1). To that end, the VAWA provides that, in general, "An applicant for or tenant of housing assisted under a covered housing program may not be denied admission to, denied assistance under, terminated from participation in, or evicted from the housing on the basis that the applicant or tenant is or has been a victim of domestic violence, dating violence, sexual assault, or stalking, if the applicant or tenant otherwise qualifies for admission, assistance, participation, or occupancy" (42 USC §14043e-11[b][1]).

As relevant here, the VAWA specifically provides that an incident of actual or threatened domestic violence, dating violence, sexual assault, or stalking, shall not be construed as a serious or repeated lease violation, or good cause for terminating assistance to the victim (see 42 USC §14043e-11[b][2][A], [B]).

Notwithstanding the above, even if a tenant has established that he or she is a victim under the VAWA, a public housing authority may terminate assistance on other independent grounds. In that regard, the VAWA does not limit the ability of a public housing authority to terminate assistance for a lease violation unrelated to domestic violence, dating violence, or stalking, provided that the public housing authority does not subject an individual who has been the victim of such violence to a more
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demanding standard than other tenants (see 42 USC §14043e-11 [b][3][C][ii] ; see also 24 CFR 5.2005[a][2][i]).

Here, the hearing officer upheld the termination of the petitioner’s participation in the Housing Choice Voucher Program on the ground that McGill resided with the petitioner, therefore she was obligated to request permission to add him as an occupant of the unit, and her failure to request such approval was a violation of her obligations under the program warranting termination of her participation in the program. The regulations governing the Section 8 Housing Choice Voucher Program authorize, but do not require, a public housing agency to terminate program assistance for a participant if the participant violates any obligations under the program (see 24 CFR 982.552(c)[2]). The petitioner’s obligations under the program included the duty to request the Agency’s written approval to add any other family member to the contract unit. The petitioner signed a form on November 12, 2013, acknowledging that violating this obligation was grounds for termination of her housing assistance. We note that although the hearing officer suggested in his determination that the petitioner was obligated to seek the subject approval as early as June 2012, the Agency’s notice of termination identified the November 12, 2013, recertification process and the documents that the petitioner signed at that time as the basis of the petitioner’s alleged violation. Consequently, it is the petitioner’s failure to seek approval to add McGill as an occupant at that point in time that is at issue (see generally 24 CFR 982.555[a][2]). In this proceeding pursuant to CPLR article 78, we accept, as we must, the hearing officer’s factual determination that McGill resided with the petitioner “at least for some period” (see Matter of Berenhaus v. Ward, 70 NY2d 436, 443; Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 230). However, we find that the hearing officer erred in his legal conclusion that the petitioner was not entitled to the protections of the VAWA.

As noted above, the VAWA provides that incidents of actual or threatened domestic violence or stalking shall not be construed as good cause for terminating assistance under a covered housing program (see 42 USC §14043e-11[b][2][B]). The VAWA defines “domestic violence” as felony or misdemeanor crimes of violence committed by, among others, a current or former intimate partner of the victim, a person with whom the victim shares a child in common, or a person who is cohabiting with or has cohabitated with the victim as an intimate partner (see 42 USC §13925[a][8]; see also 24 CFR 5.2003). It defines “stalking” to mean engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for her safety or the safety of others, or suffer substantial emotional distress (see 42 USC §13925[a][30]; see also 24 CFR 5.2003).

The petitioner’s testimony established that throughout her relationship with McGill, which spanned from July 2012 through December 2013, McGill threatened, intimidated, harassed, and physically assaulted her. This unrefuted testimony established incidents of domestic violence and a course of conduct by McGill directed at the petitioner that would cause a reasonable person to fear for her safety or suffer substantial emotional distress. Moreover, his presence at her home and continued access to the contract unit was an integral part of the intimidation. There was no evidence presented at the hearing from which the hearing officer could conclude that the petitioner voluntarily gave McGill permission to reside at the contract unit from June 2012 through December 2013, or that his ultimate residency there “for some period of time” was unrelated to the domestic violence he perpetrated upon her (cf. Hammond v. Akron Metropolitan Housing Authority, 2011-Ohio-2635 [9th Dist.]). Indeed, the hearing officer did not make such findings. Instead, he concluded that any fear experienced by the petitioner did not excuse her from requesting to add McGill as an occupant of the contract unit. This conclusion reflects a misinterpretation of the statute. The VAWA seeks to provide greater protections to victims of violence and intimidation perpetrated by an intimate partner. Here, in light of the uncontested evidence that McGill’s presence in and access to the contract unit was the result of conduct that constitutes domestic violence and stalking as defined by the VAWA, it would be unreasonable and inconsistent with the purpose of the statute to require the petitioner to seek permission to add McGill as an occupant of the unit. Indeed, requiring the petitioner to do so would effectively require her to legitimize his access to the contract unit by making him an established part of her household, thus giving him greater power and control over her. The hearing officer’s failure to recognize that McGill’s presence in and access to the contract unit was the result of domestic violence did not take into account the dynamics of domestic violence where the victim very often fails to report the abuser to the police, medical professionals when being treated for injuries inflicted by a batterer, or even to her family (see Nicholson v. Williams, 203 F Supp 2d 153 [ED NY], affd in part sub nom. Nicholson v. Scoppetta, 344 F3d 154 [2d Cir]). To uphold a conclusion that the petitioner violated her obligation under the Section 8 Housing Choice Voucher Program by failing to seek permission to add McGill as an occupant would place her in the untenable position of having to either choose between becoming more deeply embroiled in an abusive situation by legitimizing his presence in the contract unit, or facing the loss of the housing assistance benefits she relies upon for herself and her five children. This is a choice that a domestic violence victim should not have to make (see Nicholson v. Williams, 203 F Supp 2d 153, affd in part sub nom. Nicholson v. Scoppetta, 344 F3d 154 [2d Cir]). We decline to read the VAWA in such a way, which is plainly inconsistent with its salutary purposes (see generally 42 USC §14043e-1).

We also reject the Agency’s contention that the petitioner is not entitled to the protection of the VAWA because she did not report...
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that she was a victim of domestic violence prior to the informal hearing, and did not provide third-party documentation to corroborate her testimony. As to the timeliness of the petitioner’s assertion, no statutory or regulatory provisions dictate when and how a tenant must assert her right to protections under the VAWA (cf. 42 USC §14043e-11; 24 CFR 5.2005). Furthermore, the petitioner had no cause to assert the protections of the VAWA until she received the notice of termination from the Agency, which directed her to request an informal hearing if she disagreed with the decision to terminate her participation in the program. As to the petitioner’s burden of proof, the VAWA places no burden of proof in the first instance on a person seeking the protections of the VAWA. If a tenant of covered housing represents that she is “entitled to protection under [the VAWA]” (42 USC §14043e-11[c][1]), documentation is not required (see 42 USC §14043e-11[c][5]; see also 24 CFR 5.2007[b][3]). Nonetheless, the public housing agency may, in its discretion, request that the tenant submit a form of documentation described in the statute (see 42 USC §14043e-11[c][1]; see also 24 CFR 5.2007[a][1]). However, it cannot deny relief for protection under the VAWA unless it has provided the individual with a written request for such documentation and the individual has failed to provide documentation within the specified time (see 42 USC §14043e-11[c][1]; [2]; see also 24 CFR 5.2007[a]). Here, the Agency never made a written request for documentation which would have prompted the petitioner’s obligation to provide such documentation (see 42 USC §14043e-11[c][2]; see also 24 CFR 5.2007[a][2]).

In any event, the petitioner’s testimony at the informal hearing was sufficient to establish that she was entitled to the protections of the VAWA (see 42 USC §14043e-11). Where the public housing agency has made a written request for documentation, the tenant may submit any one of the specified forms of documentation “at the discretion of the tenant” (24 CFR 5.2007[b] [1]; see also 24 CFR §14043e-11[c][c]). The choices include a HUD-approved certification form, which may be based solely on the personal signed attestation of the victim (see 42 USC §14043e-11[c][3][A]; 24 CFR 5.2007[b][1][i][i]), and, at the discretion of the housing agency, “a statement or other evidence provided by an applicant or tenant” (42 USC §14043e-11[c][c][3][D]; see 24 CFR 5.2007[b][1][i][iv]). “[A]s long as the victim provides a HUD-approved certification form, third-party documentation, a verbal statement, or other corroborating evidence, the victim is statutorily entitled to [the protections [of the VAWA]]” (HUD Programs: Violence Against Women Act Conforming Amendments, 75 Fed Reg 66246-01, 66251 [2010]). Here, because the Agency never made a written request for documentation, there was no occasion for the petitioner to respond accordingly. The question of the VAWA’s application arose in the nature of the informal hearing where the petitioner testified as detailed above, under oath. Moreover, her sworn hearing testimony, which provided far more detail than called for by the HUD-approved certification form, was sufficient to document the occurrences of domestic violence and stalking perpetrated against her by McGill (24 CFR 5.2007), and established that she was statutorily entitled to the protections of the VAWA. Contrary to the Agency’s contention, no third-party documentation of the petitioner’s account was necessary.

Finally, although not determinative of the legal issue before us, we note that under the HUD rules and regulations, “[c]overed housing providers are encouraged to undertake whatever actions permissible and feasible under their respective programs to assist individuals residing in their units who are victims of domestic violence, dating violence, sexual assault, or stalking to remain in their units or other units under the covered housing program” (24 CFR 5.2009[c]). Here, the Agency’s investigation, which was prompted by an unidentified anonymous caller, did not commence until after the December 19, 2013, assault resulting in McGill’s arrest. By the time the Agency decided to terminate the petitioner’s participation in the program, McGill had been incarcerated for nearly two months for assaulting the petitioner, and plainly was no longer living in the contract unit. McGill’s continuing acts of harassment, intimidation, and domestic violence against the petitioner were well documented before the Agency. Under the circumstances, the Agency’s determination to exercise its discretion in a way that would result in the petitioner’s loss of her unit was inconsistent with the VAWA.

In sum, we find that the hearing officer’s determination was affected by an error of law and rendered in violation of the VAWA (see 42 USC §14043-11[b][1], [2]; CPLR 7803[3]). The petitioner’s alleged violation of the program rules was her failure to seek Agency approval to add McGill as an occupant to the contract unit. However, the unrefuted evidence at the informal hearing established that McGill’s residency at the contract unit was a result of the intimidation, harassment, and domestic violence that he carried out against the petitioner. The petitioner did not willingly allow McGill’s very limited residency in her apartment. Adding McGill as an occupant to the contract unit would have increased McGill’s control over the petitioner and furthered the fear-inducing course of conduct which he had directed at her. On the record presented, we are persuaded that the termination of the petitioner’s participation in the program and McGill’s abusive and violent conduct against the petitioner are inextricably intertwined. Under these circumstances, we hold, as a matter of law, that the petitioner was entitled to the housing protections of the VAWA, which prohibited the Agency from terminating her participation in the program on this ground.

In light of our determination, we need not reach the petitioner’s remaining contentions, including the substantial evidence issue.

Accordingly, the petition is granted, the determination is annulled, and the matter is remitted to the respondents to reinstate the petitioner’s participation in the Section 8 Housing Choice Voucher Program retroactive to March 25, 2014.

LEVENTHAL, J.P., MALTESE and LASALLE, JJ., concur.

ADJUDGED that the petition is granted, on the law, without costs or disbursements, the determination is annulled, and the matter is remitted to the respondents to reinstate the petitioner’s participation in the Section 8 Housing Choice Voucher Program retroactive to March 25, 2014.

ENTER:

1. We note that some of the relevant HUD regulations were amended in November 2016 in a manner that affected the internal numeration of some of the regulations cited to herein. Because the amendments did not affect the substance of the regulations insofar as they relate to this proceeding, we cite to the current version of the regulations.
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By: Paul E. Kersen

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“Short Term Visits DO NOT = Permanent Residence Opportunities”

By Dev B. Viswanath, Esq. and Michael Phulwani, Esq.

On August 1, 2017, the Department of State (DOS) revised its Foreign Affairs Manual (FAM) and expanded the previous “30/60 day” rule to a 90-day threshold. This is new guidance for how consular officers should make determinations of inadmissibility under INA 212(a)(6)(C). Previously, the rule was that if a person who entered on a non-immigrant visa, like a visitor visa or visa waiver, filed for permanent residence within 30 days of entry, there was an irrebuttable presumption that they committed fraud/misrepresentation. If the person filed within 30-60 days of entry, there was a rebuttable presumption of fraud, which the applicant had the burden of proving otherwise. If after 60 days, there was no legal presumption, although Immigration would still be able to ask questions as to the applicant’s intentions when entering.

In order to find an alien inadmissible under INA 212(a)(6)(C), it must be determined that: (1) there has been a misrepresentation made by the applicant; (2) the misrepresentation was willfully made; (3) the fact misrepresented is material; and (4) the alien by using fraud or misrepresentation seeks to procure, has sought to procure, or has procured a visa, other documentation, admission into the United States, or other benefit provided under the INA.

Under the new rule a presumption of willful misrepresentation is established “if an alien violates or engaged in conduct inconsistent with his or her nonimmigrant status within 90 days of entry.” 9 FAM 302.9-4 gives the following examples of “conduct that violates or is otherwise inconsistent with an alien’s nonimmigrant status,” for purposes of applying the 90-day rule: (i) engaging in unauthorized employment; (ii) enrolling in a course of academic study, if such study is not authorized for that nonimmigrant classification; (iii) a nonimmigrant in B or F status, or any other status prohibiting immigrant intent, marrying a United States citizen or lawful permanent resident and taking up residence in the United States; or (iv) undertaking any other activity for which a change of status or an adjustment of status would be required, without the benefit of such a change or adjustment. If any of these actions occur within 90 days of entry a consular officer “may presume that the applicant’s representations about engaging in only status-compliant activity were willful misrepresentations of his or her intention in seeking a visa or entry.” A consular officer must request an Advisory Opinion from the Advisory Opinion Division of the Office of Legal Affairs in the Visa Office of the Department of State Bureau of Consular Affairs in order to make a finding of inadmissibility for misrepresentation under the 90-day rule. Under 9 FAM 302.9-4 when more than 90 days pass there is no presumption of willful misrepresentation.

The prior “30/60-day rule” and the current 90-day rule have a few similarities and differences. Under the new rule the window during which an activity contradictory to the initial visa classifications could trigger inadmissibility under INA 212(a)(6)(C) is 90 days as opposed to 30 days. The new rule applies the same “reasonable belief” standard to inconsistent activities that occur after 90 days of entry to determine if the alien misrepresented him or herself. Under the prior rule if a status violation or inconsistent activity occurred after 60 days of entry than the DOS did not solely consider that activity as conduct to constitute inadmissibility. However, under the new rule there is no limit on when an inconsistent activity or status violation occurring after 90 days will give rise to “reasonable belief” that the alien misrepresented his or her intent.

Although the DHS, USCIS, ICE, and CBP are not bound by the policies of another agency, DOS, they are allowed to consider such policies when making their own independent determinations and adjudications. Volume 8, Part J of the USCIS Policy Manual directs USCIS officers that “as long as there is a reasonable evidentiary basis to conclude that a person is inadmissible for fraud or willful misrepresentation, and the applicant has not overcome that reasonable basis with evidence, the officer should find the applicant inadmissible.” Granting that USCIS has not yet updated its Policy Manual to reflect the change to the 90-day rule, applicants for USCIS benefits should be mindful that they may be asked to present evidence to explain any misrepresentation concerns that USCIS may have.
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