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COMMISSIONER AND  
CHIEF ADMINISTRATIVE LAW JUDGE

INGRID M. ADDISON  
ADMINISTRATIVE LAW JUDGE  
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January 3, 2022

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Re: *Dep't of Housing Preservation and Development v. Herman,*  
OATH Index No. 60/22

Dear Counsel:

Enclosed please find my Memorandum Decision in the above-referenced matter.

Very truly yours,

Ingrid M. Addison  
Administrative Law Judge

IMA: bs

Encl.

# *Dep't of Housing Preservation & Development v. Herman*

OATH Index No. 60/22, mem. dec. (Jan. 3, 2022)

Respondent's motion to dismiss the petition is granted where the Department of Buildings erroneously requested that he obtain a Certificate of No Harassment as a condition for a job application approval, well in advance of his building being placed in the Pilot Program, which would have triggered the need for the Certificate. Petitioner therefore lacked jurisdiction to investigate and make its initial determination of harassment, and the matter is not properly before this tribunal.

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**NEW YORK CITY OFFICE OF  
ADMINISTRATIVE TRIALS AND HEARINGS**

*In the Matter of*  
**DEPARTMENT OF HOUSING PRESERVATION  
AND DEVELOPMENT**  
*Petitioner*  
*- against -*  
**SHULEM HERMAN**  
*Respondent*

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**MEMORANDUM DECISION**

**INGRID M. ADDISON**, *Administrative Law Judge*

The Department of Housing Preservation and Development (“HPD,” “Department” or “petitioner”) commenced this proceeding pursuant to section 27-2093.1 of the Administrative Code. Admin. Code § 27-2093.1 (Lexis 2021). It referred the matter to this tribunal pursuant to title 28, and section 10-06 of the Rules of the City of New York (“RCNY”) (Lexis 2021). Respondent owns a building at 214 Knickerbocker Avenue in Brooklyn, New York (“Building”). Upon respondent’s application for a Certificate of No Harassment (“CONH”), the Department conducted an investigation based on which it issued an initial determination that there was reasonable cause to believe that harassment had occurred. The Department seeks a finding from this tribunal that harassment did indeed occur.

Respondent moves for dismissal of the petition for lack of jurisdiction, asserting that at the time that he sought a construction permit from the Department of Buildings (“DOB”), he was not legally required to obtain a CONH. Petitioner opposes respondent’s motion and seeks to proceed to trial.

For the following reasons, respondent's motion is granted, and the petition is dismissed.

### The CONH Pilot Program

The genesis of the CONH Pilot Program is Local Law 1 of 2018. The law, which was enacted to protect tenants at risk of displacement due to harassment, authorizes the Department to identify distressed buildings within identified community districts where harassment may have occurred, and to create a Pilot Program List ("List"). Admin. Code § 27-2093.1. Owners of buildings that are on the List must obtain a CONH from HPD or a waiver of such, as a pre-condition for the "approval of construction documents or an initial or reinstated permit . . . for any covered categories of work" by DOB. Admin. Code §§ 27-2093.1(c)(1); 28-505.4.

In pertinent part, the enabling law provides as follows:

. . . This local law **shall not apply to work relating to applications for construction document approval filed with the department of buildings prior to the inclusion of a building on the pilot program list** pursuant to subdivision b of section 27-2093.1 of the administrative code of the city of New York, as added by section two of this local law.

NYC Local Law 1 of 2018 § 5 (emphasis added). Thus, under the law, a CONH requirement is triggered only when the building is on the List at the time that the DOB permit application is filed.

Upon receipt of a CONH application, HPD conducts an investigation to determine whether harassment had occurred during the 60 months preceding the filing of the application ("inquiry period") and issues a CONH if it finds that no harassment has occurred or refer the matter to this tribunal for a trial, if it finds to the contrary. Admin. Code §§ 27-2093.1(d)(3)(iv), 27-2093.1(d)(5)(A), 27-2093.1(d)(5)(C).

### BACKGROUND

Respondent filed an Alteration 1 job ("ALT 1") application number 321471082 with DOB on May 4, 2018, which was approved on August 7, 2018 (Resp. Ex. E). On October 11, 2018, DOB added the requirement of a CONH as a prerequisite for the issuance of a permit for the ALT 1 job (Resp. Ex. F). On October 16, 2018, the building was added to the List (Resp. Ex. G).

On September 29, 2020, respondent filed a CONH application with HPD, in which he listed job number 321471082 as the reason that he was seeking a CONH (Resp. Ex. H). On June 3, 2021, HPD issued an Initial Determination that there was reasonable cause to believe that harassment had occurred during the inquiry period (Resp. Ex. A). HPD then issued a Notice of Hearing on July 9, 2021.

On August 5, 2021, respondent, who, by that time was represented by counsel, wrote DOB, citing to the relevant section of Local Law 1 of 2018, and requesting that DOB reconsider its prerequisite for a CONH for the issuance of a work permit in connection with job number 321471082 (Resp. Ex. I). In turn, the DOB Borough Commissioner hand-wrote:

Approved.

Ok to waive "CONH Pilot" as the App. was approved on 8/7/18 prior to the enactment of the program on 10/12/18.

(Resp. Ex. J).

Respondent moves for dismissal of the petition on grounds that HPD lacked jurisdiction to issue its Initial Determination dated June 3, 2021 and the Notice of Hearing dated July 9, 2021, and that HPD fails to state a claim (Resp. Brief ¶¶ 23-30).

Petitioner opposes respondent's motion on the basis it is not bound by statute to assess documents submitted to it or to ascertain whether a CONH is in fact required. Rather, HPD posits that that falls within the ambit of DOB's jurisdiction. HPD adds that when it accepts a CONH application, it is obligated to act on it and commence a proceeding before this tribunal if there is reasonable cause to believe that harassment occurred (Pet. Brief at 2).

### ANALYSIS

Petitioner maintains that it is of no import why the respondent filed a CONH in September 2020, and that it is not a jurisdictional hurdle that respondent acted in good faith when he responded to a DOB request for a CONH before it could issue a work permit on the job application at issue, even if that request was made in error. Petitioner claims that all it needs to acquire jurisdiction over respondent is his filing of a CONH application. I disagree. Such an argument ignores that DOB clearly lacked authority to request that respondent obtain a CONH in the first place since the building is neither a Single-Room Occupancy ("SRO"),<sup>1</sup> does not fall

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<sup>1</sup> See Local Law 19 of 1983, codified at Admin. Code § 27-2093 (Lexis 2021).

within the Clinton Special District,<sup>2</sup> and was not on the List either at the time that respondent filed his job application with the DOB or at the time that DOB approved it.

Petitioner relies on *Department of Housing Preservation and Development v. Barbanel*, OATH Index No. 2652/19 (Mar. 5, 2021), *adopted*, Comm'r Dec. (Mar. 9, 2021), to support its posture that it retains jurisdiction in the instant matter. Pet. Brief at 3. I find *Barbanel* to be inapposite.

The issue in *Barbanel* was whether the lack of explanation of the building qualification index (“BQI”), which factored into the placement of respondent’s building on the List, and subsequent lack of notice to respondent that his building was on the List, stripped this tribunal of jurisdiction to hear the matter. Administrative Law Judge (“ALJ”) Astrid Gloade determined that the Administrative Code did not require HPD to establish that the respondent’s building was properly placed on the List. ALJ Gloade noted that, “[o]n its face, the statute provides that the hearing at OATH is for the purpose of determining whether there has been harassment at a building that was placed on the Pilot Program List. It is devoid of any requirement that OATH determine whether the Department properly placed a building on the Pilot Program List as a prerequisite for reaching the issue of whether harassment occurred.” *Barbanel*, OATH 2662/19 at 6-7.

ALJ Gloade nevertheless envisioned instances where a CONH harassment case may not be properly before this tribunal, such as if “a subject building in a CONH proceeding under section 27-2093.1 was not on the Pilot Program List, the basis for a referral of the matter to OATH as set forth in section 27-2093.1 is not satisfied.” *Id* at 7. As a practical matter, such a situation is not far removed from the instant matter where respondent’s building was not on the List at the time that he applied to DOB for a construction permit. To reiterate, Local Law 1 of 2018 is unambiguous. It clearly states that it “shall not apply to work relating to applications for construction document approval filed with the department of buildings prior to the inclusion of a building on the pilot program list.” This makes it crystal clear that at the time of respondent’s job application, no CONH requirement should have been imposed by DOB, a requirement which DOB later rectified. Thus, regardless of HPD’s investigatory findings, since a CONH was not legally required, respondent’s application for same which was predicated upon DOB’s error, in turn deprived HPD of jurisdiction to pursue a harassment investigation in the first place.

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<sup>2</sup> See Section 96-110 of the Zoning Resolution (Lexis 2021).

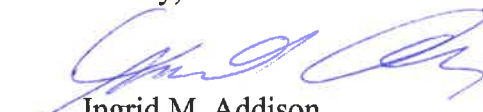
Underlying respondent's second argument that petitioner fails to state a claim, is its position that because HPD lacked jurisdiction in the first place, no cause of action existed, even if one was pleaded. Resp. Brief at ¶ 30. Noting that this tribunal has oft articulated that pre-trial dispositive motions are generally disfavored, HPD counters that when a harassment case is referred to OATH, it is the elements of harassment and nothing else that need to be pled. HPD cites to this tribunal's decision in *Department of Housing Preservation and Development v. Jusewitz*, OATH Index No. 347/10, mem. dec. (Feb. 9, 2010). Pet. Brief at 3-4.

As an initial matter, *Jusewitz* was brought under the CONH provision in the Zoning Resolution for buildings located in the Clinton Special District, not under the Pilot Program at issue here. However, it has no impact on the present case because the situations are dissimilar. In *Jusewitz*, there was no issue that the respondent had applied for a CONH based upon a legally unsupported request from DOB in the first place.

In sum, I find that respondent filed for a CONH based on a legally unsupported requirement from DOB. As a result, petitioner lacked jurisdiction to investigate and make findings on whether or not harassment occurred at the premises. Accordingly, I find that the matter is not properly before this tribunal.

### CONCLUSION

Based on my finding that this matter is not properly before OATH, respondent's motion to dismiss is granted, the petition is dismissed in its entirety, and all trial dates are vacated.

  
Ingrid M. Addison  
Administrative Law Judge

January 3, 2022

#### APPEARANCES:

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